

OFFICE OF JUDICIAL EDUCATION

7/2026



RELEASE NO. 6

EDITION (1980)

JULY 2026

TO: Consumers of the Wisconsin Jury Instructions – Children

FROM: Wisconsin Court System, Office of Judicial Education

Enclosed is Release No. 6 for the 1980 edition of Wis JI-Children. The release contains material approved by the Wisconsin Juvenile Jury Instructions Committee through May 2026.

The following material is included in Release No. 6:

None									
185	197	212	250	255	300	301	303	305	307
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Filing Instructions. The material is preceded by filing instructions which should be followed carefully. It is recommended that the Filing Instructions page be retained in the front of Volume I as a record of the proper filing of this release.

Questions. If you have any questions concerning the publication process, this release, or the juvenile jury instructions project in general, please direct them to Bryce Pierson at Bryce.pierson@wicourts.gov.

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EDITION (1980)

JULY 2026

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WISCONSIN JURY INSTRUCTIONS

CHILDREN

VOLUME I

**Wisconsin Juvenile Jury
Instructions Committee**

[Cite as Wis JI-Children]

- Includes 7/2026 Supplement (Release No. 6)

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WISCONSIN JURY INSTRUCTIONS — JUVENILE

Committee Member List

Prepared for the Wisconsin Judicial Conference by its Juvenile Jury Instructions Committee, with assistance from the Office of Judicial Education.

Committee Members Judges	
Name	Role / Title
Hon. Maria Lazar	Chair
Hon. Tammy Jo Hock	Member
Hon. Brittany Grayson	Member
Hon. Kristine Snow	Member
Hon. Galen Bayne-Allison	Member
Hon. Natasha Torry	Member
Hon. Lyndsey Brunette	Member
Hon. Maureen Boyle	Member
Hon. Jodi Meier	Member
Assistance Provided By	
Bryce Pierson	Office of Judicial Education Legal Advisor

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Wisconsin Jury Instructions

Juvenile

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185 FIVE-SIXTHS VERDICT

Agreement by ten (five) or more jurors is sufficient to become your verdict. Jurors have a duty to consult with one another and deliberate for the purpose of reaching agreement. If you can do so consistently with your duty as a juror, at least the same ten (five) jurors should agree in all the answers [necessary to decide the same (claim) (ground)]¹. I ask you to be unanimous if you can.

At the bottom of the verdict, you will find a place provided where dissenting jurors, if there be any, will sign their names and state the answer or answers (the number of the verdict question(s)) with which they do not agree. Either the blank lines or the space below them may be used for that purpose.

COMMENT

This instruction was approved by the Committee in 2017. It is adapted from Wis JI–Civil 180. This revision was approved by the Committee in May 2026. It added to the comment.

Five-Sixths Verdict Rule. In Wisconsin, the five-sixths rule does not require that the same ten jurors must agree on every question. Nommensen v. American Continental Ins. Co., 2000 WI App 230, 239 Wis. 2d 129, 619 N.W.2d 137. Instead, the rule requires that the same ten jurors must agree on all questions necessary to support a judgment on a particular claim. Prior to 2017, a preliminary instruction (Wis JI–Children 150) instructed jurors that “at least the same ten jurors should agree in all the answers.” This language was addressed in a 2016 one-judge opinion of the Wisconsin Court of Appeals, Racine County Human Services Department v. L.H., Appeal No. 2015AP1872. The court noted that the parties and the trial judge agreed that the language in the five-sixths instruction – “at least the same ten jurors should agree in all the answers” – was incorrectly worded for a situation where there is more than one ground alleged for termination. The opinion cited Waukesha County Department of Social Services v. C.E.W., 124 Wis. 2d 47, 368 N.W.2d 47 (1985), in which the Supreme Court held that the trial court erred in instructing the jury that “at least the same ten jurors should concur in all the answers made.” The Supreme Court said this instruction to the jury was error “because the six verdicts given to the jury were independent, each verdict being separate and distinct from the others.”

The C.E.W. decision was preceded by the decision in Giese v. Montgomery Ward, Inc., 111 Wis. 2d 392, 331 N.W.2d 585 (1983) in which the Supreme Court held that:

“It is well established in Wisconsin law that this statute (Wis. Stat. § 805.09(2)) requires not that five-sixths of the jury agree on all questions in the verdict, but rather that this number must agree on all questions necessary to support a judgment on a particular claim.”

The C.E.W. and Giese decisions and the five-sixths rule were discussed in two court of appeals decisions in 2014 (both decided by one judge): Portage County Department of Health and Human Services v. Tanya G., Appeal No. 2014AP86, and State v. Jimmy J., Appeal No. 2014AP573. Neither Tanya G. nor Jimmy J. has precedential value under Wis. Stat. § 809.23(3), and they are cited here only as illustrative applications of the C.E.W./Giese rule. In Tanya G. the court said:

¶17 Tanya G. contends that the version of Wis JI 152 read by the court was a misstatement of law and thus the instruction was misleading and erroneous. The court instructed the jury as follows:

Agreement by 10 or more jurors is sufficient to become the verdict of the jury.

If you can do so consistently with your duty as a juror, at least the same 10 jurors should agree in all the answers. I ask you to be unanimous if you can.

(Emphasis added.) Tanya G. argues that, contrary to the court’s instruction, case law does not require the same ten persons to agree when the civil verdict presents two or more claims, citing In Interest of C.E.W., 124 Wis. 2d 47, 59, 368 N.W.2d 47 (1985), and Giese v. Montgomery Ward, Inc., 111 Wis. 2d 392, 401, 331 N.W.2d 585 (1983) (the five-sixths verdict rule requires that the same ten jurors agree on all questions necessary to support a judgment *only on a particular claim*). The County essentially concedes this point. We agree with Tanya G. that the five-sixths verdict instruction read to the jury in this case misstates the law. As we quoted above, the jury was instructed that “at least the same 10 jurors should agree in *all the answers*,” which necessarily included the second and separate claim that Tanya G. failed to assume her parental responsibility for Autumn B.A. See C.E.W., 124 Wis. 2d at 59; Giese, 111 Wis. 2d at 401.

Similarly, in State v. Jimmy J., the court said:

¶4. . . [T]he general rule is that the same ten persons do not have to agree when the civil verdict presents two or more claims. See WIS. STAT. RULE 805.09(2) (“A verdict agreed to by five-sixths of the jurors shall be the verdict of the jury. If more than one question must be answered to arrive at a verdict on the same claim, the same five-sixths of the jurors must agree on all the questions.”); Giese v. Montgomery Ward, Inc., 111 Wis. 2d 392, 401, 331 N.W.2d 585, 590 (1983) (“It is well established in Wisconsin law that this statute requires not that five-sixths of the jury agree on all questions in the verdict, but rather that this number must agree on all questions necessary to support a judgment on a particular claim.”). Further, Jimmy J. points to Waukesha Cnty. Dep’t of Social Services v. C.E.W., 124 Wis. 2d 47, 71-72, 368 N.W.2d 47, 59 (1985), which determined that it was error to tell the jury that it had to agree on all the bases on which the County sought to terminate the parent’s parental rights.

Under Wis. Stat. § 805.09(2), when multiple questions must be answered to resolve a single claim, the same five-sixths of the jurors must agree on all such questions. This requirement applies on a claim-by-claim basis.

Although the right to demand a jury at the grounds phase of a TPR proceeding is statutory, the right to a verdict by at least five-sixths of the jury in a civil case arises from Wis. Const. art. I, § 5 and Wis. Stat. § 805.09(2).

In termination of parental rights proceedings involving abandonment under Wis. Stat. § 48.415(1)(a)3, the time period submitted under the abandonment element and any good-cause questions submitted under § 48.415(1)(c) are part of the same abandonment ground for five-sixths purposes. In In re L.L.S.-P., 2025 WI App 69, ¶¶53–56, 418 Wis. 2d 654, 28 N.W.3d 232, the court held that the same five-sixths of the jurors must agree on one specific period of abandonment, and the same five-sixths must agree on all verdict answers necessary to resolve the § 48.415(1)(c) good-cause questions for that same period. A verdict is not valid unless the same five-sixths concur on all questions necessary to resolve that ground.

Relatedly, L.L.S.-P. further held that where more than one period of abandonment is alleged, the jury must be instructed to consider each alleged period separately, and the verdict must include a separate verdict form for each period. 2025 WI App 69, ¶¶43–48. Failure to do so deprives the parent of the right to a five-sixths verdict as to any alleged period submitted, because a general verdict cannot establish that the same five-sixths of the jurors agreed that abandonment occurred during any one qualifying statutory period.

Note: L.L.S.-P. was decided on plain-error review because trial counsel did not object at the jury instruction and verdict conference. 2025 WI App 69, ¶¶30, 36–42. The court nevertheless reversed the termination order, concluding that the failure to require separate consideration and separate verdict forms for each alleged abandonment period was plain error and was not harmless.

The rule adopted in L.L.S.-P. is best understood, in the Committee’s view, as a targeted application of § 805.09(2) specific to the abandonment ground, and it should be read against the general civil rule that an affirmative defense is typically treated as distinct from the claim for purposes of juror agreement. See Giese v. Montgomery Ward, Inc., 111 Wis. 2d 392, 331 N.W.2d 585 (1983); DeClerc v. Bellin Mem’l Hosp., 229 Wis. 2d 253, 599 N.W.2d 666 (Ct. App. 1999). Under Giese and DeClerc, different groups of five-sixths jurors may form the majority on a claim and on an affirmative defense, so long as each receives the required concurrence. L.L.S.-P. treats abandonment differently from the ordinary claim/defense dichotomy because the statutory good-cause defense under § 48.415(1)(c) is, by the legislature’s design, an integral part of the abandonment ground rather than an independent issue.

While L.L.S.-P. resolved this issue for abandonment, the application of the five-sixths rule to defenses raised under other termination of parental rights grounds remains unsettled, as no published Wisconsin case has addressed whether other grounds and associated defenses constitute a single “claim” under § 805.09(2).

Separate Verdict for Each Child; Each Parent; Each Ground; and Each Alleged Period of Abandonment. The Committee recommends that the trial judge submit separate verdicts for each child, for each parent, for each ground alleged in the petition, and, where abandonment is alleged during more than one time period, a separate verdict form for each alleged abandonment period. That form should identify the specific dates of the period being submitted. See In re L.L.S.-P., 2025 WI App 69, ¶¶43–48, 418 Wis. 2d 654, 28 N.W.3d 232.

When multiple periods of abandonment are submitted, the model verdict questions in Wis JI–Children 314 should be repeated for each alleged period, with the dates of the specific period inserted in question 3 and in each of the dependent good-cause questions (questions 4–7) tied to that period. The verdict form should make clear that the jury is to answer each set of questions independently as to each period.

NOTES

1. Different claims may be decided by different groups of five-sixths of the jurors, so long as the required number of jurors agree on each claim. When more than one question is required to resolve a single claim, however, the same five-sixths of jurors must agree on all such questions. In cases alleging abandonment under Wis. Stat. § 48.415(1)(a) 2. or 3., the statutory good-cause defense under § 48.415(1)(c) must be resolved as part of the same abandonment ground for purposes of juror agreement on all questions necessary to decide that ground. See Wis. Stat. § 805.09(2); In re L.L.S.-P., 2025 WI App 69, 418 Wis. 2d 654, 28 N.W.3d 232.

197 INSTRUCTION AFTER VERDICT IS RECEIVED

Your service in this case is completed. Many jurors ask if they are allowed to discuss the case with others after receipt of the verdict. Because your role in the case is over, you are not prohibited from discussing the case with anyone except that you may not disclose the identity of the child(ren) or the family [or any information that could identify the child(ren) or the family]. However, you should know that you do not have to discuss the case with anyone or answer any questions about it from anyone other than the court. This includes the parties, lawyers, or anyone else.

If you do decide to discuss the case with anyone, I would suggest you treat any discussion with a degree of solemnity such that whatever you do say, you would be willing to say in the presence of your fellow jurors or under oath here in open court in the presence of the parties. It is in the public interest that there be the utmost freedom of debate in the jury room and that jurors be permitted to express their views without fear of incurring the anger of any litigants or criticism of any person. Please respect the privacy of the views of your fellow jurors.

I want to remind you that because this case involves (a child) (children) and is being heard by the Children's Court, these proceedings are confidential. The child(ren) and the family involved in these proceedings have a statutory right to the protection of their identities. [This prohibition includes not only names, but also facts, circumstances, or descriptions that could reasonably permit others to identify the child(ren) or the family]. I

caution you that any person, including a juror, who discloses the identity of the child(ren) or the family [or any information that could identify the child(ren) or the family] is subject to sanctions for contempt of court.

Finally, should any of you have questions for the court before leaving today, please let the bailiff know before you leave the jury room. You may confer with me at any time before answering any questions asked by anyone.

COMMENT

This instruction was approved in 2017. It was adapted from Wis JI-Civil 197. The Committee approved this revision in May 2026. It amended the instruction to align more consistently with Wis. Stat. § 48.299(1)(b) and 938.299(1)(b) concerning any identifying information about a child or a family.

The instruction was revised in 2026 to track more closely the confidentiality language of Wis. Stat. §§ 48.299(1)(b) and 938.299(1)(b), which prohibit any person from divulging “any information that would identify” the child or juvenile or the family involved in the proceeding, on pain of contempt under Chapter 785.

For background on the statutory confidentiality scheme, see State ex rel. E.R. v. Flynn, 88 Wis. 2d 37, 43, 276 N.W.2d 313 (Ct. App. 1979) (recognizing court’s authority to condition attendance at confidential proceedings on non-disclosure of the juvenile’s identity).

212 CHIPS: RELINQUISHMENT OF CUSTODY OF NEWBORN CHILD [WIS. STAT. § 48.13(2m)]

The petition in this case alleges that the custody of (child) was relinquished by (his) (her) parent(s). Your role as jurors will be to answer the following questions in the special verdict:

1. Did (parent) relinquish custody of (child) [to a (law enforcement officer) (emergency medical services practitioner¹) (hospital staff member)] [by placing (child) in a newborn infant safety device²] on (date) without expressing an intent to return for the child?

If the answer to question 1 is “yes,” answer question 2:

2. At the time (child) was taken into custody, did the person taking custody reasonably believe that (child) was 30 days old or younger?

The burden of proof is on (petitioner) to convince you by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that the questions should be answered “yes.”

The term “relinquish custody” means to [give the child to a (law enforcement officer) (emergency medical services practitioner) (hospital staff member) or leave the child with such a person] [place the child in a newborn infant safety device under Wis. Stat. § 48.195(1m)] without expressing an intent to return for the child. [A parent may relinquish custody directly or with the assistance of (another) (other) person(s).]

In answering question 1, you should consider whether (parent) made or gave any verbal or written statement or any other form of expression indicating an intent to return for (child).

In answering question 2, you should consider the age and appearance of (child) at the time (child) was taken into custody. You should also consider any statement made to the person taking custody by the parent (or person assisting the parent) about the age of the child.

SPECIAL VERDICT

1. Did (parent) relinquish custody of (child) [to a (law enforcement officer) (emergency medical services practitioner) (hospital staff member)] [by placing (child) in a newborn infant safety device] on (date) without expressing an intent to return for the child?

Answer: _____
Yes or No

If the answer to question 1 is “yes,” answer question 2:

2. At the time (child) was taken into custody on (date), did the person taking custody reasonably believe that (child) was 30 days old or younger?

Answer: _____
Yes or No

COMMENT

Wis JI–Children 212 and comment were approved by the Committee in 2001 and revised in 2004 and 7/2024. An editorial change was made to the comment in 2005. The verdict was updated in 2009. This revision was approved by the Committee in May 2026. It revised the instruction and comment in light of 2025 Wisconsin Act 94, which amended Wis. Stat. § 48.195(1m)(a).

Wis. Stat. § 48.13(2m) reads:

48.13. Jurisdiction over children alleged to be in need of protection or services. Except as provided in s. 48.028 (3), the court has exclusive original jurisdiction over a child alleged to be in need of protection or services which can be ordered by the court if one of the following applies:

(2m) The child’s parent has relinquished custody of the child under s. 48.195 (1m).

The bracketed language in the third paragraph can be used in cases where the parent relinquished the child with assistance from another person or other persons.

A CHIPS finding that a newborn’s custody was relinquished by his or her parent provides the basis for a TPR under Wis. Stat. § 48.415(1m). See Wis JI–Children 303.

2025 Wisconsin Act 94 [effective date: March 15, 2026] amended Wis. Stat. § 48.195(1m)(a) (intro.) to expand the safe-haven age threshold from 72 hours to 30 days. The Act also made related changes to § 48.195 concerning newborn infant safety devices, required informational materials, tribal-agent notice, and Indian child custody proceedings. The bracketed language in Question 1 should be selected to match the alleged method of relinquishment. If the petition alleges relinquishment through a newborn infant safety device, the instruction should refer to placement in the device rather than relinquishment directly to a law enforcement officer, emergency medical services practitioner, or hospital staff member.

For relinquishments occurring before March 15, 2026, the prior 72-hour threshold applies, and the instruction should be modified to reflect that age limit.

1. “Emergency medical services practitioner” has the meaning given in Wis. Stat. § 256.01(5). It means an emergency medical technician, an advanced emergency medical technician, an emergency medical technician–intermediate, or a paramedic. See Wis. Stat. § 48.195(1b)(a).

2. “Newborn infant safety device” means a device that is installed in a supporting wall of a hospital, fire station, or law enforcement agency and that has an exterior point of access allowing an individual to place a newborn infant inside and an interior point of access allowing individuals inside the building to safely retrieve the newborn infant. See Wis. Stat. § 48.195(1b)(b).

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250 CHIPS: PARENTAL NEGLECT, REFUSAL, OR INABILITY TO PROVIDE – WIS. STAT. § 48.13(10)

The petition in this case alleges that (parent)¹ neglects, refuses, or is unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter for (child) so as to seriously endanger (child)’s physical health. Your role as jurors will be to answer the following question in the special verdict:

1. Did (parent) neglect or refuse, or was (he) (she) unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter for (child) so as to seriously endanger (child)’s physical health?

The burden of proof is on (petitioner) to convince you by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that the question should be answered “yes.”

Before you may answer this question “yes,” you must be convinced by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that the following two elements have been proved:

First, that (parent) neglected, refused, or was unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter for (child).²

Second, that the failure to provide seriously endangered (child)’s physical health.

The first element requires that you find that (parent)³ failed to provide necessary care, food, clothing, medical or dental care, or shelter as a result of neglect, refusal, or inability.

“Neglect” means a failure to provide which is neither intentional nor due to parental incapacity but rather is due to an inattentive state of mind.

“Refusal” is a willful and intentional failure to provide.

“Inability” means an incapacity on the part of the parent to perceive or to respond adequately to the needs of the child, but does not include an incapacity which is solely the result of poverty.⁴

[“Necessary care” means that care which is vital to the needs and the physical health of the child. Parents have the right and duty to protect, train, and discipline their children and supervise their activities. In determining what constitutes necessary care, you may consider all of the facts and circumstances bearing on the child’s need for care, including his or her age, physical condition, and special needs.]⁵

The second element requires that the failure to provide care, food, clothing, medical or dental care, or shelter seriously endangered (child)’s physical health.

“Physical health” refers to bodily health and safety and does not include the mental or emotional health of the child. The physical health of the child is “seriously endangered” if the failure to provide creates a significant risk that the child will be seriously harmed or injured. However, actual harm or injury need not have occurred. In determining whether the physical health of the child was seriously endangered, you may consider the natural and probable consequences of the failure to provide. You may also consider the nature of any possible harm to the child and the level of risk that a particular harm will occur.

SPECIAL VERDICT

1. Did (parent) neglect or refuse, or was (he) (she) unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care, or shelter for (child) so as to seriously endanger (child)’s physical health?

Answer: _____

Yes or No

COMMENT

Wis JI–Children 250 and comment were originally approved by the Committee in 1996 and revised in 1997, 2001, 2004, 2012, and 2025. The change in 2004 conformed the burden of proof language to Wis JI–Civil 205. An editorial correction to the comment was made in 2008. This revision was approved by the Committee in May 2026. It added a new comment clarifying that “necessary care” under § 48.13(10) and (10m) is limited to the child’s physical health.

Wis. Stat. § 48.13(10) reads:

48.13. Jurisdiction over children alleged to be in need of protection or services.

Except as provided in s. 48.028 (3), the court has exclusive original jurisdiction over a child alleged to be in need of protection or services which can be ordered by the court if one of the following applies:

(10) The child’s parent, guardian or legal custodian neglects, refuses or is unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter so as to seriously endanger the physical health of the child.

Neglect; Refuse; Unable. This instruction combines the terms “neglect,” “refuse,” and “unable” in a single jury question. After extensive discussions regarding the intent of this section and the need for separate verdict questions as to each of these terms, the Committee decided that the essence of this section is a parental *failure* to provide and that there does not need to be jury agreement on the particular type of failure. The Committee could not conceive of any “failure” which would not qualify as either a neglect or refusal or inability and felt that it was not productive to require a jury to deliberate about the application of each of these three terms. Most often, a parental failure will result from some combination of these three factors. The fact that jurors cannot agree as to whether the parental failure can be characterized as “neglect” or “refusal” or “inability” should not defeat jurisdiction. Of course, the Committee does not believe that it would be error to submit these three terms as separate jury questions.

Necessary Care, Food, Clothing, Medical or Dental Care, or Shelter. In 2012, the Committee

revised the instruction to clarify that the word “necessary” applies to each of the items listed in § 48.13(10), i.e., care, food, clothing, medical or dental care, or shelter.

NOTES

1. Section 48.13(10) provides: “The child’s parent, guardian, or legal custodian...” While the instruction uses only the term “parent” because it is the most likely to apply, this terminology should be modified based on the specific facts of the case.

2. The trial court has discretion over how specific the instruction should be regarding the allegations of neglect, refusal, and/or inability to provide. See § 48.13(10). If the court determines that greater specificity is necessary based on the factors involved, it may modify the language of this element to address the specific theory.

3. **Neglect Only by One Parent.** In State v. Gregory L.S., 2002 WI App 101, 253 Wis. 2d 563, 643 N.W.2d 890, the court of appeals held “a court is not precluded from finding a child in need of protection and services even when only one parent has neglected the child.” Although one parent may be fit, whether a child is in need of court intervention will depend on the particular facts of the case. If the child was neglected and seriously endangered by one parent, the child may be adjudicated in need of protection or services. 2002 WI App 101, ¶ 42.

The court concluded that the “facts in existence on the date the petition was filed” controlled the determination whether the child was in need of protection and services. Changes subsequent to the filing, including the intervention of the fit parent, should be considered by the court at the dispositional hearing, but did not, necessarily, preclude the exercise of jurisdiction by the juvenile court.

4. **Inability.** The Committee recognizes that there may be considerable difficulty in determining whether an “inability” results from poverty or from other causes. To the extent that other causes of the inability might be identified, these circumstances may arguably be caused by or related to poverty. There is also a question as to whether “poverty” is intended to include a lack of money which is self-induced: If a parent cannot care for children because he or she spends all available money gambling, is that “poverty”? Does it matter whether the parent has been diagnosed as having a gambling addiction? The Committee was unable to agree on language which would resolve these questions as matters of law, and the instruction therefore leaves them to the common sense of jurors.

5. **“Necessary Care” and Physical Health.** For consistency with the statutory language, “necessary care” in the CHIPS context pertains only to the child’s physical health. Unlike the criminal neglect statute (which defines necessary care to include a child’s emotional or mental health), § 48.13(10) and (10m) concern harm to the child’s physical well-being. If a child’s primary harm is psychological or emotional, the appropriate ground is not “neglect” but a separate CHIPS provision (e.g., emotional damage under § 48.13(11)).

255 CHIPS: SUBSTANTIAL RISK OF NEGLECT, REFUSAL, OR INABILITY TO PROVIDE [WIS. STAT. § 48.13(10m)]

The petition in this case alleges that (child) is in need of the protection or services of the court because (his) (her) parent is at substantial risk of neglecting, refusing, or being unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care, or shelter for (child) so as to seriously endanger (his) (her) physical health.

Your role as jurors will be to answer the following questions in the special verdict:

1. Does reliable and credible information exist that (child)’s parent neglected, refused, or was unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care, or shelter for another child in the home so as to seriously endanger the physical health of that other child?

If the answer to question 1 is “yes,” answer question 2:

2. Is (child)’s parent at substantial risk of neglecting, refusing, or being unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care, or shelter for (child) so as to seriously endanger (his) (her) physical health?

The burden is on (petitioner) to convince you by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that the questions should be answered “yes.”

In answering the questions in the special verdict, you should apply the following definitions for the terms and phrases in those questions.

Information is “reliable” if the nature, source, corroboration for, and other facts and circumstances relating to that information establish it as accurate and trustworthy. Information is “credible” if, in the light of reason and common sense, it is worthy of belief.

A parent neglects, refuses, or is unable to provide necessary care, food, clothing, medical or dental care, or shelter for a child for reasons other than poverty when he or she fails to provide for any reason other than solely a lack of economic resources.

“Necessary care” means that care which is vital to the needs and the physical health and safety of the child. Parents have the right and duty to protect, train, and discipline their children and supervise their activities. In determining what constitutes necessary care, you may consider all of the facts and circumstances bearing on the child’s need for care, including age, physical condition, and special needs, if any.

“Another child in the home” means someone under the age of 18 other than (child), who resides or resided in the home of (parent), either permanently or temporarily. The other child may, but need not necessarily, be related to (child). In this case, the petition alleges the other child to be _____. (The other child)’s physical health is seriously endangered if the failure to provide creates a significant risk that (the other child) will be seriously harmed or injured. Actual harm or injury need not have occurred. In determining whether the physical health of (the other child) was seriously endangered, you may consider the natural and probable consequences of the failure to provide. You may also consider the nature of any actual or possible harm to the child and

the level of risk that a particular harm will occur. However, you may not consider actual or possible harm to the emotional health of the child. In answering question 1, you must consider the facts and circumstances as they existed on _____, which was the date on which this petition was filed. Your answer must reflect your finding as of that date.

“Substantial risk” means that a significant and appreciable threat exists that (parent) will fail to provide necessary care, food, clothing, medical or dental care, or shelter for (child) for reasons other than poverty so as to seriously endanger (his) (her) physical health. In determining the seriousness of the risk, among the things you may consider are: (1) the nature and severity of the failure to provide necessary care, food, clothing, medical or dental care, or shelter to the other child; (2) the similarity of the subject child to the other child, with regard to age, sex, size, health, and intelligence; (3) the similarity or dissimilarity of the subject child to the other child by way of relationship or position of favor or disfavor; and (4) any changes which have occurred in the home since the prior (neglect) (insert other conduct) in terms of services having been provided, people having moved into or moved out of the home, and/or any monitoring or supervision which has been put into place. In answering question 2, you may consider all evidence bearing on that question, including evidence of events and conduct occurring since the filing of the petition on (_____). Your answer must reflect your finding as of today’s date.

If you are convinced by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that reliable and credible information exists that (parent) failed for reasons other than poverty to provide for a child in (his) (her) home so as to seriously endanger that child's physical health, you should answer question 1 of the special verdict "yes." If you are not so convinced, you must answer question 1 "no."

If the answer to question 1 is "yes," and you are further convinced by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, based upon that information that (parent) is at substantial risk of failing to provide necessary care, food, clothing, medical or dental care, or shelter for (child) for reasons other than poverty so as to seriously endanger (child)'s physical health, you should answer question 2 of the special verdict "yes." If you are not so convinced, you must answer question 2 "no."

SPECIAL VERDICT

1. Does reliable and credible information exist that (child)'s parent neglected, refused, or was unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care, or shelter for another child in the home so as to seriously endanger the physical health of that other child?

Answer: _____

Yes or No

If the answer to question 1 is “yes,” answer question 2:

2. Is (child)’s parent at substantial risk of neglecting, refusing, or being unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care, or shelter for (child) so as to seriously endanger (his) (her) physical health?

Answer: _____

Yes or No

COMMENT

Wis JI–Children 255 and comment were originally approved by the Committee in 1996 and revised in 1999, 2001, 2004, 2008, 2009, 2012, and 2/2025. This revision was approved by the Committee in May 2026. It added a new comment clarifying that “necessary care” under § 48.13(10m) is limited to the child’s physical health.

Wis. Stat. § 48.13(10m) reads:

48.13. Jurisdiction over children alleged to be in need of protection or services. Except as provided in s. 48.028 (3), the court has exclusive original jurisdiction over a child alleged to be in need of protection or services which can be ordered by the court if one of the following applies:

(10m) The child’s parent, guardian or legal custodian is at substantial risk of neglecting, refusing or being unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter so as to endanger seriously the physical health of the child, based on reliable and credible information that the child’s parent, guardian or legal custodian has neglected, refused or been unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter so as to endanger seriously the physical health of another child in the home.

Substantial Risk. This instruction provides that “substantial risk” means “that a significant and appreciable threat exists.” The statutory language does not advise how to assess that risk, but in thinking about the statute, this Committee has identified a number of factors which a fact finder might consider in trying to assess the seriousness of that risk. Those factors are: (1) the nature and severity of the failure to

provide necessary care, food, clothing, medical or dental care, or shelter to the other child; (2) the similarity of the subject child to the other child, with regard to age, sex, size, health, and intelligence; (3) the similarity or dissimilarity of the subject child to the other child by way of relationship or position of favor or disfavor; and (4) any changes which have occurred in the home since the prior (neglect) (insert other conduct) in terms of services having been provided, people having moved into or moved out of the home, and/or any monitoring or supervision which has been put into place. These factors were added to the instruction in 2001.

Post-petition Evidence. The Committee believes that evidence of post-petition conduct is relevant to the petition's allegations of "substantial risk" to the child. A sentence was added in 2001 to the instruction on the second element to allow the jury to consider events and conduct occurring since the petition was filed.

Summary Judgment. The Committee believes that summary judgment is not available for this ground if the parent disputes the allegation of substantial risk. It has been contended by some that this statutory ground limits the fact finder's role so that if the parent has been the subject of previous court findings, no defense is possible and summary judgment is appropriate. The Committee disagrees.

Necessary Care, Food, Clothing, Medical or Dental Care, or Shelter. In 2012, the Committee revised the instruction to clarify that the word "necessary" applies to each of the items listed in § 48.13(10m), i.e., care, food, clothing, medical or dental care, or shelter.

"Necessary Care" and Physical Health. For consistency with the statutory language, "necessary care" in the CHIPS context pertains only to the child's physical health. Unlike the criminal neglect statute, which defines necessary care to include a child's emotional or mental health, § 48.13(10m) concerns harm, or substantial risk of harm, to the child's physical well-being. If the child's primary harm is psychological or emotional, the appropriate ground is not neglect under § 48.13(10m), but a separate CHIPS provision, such as emotional damage under § 48.13(11).

**300 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS:
PRELIMINARY INSTRUCTION (GENERAL)**

This is a fact-finding proceeding on a petition to terminate parental rights. It is conducted pursuant to the Children's Code of this state. It is a civil, not a criminal, proceeding.

This hearing is a part of the process that was started by the filing of a petition by _____. The petition asks that the parental rights of (parent) to (child), a ____-year-old (boy) (girl), be terminated. The petition alleges that (child) (insert grounds under Wis. Stat. § 48.415).

I want to emphasize to you that this hearing is only one part of a process that may result in the termination of parental rights. You will not be asked to decide whether _____'s parental rights should be terminated. Your responsibility is to determine whether the grounds for termination alleged in the petition have been proved. In doing so, you should not consider what the final result of this proceeding might be. If you determine that grounds for termination of (parent)'s parental rights have been proved, it is my responsibility to determine whether (her) (his) (their) parental rights should be terminated.¹

The petitioner, _____, is represented in this proceeding by Attorney _____.

The mother of (child) is (_____). She is represented by Attorney _____. [The father of (child) is (_____). He is represented by Attorney _____.]

_____.] [Use the following if one parent is not in the courtroom: (Parent), the (mother) (father) of (child), is not in the courtroom because (her) (his) parental rights are not a part of this proceeding.^{2]}

The interests of (child) will be represented by Attorney _____, who is the child's guardian ad litem.³ [(Child) is not in the courtroom because the laws governing this proceeding do not require that (he) (she) attend.]

At the end of this hearing, you will be given a special verdict to answer. I will give you further instructions on the law that applies to the verdict questions.

I want to remind you that (child) and (his) (her) family have a statutory right to keep their identities confidential. This is why these proceedings are closed to the public. You must never disclose the identity of the child or family members to anyone.

COMMENT

Wis JI-Children 300 and comment were originally approved by the Committee in 1996. Editorial changes were made in 2004. Editorial corrections were made to paragraphs 2, 3, and 5 in 2005. Footnote 2 was added in 2018. Footnote 3 was added in 2009. The comment was updated in 2008, 2009, and 2018. This revision was approved by the Committee in May 2026. It amended the comment to reflect the opinion in State v. H.C., 2025 WI 20.

Dispositional Phase—No Burden of Proof. Once the jury finds that grounds for termination have been established, the court proceeds to a separate dispositional hearing. Under Wis. Stat. § 48.426(2), and as clarified in State v. H.C., 2025 WI 20, ¶¶20, 26, 32, 416 Wis. 2d 233, 21 N.W.3d 330, the court exercises its discretion to determine whether termination of parental rights is in the child's best interests. No party bears a burden of proof at this stage. The burdens set forth in this instruction apply solely to the fact-finding (grounds) phase.

NOTES

1. With respect to the extent to which a jury should be advised about its role in a case involving the termination of parental rights, see the related discussion and case citations in the Comment and Note 1 to Wis JI-Children 200.

2. The unpublished decision in In re G.L.S., 2018AP177 (August 23, 2018) addressed a termination of parental rights case in which grounds were established as to one parent, after a default finding as to that parent, midway through the trial on grounds. The court of appeals approved the following instruction, which was provided to the jury on the second day of trial:

There has been a development since we last met. The case involving [parent], who is the father, has now been resolved, and it will not be under consideration by you, so that part of the case is no longer before you. . . . [Father's] attorney, you will notice, no longer appears. There may be testimony that involves [Father] that's presented to you, but only as it affects the other parent . . .

3. In jury trials under Chapter 48, the guardian ad litem (GAL) or the court may tell the jury that the GAL represents the interests of the person or unborn child for whom the GAL was appointed. Wis. Stat. § 48.235(6).

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301 CONSIDERATION OF CHILD'S BEST INTERESTS IN TERMINATION PROCEEDINGS

I want to again emphasize that this hearing is only one part of a process that may result in termination of parental rights.

In this jury trial, the first phase of the proceedings, your responsibility is to determine what the facts are from all the evidence and answer the questions on the special verdict that will be submitted to you. Your answers will determine whether the State has proved that a ground or grounds for termination of parental rights exists. However, you are not being asked to decide if parental rights should be terminated. Based on your answers to the questions on the special verdict, it will be my responsibility to conduct further proceedings and hearings, and it is solely and ultimately my responsibility to determine if parental rights should be terminated based upon factors the law requires a court to consider if grounds for termination of parental rights are proven.¹ You should not be concerned with what the final result of this jury proceeding might be, and you should not be concerned with what the final result of this entire lawsuit might be.

Consideration of the best interests of the child is a matter for the court in proceedings which will be conducted in the future; it is not a consideration for the jury.

COMMENT

This instruction and comment were approved in 2004. The instruction was revised in 2013. An editorial revision was made to the instruction in 2009. The comment was updated in 2008, 2014, and 2015. This revision was approved by the Committee in May 2026. It amended the comment to reflect the opinion in State v. H.C., 2025 WI 20.

Dual Purpose Evidence. The committee recommends giving this instruction at the end of the grounds hearing in cases where there is “dual purpose” evidence that goes to both grounds and disposition. Examples of this dual purpose evidence include, among other things: details of “unsuccessful” parental visits, that is, a child’s negative reaction to the parent at the visit; foster parent testimony about the child’s special needs and details of the foster parents’ duties in meeting the child’s special needs; foster parent testimony about the failure of the parent to contact the child, provide support for, or give gifts to the child; and details regarding the physical and mental health of the biological parent.

Since this type of evidence could shift the jury’s focus away from the grounds testimony, the above limiting instruction may be appropriate after the specific testimony and again during the closing instructions.

See In re Kristeena A.M.S., 230 Wis. 2d 460, 602 N.W.2d 167 (Ct. App. 1999) (citing In re C.E.W., 124 Wis. 2d 47, 54, 368 N.W.2d 47 (1985)).

For an unpublished decision citing In re C.E.W. involving the giving of cautionary limiting instructions to the jury in the grounds-phase of TPR proceeding to not consider whether termination would be in the child’s best interest, see State v. Samantha S., No. 2013AP1503 (not published; one-judge decision).

For an unpublished decision discussing the ineffectiveness of counsel for failing to ask that the jury be instructed on Wis JI-Children 301, see Manitowoc County Human Services Dep’t v. Ralph B., Appeal No. 2014AP140 (one-judge decision, July 30, 2014).

Dispositional Phase—No Burden of Proof. In State v. H.C., 2025 WI 20, 416 Wis. 2d 233, 21 N.W.3d 330, the Wisconsin Supreme Court held that neither the Due Process Clause nor Wis. Stat. § 48.426 imposes a burden of proof on any party at the dispositional phase of a TPR proceeding.

NOTES

1. Once the jury finds that grounds for termination have been established, the court proceeds to a separate dispositional hearing. Under Wis. Stat. § 48.426(2), and as clarified in State v. H.C., 2025 WI 20, ¶¶ 20, 26, 32, the court exercises its discretion to determine whether termination of parental rights is in the child’s best interests. No party bears a burden of proof at this stage. The burdens set forth in this instruction apply solely to the fact-finding (grounds) phase.

**303 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS:
RELINQUISHMENT [WIS. STAT. § 48.415(1m)]**

NO INSTRUCTION IS RECOMMENDED.

COMMENT

The comment to Wis JI–Children 303 was approved by the Committee in 2001 and revised in 2004. This revision was approved by the Committee in May 2026. It reflects 2025 Wisconsin Act 94, which amended the age threshold in Wis. Stat. § 48.415(1m) from 72 hours to 30 days.

Wis. Stat. § 48.415 (1m) reads:

48.415. Grounds for involuntary termination of parental rights. At the fact-finding hearing the court or jury may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following:

(1m) Relinquishment. Relinquishment, which shall be established by proving that a court of competent jurisdiction has found under § 48.13(2m) that the parent has relinquished custody of the child under § 48.195(1m) when the child was 30 days old or younger.

The CHIPS ground for relinquishment of custody is JI–Children 212.

Only the parent who has relinquished custody and was the subject of the CHIPS order may have his or her parental rights terminated on this ground.

The Committee concludes that a jury instruction for this ground is not necessary. The statute provides that a CHIPS finding of relinquishment, in combination with the fact that the child was 30 days old or younger at the time of relinquishment, is conclusive in establishing this ground for termination of the rights of the parent who relinquished custody. See Lee v. State Board of Dental Examiners, 29 Wis. 2d 330, 139 N.W.2d 61 (1966); In re Estate of Safran, 102 Wis. 2d 79, 306 N.W.2d 27 (1981).

The Committee recognizes that there is a difference in language between the CHIPS finding (reasonably believe the child was 30 days old or younger) and the TPR finding (child was 30 days old or younger). This difference could create a triable issue.

2025 Wisconsin Act 94 [effective date: March 15, 2026] amended Wis. Stat. § 48.415(1m) to change the age threshold from 72 hours to 30 days, consistent with the parallel amendment to the safe-haven relinquishment statute at Wis. Stat. § 48.195(1m)(a) (intro.). The CHIPS instruction, Wis JI–Children 212, has been similarly revised. For cases involving relinquishments that occurred before March 15, 2026, the

prior 72-hour threshold applies. The observation in the preceding paragraph about the difference in language between the CHIPS standard (“reasonably believe the child was 30 days old or younger”) and the TPR standard (“child was 30 days old or younger”) continues to apply under the amended statute.

Summary Judgments and Directed Verdicts. See Special Materials, SM–2, at the end of this publication for a discussion of the use of summary judgments and directed verdicts in CHIPS and TPR proceedings.

**305 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS:
ABANDONMENT (60 DAYS) [WIS. STAT. § 48.415(1)(a)1.]**

The petition in this case alleges that (child) has been abandoned, which is a ground for termination of parental rights. Your role as jurors in this case will be to answer the following questions in the special verdict:

1. Was (child) left without provision for (his) (her) care or support?
2. Has (petitioner) investigated the circumstances surrounding the absence of (parent)?
3. Was (petitioner), despite reasonable efforts, unable to locate either of (child)'s parents for a period of at least 60 days prior to (date of filing petition)?

Before (child) may be found to have been abandoned, (petitioner) must prove the following three elements by evidence that is clear, satisfactory, and convincing, to a reasonable certainty.

First, that (child) was left without provision for the child's care or support. Question 1 of the special verdict addresses this element.

Second, that (petitioner) has investigated the circumstances surrounding the absence of the parent(s). Question 2 of the special verdict addresses this element.

Third, that (petitioner), despite reasonable efforts, was unable to locate either of (child)'s parents for a period of at least 60 days prior to the filing of the petition. Question 3 of the special verdict addresses this element.

Before you may answer any question in the special verdict “yes,” you must be convinced by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that the question should be answered “yes.” If you are not so convinced, you must answer the question “no.”¹

SPECIAL VERDICT

1. Was (child) left without provision for (his) (her) care or support?

Answer: _____

Yes or No

2. Has (petitioner) investigated the circumstances surrounding the absence of (parent)?

Answer: _____

Yes or No

3. Was (petitioner), despite reasonable efforts, unable to locate either of (child)’s parents for a period of at least 60 days prior to (date of filing petition)?

Answer: _____

Yes or No

COMMENT

Wis JI-Children and comment were originally approved by the Committee in 1997 and revised in 1999, 2001, 2004, 2005, and 2006. The change in 2004 conformed the burden of proof language to Wis JI-

Civil 205. This revision was approved by the Committee in May 2026. It amended the comment to reflect the opinion in State v. H.C., 2025 WI 20.

Wis. Stat. § 48.415(1)(a) 1. reads:

48.415. Grounds for involuntary termination of parental rights. At the fact-finding hearing the court or jury shall determine whether grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following:

(1) Abandonment. (a) Abandonment, which, subject to par. (c), shall be established by proving that:

1. The child has been left without provision for the child's care or support, the petitioner has investigated the circumstances surrounding the matter and for 60 days the petitioner has been unable to find either parent.

The Committee believes the statute requires an investigation of the whereabouts of the parents during a sixty-day period prior to the filing of a petition for termination on this ground. Reasonable investigative efforts must be undertaken; however, in the Committee's view, they need not be continuous throughout the sixty-day period. While investigative efforts to locate the parents will almost always commence immediately upon the discovery of an abandoned child, a trial court may encounter factual circumstances which require further explanation of this requirement.

The Committee believes the phrase “without provision for care or support” clearly means more than “without any provision” and requires provision for sufficient and adequate care. Otherwise, a parent who leaves a child in a dumpster might defeat jurisdiction by arguing that the child was wrapped in a blanket and had \$20 tucked in the child's sleeper, and therefore some provision had been made. Similarly, “provision for care and support” requires that the parent has actively arranged for care and does not include the expectation that others will find and care for the child. Thus, where the parent otherwise abandons a child, jurisdiction is not defeated simply because the parent makes an anonymous phone call to the Department of Social Services and advises them where to find the baby. If appropriate, the jury should be instructed on this matter.

Dispositional Phase—No Burden of Proof. In State v. H.C., 2025 WI 20, 416 Wis. 2d 233, 21 N.W.3d 330, the Wisconsin Supreme Court held that neither the Due Process Clause nor Wis. Stat. § 48.426 imposes a burden of proof on any party at the dispositional phase of a TPR proceeding.

Biological Parent; Periods of Abandonment Prior to Adjudication as Parent. See Comment, Wis JI-Children 314.

NOTES

1. Once the jury finds that grounds for termination have been established, the court proceeds to a separate dispositional hearing. Under Wis. Stat. § 48.426(2), and as clarified in State v. H.C., 2025 WI 20, ¶¶20, 26, 32, the court exercises its discretion to determine whether termination of parental rights is in the

child's best interests. No party bears a burden of proof at this stage. The burdens set forth in this instruction apply solely to the fact-finding (grounds) phase.

**307 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS:
ABANDONMENT: LEFT WITHOUT PROVISION FOR CARE [WIS.
STAT. § 48.415(1)(a)1m.]**

The petition in this case alleges that on (date) (parent) abandoned (child) by leaving (him) (her) without providing for (his) (her) care or support in a place or manner that exposed the child to a substantial risk of either great bodily harm or death. This is a ground for termination of parental rights. Your role as jurors will be to answer the following questions in the special verdict:

1. On (_____), was (child) left by (parent) without provision for the child's care or support?

If the answer to question 1 is “yes,” answer the following question:

2. Was (child) left by (parent) in a (place) (manner) that exposed the child to a substantial risk of either great bodily harm or death?

Before (child) may be found to have been abandoned, (petitioner) must prove the following two elements by evidence that is clear, satisfactory, and convincing to a reasonable certainty.

First, that (child) was left by (parent) without provision for the child's care or support. This means that (parent) physically removed (himself) (herself) from the child under circumstances which demonstrated that (he) (she) was relinquishing parental responsibility for the child and that the parent failed to provide for the child's care and support. Question 1 of the special verdict addresses this element.

Second, that (child) was left by (parent) in a place or manner that exposed the child to a substantial risk of either great bodily harm or death. “Substantial risk” means a threat which is significant and appreciable. “Great bodily harm” means serious bodily injury. Question 2 of the special verdict addresses this element.

Before you may answer any question in the special verdict “yes,” you must be convinced by evidence that is clear, satisfactory, and convincing to a reasonable certainty, that the question should be answered “yes.” If you are not so convinced, you must answer the question “no.”¹

SPECIAL VERDICT

1. On (_____), was (child) left by (parent) without provision for the child’s care or support?

Answer: _____

Yes or No

If the answer to question 1 is “yes,” answer the following question:

2. Was (child) left by (parent) in a (place) (manner) that exposed the child to a substantial risk of either great bodily harm or death?

Answer: _____

Yes or No

COMMENT

Wis JI–Children 307 and comment were originally approved by the Committee in 1997 and revised in 2001 and 2004. The change in 2004 conformed the burden of proof language to Wis JI–Civil 205. The comment was updated in 2005. The verdict was revised in 2009. This revision was approved by the Committee in May 2026. It amended the comment to reflect the opinion in State v. H.C., 2025 WI 20.

This instruction is intended for use in connection with § 48.415(1)(a)1m., which creates the following ground for the termination of parental rights:

48.415. Grounds for involuntary termination of parental rights. At the fact-finding hearing the court or jury shall determine whether grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following:

(1) ABANDONMENT. (a) Abandonment, which . . . shall be established by proving that:

1m. The child has been left by the parent without provision for the child’s care or support in a place or manner that exposes the child to substantial risk of great bodily harm, as defined in § 939.22 (14), or death.

The Committee engaged in an extensive debate as to the scope of this ground. Read broadly, it applies to any physical “leaving” of a child, however momentary and regardless of any intent to return. The narrow reading assumes a legislative intent to include only the leaving of a child which is accompanied by a relinquishment of parental responsibility. This discussion focused both on the meaning of the word “left,” as well as the entire phrase “left without provision for care or support.”

Under the broad view, many brief physical separations could become grounds for possible termination if the separation involved sufficient risk to the child, such as the parent who steps away from the infant child in the bathtub to answer the phone or leaves a child in a locked car on a hot day to run into the grocery store. Another example might be the parent who leaves young children alone and heads for the tavern. These have been traditional grounds for CHIPS jurisdiction but have not previously been considered grounds for termination.

Ultimately, the Committee concluded that the law intended to require some relinquishment of parental responsibility. The ground is, after all, a means of establishing “abandonment,” a term which clearly involves more than brief physical separation. The parents in the examples above may have been terribly reckless, but in no reasonable sense have they abandoned their children. Moreover, termination of parental rights requires more egregious actions or omissions by the parent than actions which allow for the exercise of CHIPS jurisdiction.

The Committee also felt that the phrase “without provision for care or support” clearly means more than “without any provision” and requires provision for sufficient and adequate care. Otherwise, a parent who leaves a child in a dumpster might defeat jurisdiction by arguing that the child was wrapped in a blanket and had \$20 tucked in the child’s sleeper, and therefore some provision had been made. Similarly, “provision for care or support” requires that the parent has actively arranged for care and does not include the expectation that others will find and care for the child. Thus, where the parent otherwise abandons a child, jurisdiction is not defeated simply because the parent makes an anonymous phone call to the

Department of Social Services and advises them where to find the baby. If appropriate, the jury should be instructed on this matter.

Dispositional Phase—No Burden of Proof. In State v. H.C., 2025 WI 20, 416 Wis. 2d 233, 21 N.W.3d 330, the Wisconsin Supreme Court held that neither the Due Process Clause nor Wis. Stat. § 48.426 imposes a burden of proof on any party at the dispositional phase of a TPR proceeding.

Biological Parent; Periods of Abandonment Prior to Adjudication as Parent. See Comment, Wis JI-Children 314.

NOTES

1. Once the jury finds that grounds for termination have been established, the court proceeds to a separate dispositional hearing. Under Wis. Stat. § 48.426(2), and as clarified in State v. H.C., 2025 WI 20, ¶¶ 20, 26, 32, the court exercises its discretion to determine whether termination of parental rights is in the child's best interests. No party bears a burden of proof at this stage. The burdens set forth in this instruction apply solely to the fact-finding (grounds) phase.

**313 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS:
ABANDONMENT: PLACEMENT AND FAILURE TO VISIT OR
COMMUNICATE FOR THREE MONTHS [WIS. STAT. § 48.415(1)(a)2.]**

The petition in this case alleges that (child) has been abandoned, which is a ground for termination of parental rights. Your role as jurors will be to complete the special verdict form or forms submitted to you. [If more than one alleged period of abandonment is submitted to you, you will receive a separate six-question verdict form for each alleged period. You must consider each alleged period separately and answer each verdict form independently.]¹

Questions 1 and 2 read as follows:

1. Was (child) placed, or continued in a placement, outside (parent)’s home pursuant to a court order that contained the termination of parental rights notice required by law?
2. Did (parent) fail to visit or communicate with (child) throughout the period from (beginning date) through (ending date), a period of 3 months or longer?

As to these two questions, (petitioner) must convince you by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that your answer to each of the two questions should be “yes.”

Before you may answer question 1, “yes,” (petitioner) must prove that (child) has been placed, or continued in a placement, outside (parent)’s home pursuant to a court order that contained the termination of parental rights notice required by law.

ADD THE FOLLOWING LANGUAGE IF THERE IS NO DISPUTE AS TO THIS ELEMENT

[Because there is no dispute in the evidence as to this question, I have answered this question. My answer has no bearing whatsoever on what your answers should be to the other questions in the special verdict form.]

Before you may answer question 2, “yes,” (petitioner) must prove that (parent) failed to visit or communicate with (child) for a period of three months or longer. This means that (parent) did not visit or did not communicate with (child) for three months or longer. Incidental contact between (parent) and (child) does not prevent you from finding that (parent) failed to visit or communicate. Incidental contact means insignificant contact or contact that occurred merely by chance. In calculating any period during which visitation did not occur, you should not include any period during which (parent) was prohibited by judicial order from visiting with (child). In calculating any period during which communication did not occur, you should not include any period during which (parent) was prohibited by judicial order from communicating with (child).

If you answer questions 1 and 2, “yes,” abandonment has been established for the period established in question 2 unless (parent) proves certain facts. Questions 3 through 6 of the special verdict address these facts and read as follows:

Questions 3-6 apply to the period of 3 months or longer, as determined in question 2 [on that verdict form]².

Answer question 3 only if the answers to questions 1 and 2 are “yes.”

3. Did (parent) have good cause for having failed to visit with (child) during that period?

Answer question 4 only if the answer to question 3 is “yes”:

4. Did (parent) have good cause for having failed to communicate with (child) during that period?

Answer question 5 only if the answer to question 4 is “yes”:

5. Did (parent) communicate about (child) with [(_____) who had physical custody of (child)/(agency)] during that period?

Answer question 6 only if the answer to question 5 is “no”:

6. Did (parent) have good cause for having failed to communicate about (child) with [(_____) who had physical custody of (child)/(agency)] during that period?

(Parent) has the burden of satisfying you by the greater weight of the credible evidence, to a reasonable certainty, that your answer to questions 3 through 6 should be “yes.”

In determining if good cause existed, as stated in questions 3, 4, and 6, you may consider whether the (child)’s age or condition would have made any communication meaningless, whether (parent) had a reasonable opportunity to visit or communicate with (child) or communicate with (_____), who had physical custody of (child) [or the agency responsible for the care of the child during the time period]; attempts to contact (child); whether person(s) with physical custody of (child) prevented or interfered with efforts by (parent) to visit or communicate with (child); any other factors beyond (parent)’s

control which prevented or interfered with visitation or communication; and all other evidence presented at this trial on this issue.

BURDEN OF PROOF

I want to emphasize to you that as to questions 1 and 2, the burden is on (petitioner) to convince you by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that your answer should be “yes.” If it becomes necessary for you to answer questions 3 through 6, the burden is on (parent) to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that your answer should be “yes.” [Those burdens apply separately to each verdict form you are asked to answer.]³

Clear, satisfactory, and convincing evidence is evidence which, when weighed against that opposed to it, clearly has more convincing power. It is evidence that satisfies and convinces you that “yes” should be the answer because of its greater weight and clear, convincing power. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

The greater weight of the credible evidence means that the evidence in favor of a “yes” answer has more convincing power than the evidence opposed to it. Credible evidence means evidence you believe in light of reason and common sense.

“Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough

to meet the burden of proof.⁴

SPECIAL VERDICT

1. Was (child) placed, or continued in a placement, outside (parent)'s home pursuant to a court order that contained the termination of parental rights notice required by law?

Answer: _____
Yes or No

2. Did (parent) fail to visit or communicate with (child) throughout the period from (beginning date) through (ending date), a period of 3 months or longer?

Answer: _____
Yes or No

Questions 3-6 apply to the period of 3 months or longer, as determined in question 2 [on this verdict form].

Answer question 3 only if the answers to questions 1 and 2 are “yes.”

3. Did (parent) have good cause for having failed to visit with (child) during that period?

Answer: _____
Yes or No

Answer question 4 only if the answer to question 3 is “yes”:

4. Did (parent) have good cause for having failed to communicate with (child) during that period?

Answer: _____
Yes or No

Answer question 5 only if the answer to question 4 is “yes”:

5. Did (parent) communicate about (child) with [(_____) who had physical custody of (child)/(agency)] during that period?

Answer: _____
Yes or No

Answer question 6 only if the answer to question 5 is “no”:

6. Did (parent) have good cause for having failed to communicate about (child) with [(_____) who had physical custody of (child)/(agency)] during that period?

Answer: _____
Yes or No

COMMENT

Wis JI–Children 313 was originally approved by the Committee in 1997 and revised in 1999, 2001, 2004, 2011, 2019, 1/2024, and 7/2024. The instruction’s section on burden of proof was revised in 2019. The verdict was revised in 2009. The comment was revised in 2014, 2015, and 2019. This revision was approved by the Committee in May 2026. It amended the comment to reflect State v. H.C., 2025 WI 20, and incorporated the holding of In re L.L.S.–P., 2025 WI App 69, 418 Wis. 2d 654, 28 N.W.3d 232, regarding the separate consideration of multiple alleged abandonment periods and application of the five-sixths verdict rule.

Wis. Stat. § 48.415(1)(a)2. reads:

48.415. Grounds for involuntary termination of parental rights. At the fact-finding hearing, the court or jury may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following:

(1) Abandonment. (a) Abandonment, which, subject to par. (c), shall be established by proving that:

2. The child has been placed, or continued in a placement, outside the parent’s home by a court order containing the notice required by s. 48.356(2) or 938.356(2) and the parent has failed to visit or communicate with the child for a period of 3 months or longer;

(b) Incidental contact between parent and child shall not preclude the court from finding that the parent has failed to visit or communicate with the child under par. (a)2 or 3. The time periods under par. (a)2 or 3 shall not include any periods during which the parent has been prohibited by judicial order from visiting or communicating with the child.

(c) Abandonment is not established under par. (a)2. or 3. if the parent proves all of the following by a preponderance of the evidence:

1. That the parent had good cause for having failed to visit with the child throughout the time period specified in par. (a)2. or 3., whichever is applicable.

2. That the parent had good cause for having failed to communicate with the child throughout the time period specified in par. (a)2. or 3., whichever is applicable.

3. If the parent proves good cause under subd. 2., including good cause based on evidence that the child’s age or condition would have rendered any communication with the child meaningless, that one of the following occurred:

a. The parent communicated about the child with the person or persons who had physical custody of the child during the time period specified in par. (a)2. or 3., whichever is applicable, or, if par. (a)2. is applicable, with the agency responsible for the care of the child during the time period

specified in par. (a)2.

b. The parent had good cause for having failed to communicate about the child with the person or persons who had physical custody of the child or the agency responsible for the care of the child throughout the time period specified in par. (a)2. or 3., whichever is applicable.

This instruction is to be used where the petition is filed on January 1, 1997, or thereafter.

Subsection 48.415(1)(a)2 was revised to shorten the period for abandonment on a court-ordered out-of-home placement from six months to three months. This is generally effective July 1, 1996. However, §§ 9110 and 9310 of Act 275 prohibit the filing of a termination of parental rights petition on this ground unless the parent has received the appropriate notice under § 48.356(2) or § 938.356(2) of this ground for termination, as affected by this act, and three months or longer have elapsed since the date of the notice. It should be noted, however, that § 9110 of Act 275 specifically indicates that it “does not preclude a person from filing a petition,” under Wis. Stat. § 48.415(1)(a)2, against a parent who received appropriate notice under the then-existing statute and if six months or longer have elapsed since the date of that notice.

The Committee believes that Wis. Stat. § 48.415(1)(a)2 requires only that the last order placing the child/children out of the home contain the written warnings regarding the termination of parental rights. The failure of each and every order to contain such warnings is not a fatal defect.

Wis. Stat. § 48.415(1)(a)3 shortened the time period on a child who had been left by the parent from a period of one year down to six months. This statute does not have as an element that there was any type of TPR warning. However, the legislature determined that this particular part of the act would not apply until six months after the effective date of the act. In other words, it first applies to petitions filed on January 1, 1997, or thereafter.

Effect of Court Order Prohibiting Visitation. When a parent is prohibited from “visitation” by a court order, he or she may still communicate with the child by telephone and letters. In re Termination of Parental Rights to Jessica N., 228 Wis. 2d 695, 598 N.W.2d 924 (Ct. App. 1999). The court of appeals held that when a court prohibits visitation but does not prohibit communication, periods in which there has been no contact will be counted when considering whether abandonment has been established.

Condition Precedent in Court Order. In In re. Jessica N., *supra*, the father challenged the trial court’s termination for abandonment because he was prohibited by a family court order from visiting his daughter. In this case, the court order allowed the father to have supervised visitation if he saw a therapist and made progress sufficient so that, in the therapist’s opinion, visitation would not be harmful to the daughter. The court of appeals said this “condition precedent” to visitation gave the father the “keys to the door.”

Following In re. Jessica N., the court of appeals considered whether a father who was prohibited from having contact with his child unless he was either adjudicated as her father or sought third-party contact to facilitate visitation or childcare issues held the “keys to the door.” In re. Z.J.E., Appeal No. 2018AP1206 (September 18, 2018) (not published). The court held that he did and approved the trial court’s addition of the following verbiage to the standard instruction:

“However, a court order which prohibits a parent from visiting and/or communicating until the parent meets certain conditions which the parent can meet through reasonably diligent efforts does not ‘prohibit’ visitation and/or communication.”

Id. at 7.

Dispositional Phase—No Burden of Proof. In State v. H.C., 2025 WI 20, 416 Wis. 2d 233, 21 N.W.3d 330, the Wisconsin Supreme Court held that neither the Due Process Clause nor Wis. Stat. § 48.426 imposes a burden of proof on any party at the dispositional phase of a TPR proceeding.

Indian Child Welfare Act. For a termination case involving an Indian child, see Wis JI–Children 420-424.

Termination of CHIPS Order. The “three-month” abandonment provision requires that the three-month period of abandonment fall within the duration of the CHIPS placement of the child outside the parent’s home. In re Termination of Parental Rights to Cordell J.B., 2011 WI App 26, 331 Wis. 2d 666, 794 N.W.2d 800. Therefore, this TPR ground does not apply if the CHIPS order placing the child outside her home was terminated prior to the running of the required three months of abandonment.

Summary Judgment. For two cases involving the use of summary judgment when the issue to be resolved is abandonment, see Dane County Dep’t of Human Services v. Wesley J., Appeal No. 2013AP1226 (not published; one judge) and Racine County Dep’t of Human Services, Appeal No. 2012AP1974 (not published; one judge). The decision in Wesley J. notes that the burden of proof as to “good cause” for failing to visit or communicate rests with the parent, not the department.

“Communicate with the Child.” In an unpublished opinion, the court of appeals discussed the meaning of the statutory element “communicate with the child.” Dane County Dep’t of Human Services v. Hershula B., Appeal No. 2014AP2076 (one-judge decision, February 26, 2015). The parent in this case argued that she had “communicated indirectly with” her child when she left messages with the foster parents. The opinion concluded that the phrase “communicate with the child” means more than just communicating; it means that the child shares in the action of communicating.”

Five-Sixths Verdict Rule (Wis. Stat. § 805.09(2)). In Wisconsin, agreement by five-sixths of the jury is required for a valid civil verdict. Wis. Stat. § 805.09(2); Wis. Const. art. I, § 5. When more than one question must be answered to reach a verdict on the same claim, the same five-sixths of the jurors must agree on all of those questions. Giese v. Montgomery Ward, Inc., 111 Wis. 2d 392, 401, 331 N.W.2d 585 (1983). Verdicts are assessed on a claim-by-claim basis; each TPR ground constitutes a separate claim, but all questions necessary to establish or defeat a single ground must be answered by the same five-sixths of the jurors. Waukesha County Dep’t of Social Services v. C.E.W., 124 Wis. 2d 47, 71–72, 368 N.W.2d 47 (1985).

Although L.L.S.–P. arose under § 48.415(1)(a)3, the same five-sixths principles under § 805.09(2) govern trials under § 48.415(1)(a)2. The good-cause defense available under § 48.415(1)(c) is, by the legislature’s design, an integral part of the abandonment ground rather than an independent affirmative defense. Accordingly, when abandonment under § 48.415(1)(a)2 is alleged, the same five-sixths of the jurors must agree on all questions necessary to resolve that ground—including the elements of abandonment and the determination that the parent failed to establish good cause. If the same five-sixths of the jurors do not agree on all of those questions, a valid five-sixths verdict has not been reached on the abandonment claim. See In re L.L.S.–P., 2025 WI App 69, ¶¶53–56, 418 Wis. 2d 654, 28 N.W.3d 232.

Multiple Periods of Abandonment. When the petition alleges more than one distinct three-month-or-longer period of abandonment under § 48.415(1)(a)2, the jury must be instructed to consider each alleged

period separately, and the special verdict must include a separate verdict form for each alleged period, repeating questions 1 through 6 for each alleged period. Because abandonment requires proof of failure to visit or communicate for a specific continuous statutory period, each alleged period constitutes a separate factual basis for the claim and must independently satisfy the five-sixths verdict requirement. A generalized verdict that does not identify the specific period on which the jurors agree does not satisfy § 805.09(2). See In re L.L.S.-P., 2025 WI App 69, ¶¶43–48, 53–56. Give Wis JI–Children 185 so the jury is instructed that the same five-sixths of jurors must agree on all answers necessary to decide each period-specific verdict form.

NOTES

1. Different claims may be decided by different groups of five-sixths of the jurors, so long as the required number of jurors agree on each claim. When more than one question is required to resolve a single claim, however, the same five-sixths of jurors must agree on all such questions. In cases alleging abandonment under Wis. Stat. § 48.415(1)(a) 2. or 3., the statutory good-cause defense under § 48.415(1)(c) must be resolved as part of the same abandonment ground for purposes of juror agreement on all questions necessary to decide that ground. See Wis. Stat. § 805.09(2); In re L.L.S.-P., 2025 WI App 69, 418 Wis. 2d 654, 28 N.W.3d 232.

2. See note 1.

3. See note 1.

4. Once the jury finds that grounds for termination have been established, the court proceeds to a separate dispositional hearing. Under Wis. Stat. § 48.426(2), and as clarified in State v. H.C., 2025 WI 20, ¶¶20, 26, 32, the court exercises its discretion to determine whether termination of parental rights is in the child's best interests. No party bears a burden of proof at this stage. The burdens set forth in this instruction apply solely to the fact-finding (grounds) phase.

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**314 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS:
ABANDONMENT: LEFT WITH ANOTHER PERSON AND FAILURE TO
VISIT OR COMMUNICATE FOR SIX MONTHS [WIS. STAT. §
48.415(1)(a)3.]**

The petition in this case alleges that (child) has been abandoned, which is a ground for termination of parental rights. Your role as jurors in this case will be to complete the special verdict form or forms submitted to you. [If more than one alleged period of abandonment is submitted to you, you will receive a separate seven-question verdict form for each alleged period. You must consider each alleged period separately and answer each verdict form independently.]¹

Questions 1, 2, and 3 [on each verdict form]² read as follows:

1. Was (child) left by (parent) with a relative or other person?

Answer question 2 only if the answer to question 1 is “yes.”

2. Did (parent) know, or could (he) (she) have discovered, (child)’s whereabouts?

Answer question 3 only if the answer to question 2 is “yes.”

3. Did (parent) fail to visit or communicate with (child) throughout the period from (beginning date) through (ending date), a period of 6 months or longer?

As to these three questions, (petitioner), must convince you by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that your answer to each of the three questions should be “yes.”

Before you may answer question 1 “yes,” (petitioner) must prove that (child) has been left by (parent) with another person, including the other parent or another relative. The phrase “has been left by (parent) with another person” means any circumstance in which the child resides apart from (parent) and with the other person (including instances in which the child resides there pursuant to a court order).³

Before you may answer question 2 “yes,” (petitioner) must prove that (parent) knew or could have discovered the whereabouts of (child). A parent “could have discovered the whereabouts of the child” if, through reasonable efforts by that parent, (he) (she) would have discovered the location where the child resided or could be contacted.

Before you may answer question 3 “yes,” the petitioner must prove that (parent) failed to visit or communicate with (child) throughout the specific period identified on that verdict form, from (beginning date) through (ending date). This means that (parent) did not visit and did not communicate with (child) throughout that specific period. Incidental contact between (parent) and (child) does not prevent you from finding that (he) (she) failed to visit or communicate for the required period. “Incidental contact” means insignificant contact or contact which occurred merely by chance. In calculating the period during which visitation did not occur, you should not include any periods during which (parent) was prohibited by judicial order from visiting with (child). In calculating any period during which communication did not occur, you should not include any period during which (parent) was prohibited by judicial order from communicating with (child).

If the answers to questions 1 through 3 are “yes,” abandonment has been established for the specific period identified on that verdict form unless (parent) proves certain facts for that same period. Questions 4 through 7 of the special verdict address these facts and read as follows:

Questions 4 through 7 on that verdict form apply only to the specific period identified in question 3 on that form.

Answer question 4 only if the answer to question 3 is “yes.”

4. Did (parent) have good cause for having failed to visit with (child) throughout the period from (beginning date) through (ending date)?

Answer question 5 only if the answer to question 4 is “yes.”

5. Did (parent) have good cause for having failed to communicate with (child) throughout the period from (beginning date) through (ending date)?

Answer question 6 only if the answer to question 5 is “yes.”

6. Did (parent) communicate about (child) with the (person) (persons) who had physical custody of the child during the period from (beginning date) through (ending date)?

Answer question 7 only if the answer to question 6 is “no.”

7. Did (parent) have good cause for having failed to communicate about (child) with the (person) (persons) having physical custody throughout the period from (beginning date) through (ending date)?

(Parent) has the burden of satisfying you by the greater weight of the credible evidence, to a reasonable certainty, that your answer to questions 4 through 7 [on that verdict form]⁴ should be “yes.”⁵

In determining if good cause existed as stated in questions 4, 5, and 7, you may consider whether (child)’s age or condition would have rendered any communication meaningless; whether (parent) had a reasonable opportunity to visit or communicate with (child) or communicate with (_____), who had physical custody of (child); attempts to contact (child); whether the person(s) with physical custody of (child) prevented or interfered with efforts by (parent) to visit or communicate with (child); any other factors beyond (parent)’s control which precluded or interfered with visitation or communication; and all other evidence presented at this trial on this issue [as the evidence relates to the specific period identified on the verdict form you are answering]⁶.

BURDEN OF PROOF

I want to emphasize to you that as to questions 1 through 3, the burden is on (petitioner) to convince you by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that your answer should be “yes.” If it becomes necessary for you to answer questions 4 through 7, the burden is on (parent) to convince you by the greater weight of the credible evidence, to a reasonable certainty, that your answer should be “yes.” [Those burdens apply separately to each verdict form you are asked to answer.]⁷

Clear, satisfactory, and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear, convincing power. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

The greater weight of the credible evidence means that the evidence in favor of a “yes” answer has more convincing power than the evidence opposed to it. Credible evidence means evidence you believe in light of reason and common sense. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof.⁸

SPECIAL VERDICT⁹

1. Was (child) left by (parent) with a relative or other person?

Answer: _____

Yes or No

Answer question 2 only if the answer to question 1 is “yes.”

2. Did (parent) know, or could (he) (she) have discovered, (child)’s whereabouts?

Answer: _____

Yes or No

Answer question 3 only if the answer to question 2 is “yes.”

3. Did (parent) fail to visit or communicate with (child) throughout the period from (beginning date) through (ending date), a period of 6 months or longer?

Answer: _____

Yes or No

Questions 4 through 7 on this verdict form apply only to the specific period identified in question 3 on this form.

Answer question 4 only if the answer to question 3 is “yes.”

4. Did (parent) have good cause for having failed to visit with (child) throughout the period from (beginning date) through (ending date)?

Answer: _____

Yes or No

Answer question 5 only if the answer to question 4 is “yes.”

5. Did (parent) have good cause for having failed to communicate with (child) throughout the period from (beginning date) through (ending date)?

Answer: _____

Yes or No

Answer question 6 only if the answer to question 5 is “yes.”

6. Did (parent) communicate about (child) with the (person) (persons) who had physical custody of the child during the period from (beginning date) through (ending date)?

Answer: _____

Yes or No

Answer question 7 only if the answer to question 6 is “no.”

7. Did (parent) have good cause for having failed to communicate about (child) with the (person) (persons) having physical custody throughout the period from (beginning date) through (ending date)?

Answer: _____

Yes or No

COMMENT

Wis JI–Children 314 and comment were originally approved by the Committee in 1997. The section on burden of proof was revised in 2018. The comment was revised in 1999, 2004, 2005, 2011, 2012, 2013, 2014, 2015, and 2018. The verdict was revised in 2009. The Committee approved this revision in May 2026. It revised the instruction, special verdict, and comment to address multiple periods of abandonment, the five-sixths verdict rule, and the absence of a burden of proof at the dispositional phase.

Wis. Stat. § 48.415(1)(a)3 reads:

(1) Abandonment. (a) Abandonment, which, subject to par. (c), shall be established by proving any of the following:

3. The child has been left by the parent with any person, the parent knows or could discover the whereabouts of the child and the parent has failed to visit or communicate with the child for a period of 6 months or longer.

(b) Incidental contact between parent and child shall not preclude the court from finding that the parent has failed to visit or communicate with the child under par. (a)2

or 3. The time periods under par. (a)2 or 3 shall not include any periods during which the parent has been prohibited by judicial order from visiting or communicating with the child.

(c) Abandonment is not established under par. (a)2. or 3. if the parent proves all of the following by a preponderance of the evidence:

1. That the parent had good cause for having failed to visit with the child throughout the time period specified in par. (a)2. or 3., whichever is applicable.
2. That the parent had good cause for having failed to communicate with the child throughout the time period specified in par. (a)2. or 3., whichever is applicable.
3. If the parent proves good cause under subd. 2., including good cause based on evidence that the child's age or condition would have rendered any communication with the child meaningless, that one of the following occurred:
 - a. The parent communicated about the child with the person or persons who had physical custody of the child during the time period specified in par. (a)2. or 3., whichever is applicable, or, if par. (a)2. is applicable, with the agency responsible for the care of the child during the time period specified in par. (a)2.
 - b. The parent had good cause for having failed to communicate about the child with the person or persons who had physical custody of the child or the agency responsible for the care of the child throughout the time period specified in par. (a)2. or 3., whichever is applicable.

This instruction is to be used where the petition was filed on January 1, 1997, or after.

In 1999, following the revision of Wis. Stat. § 48.415(1)(a)3, the Committee withdrew Wis JI–Children 312 which applied to TPR petitions (based on abandonment) filed before January 1, 1997.

Legislative Change. Wis. Stat. § 48.415(1)(a)3 shortened the time period on a child who had been left by the parent from a period of one year to six months. This statute does not have as an element that there was any type of TPR warning. However, the legislature determined that this particular part of the act would not apply until six months after the effective date of the act. In other words, it applies to petitions filed on January 1, 1997, or thereafter.

Effect of Court Order Prohibiting Visitation. When a parent is prohibited from “visitation” by a court order, he or she may still communicate with the child by telephone and letters. In re Termination of Parental Rights to Jessica N., 228 Wis. 2d 695, 598 N.W.2d 924 (Ct. App. 1999). The court of appeals held that when a court prohibits visitation, but does not prohibit communication, periods in which there has been no contact will be counted when considering whether abandonment has been established.

Condition Precedent in Court Order. In In re Jessica N., *supra*, the father challenged the trial court’s termination for abandonment because he was prohibited by a family court order from visiting his daughter. In this case, the court order allowed the father to have supervised visitation if he saw a therapist and made

progress sufficient so that in the therapist's opinion visitation would not be harmful to the daughter. The court of appeals said this "condition precedent" to visitation gave the father the "keys to the door."

Following *In re Jessica N.*, the court of appeals considered whether a father who was prohibited from having contact with his child unless he was either adjudicated as her father or sought third-party contact to facilitate visitation or childcare issues held the "keys to the door." *In re Z.J.E.*, 2018AP1206 (September 18, 2018). The court held that he did, and approved the trial court's addition of the following verbiage to the standard instruction:

"However, a court order which prohibits a parent from visiting and/or communicating until the parent meets certain conditions which the parent can meet through reasonably diligent efforts does not 'prohibit' visitation and/or communication."

Id. at 7.

"Communicate with the Child." In an unpublished opinion, the court of appeals discussed the meaning of the statutory element "communicate with the child." *Dane County Dep't of Human Services v. Hershula B.*, Appeal No. 2014AP2076 (one-judge decision, February 26, 2015). The parent in this case argued that she had "communicated indirectly with" her child when she left messages with the foster parents. The opinion concluded that the phrase "communicate with the child" means more than just communicating; it means that the child shares in the action of communicating.

Period of Abandonment; Different Intervals. When more than one six-month-or-longer abandonment period is alleged under this instruction, each alleged period must be separately identified, separately considered by the jury, and submitted on a separate verdict form. The form for each alleged period should identify the specific beginning and ending dates of that period. See *In re L.L.S.-P.*, 2025 WI App 69, ¶¶43–48, 53–56, 418 Wis. 2d 654, 28 N.W.3d 232.

For a discussion of similar issues in a criminal context, see the majority and dissenting opinions in *State v. Johnson*, 2001 WI 52, ¶¶15-18, 243 Wis. 2d 365, 627 N.W.2d 455.

Answering Special Verdict Questions. It has been suggested that the jury should be instructed to answer all questions (1-7) regardless of their answers to prior questions. This suggestion seeks to avoid a retrial in the event an appellate court reverses one of the jury's findings.

Because questions 4-7 of the special verdict relate to the parent's reasons for failing to visit or communicate, the Committee believes it is incongruous to ask the jury to examine the parent's good cause for not visiting or communicating after the jury has already determined that the parent did not "fail to visit or communicate." The Committee reviewed the language of this instruction and determined that no revision is necessary on this issue since the instruction explains what constitutes a "failure to visit or communicate." The Committee believes that the statutory reference to "failure" by the parent means that the parent did not visit and did not communicate. Examination of the reason for a failure is addressed in the verdict questions dealing with good cause (questions 4-7).

Biological Parent; Periods of Abandonment Prior to Adjudication. The Wisconsin Supreme Court has held that:

an individual who is in fact the biological father of a nonmarital child satisfies the definition of “parent” in § 48.02(13), as he is a “biological parent,” notwithstanding that he has not officially been adjudicated as the child’s biological father. Because such an individual satisfies the definition of “parent,” he may have his parental rights terminated based on periods of abandonment that occurred prior to his official adjudication as the child’s biological father, assuming he has failed to establish a “good cause” affirmative defense to the ground of abandonment. State v. James P., 2005 WI 80, 274 Wis. 2d 494, 684 N.W.2d 164.

The court in James P. emphasized, however, that it did not address “whether an adjudication subsequent to acts that comprise grounds for the termination of a person’s parental rights subjects the adjudicated person to the termination of parental rights based on those acts[.]” James P., 2005 WI 80, ¶ 5. That is, we do not decide whether an individual who is legally adjudicated to be the biological parent of a nonmarital child, but is not in fact the biological father, may have his parental rights terminated based on conduct that occurred prior to the adjudication.

Elsewhere in its decision (¶48), the court also emphasized:

we do not hold, as did the circuit court, that “a man adjudicated as the biological father has always been the biological father and, therefore, that man has always been a ‘parent’ under § 48.02(13).” We merely hold that James P. satisfies the definition of “parent” in the first sentence of § 48.02(13) because he is and always was, in fact, Chezron’s “biological parent.”

Summary Judgment. For two cases involving the use of summary judgment when the issue to be resolved is abandonment, see Dane County Dep’t of Human Services v. Wesley J., Appeal No. 2013AP1226 (not published; one judge) and Racine County Dep’t of Human Services v. Renee DGiese v. Montgomery Ward, Appeal No. 2012AP1974 (not published; one judge). The decision in Wesley J. notes that the burden of proof as to good cause for failing to visit or communicate rests with the parent, not the department.

Dispositional Phase—No Burden of Proof. In State v. H.C., 2025 WI 20, 416 Wis. 2d 233, 21 N.W.3d 330, the Wisconsin Supreme Court held that neither the Due Process Clause nor Wis. Stat. § 48.426 imposes a burden of proof on any party at the dispositional phase of a TPR proceeding.

Indian Child Welfare Act. For a termination case involving an Indian child, see Wis JI–Children 420-424.

Five-Sixths Verdict Rule (Wis. Stat. § 805.09(2)). Special care must be taken to ensure the verdict complies with the five-sixths requirement. Under Wis. Stat. § 805.09(2), when more than one question is required to reach a verdict on the same claim, the same five-sixths of the jurors must agree on all of those questions.

In traditional Wisconsin civil actions, affirmative defenses are generally treated as distinct from the underlying claim for purposes of juror agreement. As a result, different groupings of jurors may decide the elements of a claim and an affirmative defense, so long as five-sixths agree on all questions necessary to resolve each separate issue or “claim.” Prior to 2025, Wisconsin juvenile law had not addressed whether this civil-law approach applied in termination of parental rights proceedings, particularly with respect to whether the same jurors were required to agree on both a statutory ground and an associated affirmative

defense.

That question was addressed for the first time in In re L.L.S.-P., 2025 WI App 69, ¶34, 418 Wis. 2d 654, 28 N.W.3d 232. Before L.L.S.-P., no published Wisconsin decision had resolved whether the same five-sixths of jurors must agree on both the elements of the abandonment ground and the absence of a statutory good-cause defense. See id., ¶34 (observing, in the ineffective-assistance-of-counsel context, that the law on this issue was unsettled). Addressing that issue of first impression in the context of multiple alleged periods, the court in L.L.S.-P. held that, when more than one period of abandonment is alleged, the same five-sixths of the jury must agree both on a specific period of abandonment and on the absence of good cause for failing to visit or communicate during that same period. L.L.S.-P., 2025 WI App 69, ¶¶53, 56, 60.

Under § 805.09(2), verdicts are assessed on a claim-by-claim basis. Each TPR ground constitutes a separate claim, but all questions necessary to establish or defeat a single ground must be answered by the same five-sixths of the jurors. In L.L.S.-P., supra, the court held that a generalized verdict that did not require the jury to consider each alleged period separately, and that did not permit a determination whether the same five-sixths of the jury agreed on a specific period of abandonment and on the absence of good cause for that same period, did not satisfy the five-sixths requirement.

Accordingly, when abandonment under § 48.415(1)(a)3 is alleged, the same five-sixths of the jurors must agree on all questions necessary to resolve that ground. This includes agreement by the same jurors on the elements of abandonment and on the determination that the parent failed to establish good cause for the lack of contact. If the same five-sixths of the jurors do not agree on all of those questions, a valid five-sixths verdict has not been reached on the abandonment claim.

The holding in L.L.S.-P., however, is expressly limited to the abandonment ground and its statutory good-cause defense. The court did not address whether other TPR grounds that include defenses, exceptions, or negating statutory components must be treated the same way for five-sixths verdict purposes. As a result, while L.L.S.-P. resolves the issue for abandonment, the application of the five-sixths rule to other TPR grounds remains unsettled.

Verdict Form Guidance. The Committee recommends that special verdicts include dissenting lines identifying which jurors, if any, disagree with each answer. After the verdict is returned, the court should confirm that, for each claim, the same five-sixths of the jurors agreed on all necessary answers.

In abandonment cases, a verdict satisfies § 805.09(2) only if the same five-sixths of the jurors who answer the abandonment elements “Yes” also agree on the disposition of the good-cause defense. Thus, on any one period-specific verdict form, if Questions 1 through 3 are answered “Yes” by ten jurors, the questions necessary to reject the statutory good-cause defense for that same period must likewise be resolved by those same ten jurors. A separate verdict form for each alleged period is necessary to permit that determination. If a different group supplies the requisite majority on the defense questions, the five-sixths requirement is not met.

Conversely, if fewer than five-sixths agree on any required answer, or if the same jurors do not concur on all answers necessary to resolve the abandonment ground—including the absence of good cause—the verdict is invalid as to that claim. See Giese v. Montgomery Ward, Inc., 111 Wis. 2d 392, 401–04, 331 N.W.2d 585 (1983) (verdicts are assessed on a claim-by-claim basis and require the same jurors’ agreement on all material questions within a claim); In re C.E.W., 124 Wis. 2d 47, 71–72, 368 N.W.2d 47 (1985)

(different TPR grounds or different children constitute separate claims with no requirement of identical jurors across claims); In re L.L.S.-P., 2025 WI App 69, ¶¶53–56 (the same five-sixths of jurors must agree both on the abandonment period and on the absence of good cause). Compare DeClerc v. Bellin Mem'l Hosp., 229 Wis. 2d 253, 599 N.W.2d 666 (Ct. App. 1999) (upholding a defense verdict where a different set of jurors agreed on lack of causation, defeating the claim).

Smaller Juries. When the jury consists of fewer than 12 members (see Wis. Stat. § 805.09(2) allowing verdicts of five-sixths of the jurors “in any case”), the same principles apply. For example, in a 6-person jury, at least 5 jurors must agree on the answers necessary for each claim’s verdict (5 being five-sixths of 6). The verdict form’s dissenting juror lines should be adjusted accordingly (e.g., at most one dissenting juror per question in a six-person jury). The instruction on jury agreement (Wis JI–Children 185) should be modified to tell the jury that agreement by five or more jurors is sufficient, and that if possible the same five should agree on all answers for each claim.

Multiple Periods of Abandonment. When the petition alleges more than one distinct period of abandonment under § 48.415(1)(a)3, the jury must be instructed to consider each alleged period separately, and the special verdict must include a separate verdict form for each alleged period, repeating questions 1 through 7 for each alleged period and inserting the beginning and ending dates of that period in questions 3 through 7. Give Wis JI–Children 185 so the jury is instructed that the same five-sixths of jurors must agree on all answers necessary to decide each period-specific verdict form. See In re L.L.S.-P., 2025 WI App 69, 418 Wis. 2d 654, 28 N.W.3d 232. Because abandonment requires proof of failure to visit or communicate for a specific continuous statutory period, each alleged period constitutes a separate factual basis for the claim and must independently satisfy the five-sixths verdict requirement. A generalized verdict that does not identify the period or periods on which the jurors agree does not satisfy § 805.09(2).

NOTES

1. Different claims may be decided by different groups of five-sixths of the jurors, so long as the required number of jurors agree on each claim. When more than one question is required to resolve a single claim, however, the same five-sixths of jurors must agree on all such questions. In cases alleging abandonment under Wis. Stat. § 48.415(1)(a) 2. or 3., the statutory good-cause defense under § 48.415(1)(c) must be resolved as part of the same abandonment ground for purposes of juror agreement on all questions necessary to decide that ground. See Wis. Stat. § 805.09(2); In re L.L.S.-P., 2025 WI App 69, 418 Wis. 2d 654, 28 N.W.3d 232.

2. In a multi-abandonment period case, add the bracketed language to inform the jury that it will receive a separate verdict form for each alleged period.

3. In re Christopher D., 191 Wis. 2d 680, 530 N.W.2d 34 (Ct. App. 1995).

4. See note 2.

5. The Wisconsin Supreme Court held in In re Kyle S.-G., 194 Wis. 2d 366, 533 N.W.2d 794 (1995), that if the petitioner proves the “basic facts” of abandonment, the burden of proof shifts to the respondent-parent to rebut the presumption of abandonment. This presumption is rebutted if the parent proves by the greater weight of the credible evidence, to a reasonable certainty, that they had good cause for having failed

to visit and having failed to communicate with the child during the period in issue and they communicated about the child with the person or persons who had physical custody of the child or had good cause for having failed to communicate with that person or persons about the child during that period.

Pursuant to Wis. Stat. § 903.01, and Kyle S.-G., the respondent-parent must meet the ordinary, or lowest, burden of proof to rebut the presumption. Civil Jury Instruction 200 is therefore incorporated into this instruction with respect to the respondent-parent's duty to rebut the presumption.

6. See note 2.

7. See note 2.

8. Once the jury finds that grounds for termination have been established, the court proceeds to a separate dispositional hearing. Under Wis. Stat. § 48.426(2), and as clarified in State v. H.C., 2025 WI 20, ¶¶20, 26, 32, the court exercises its discretion to determine whether termination of parental rights is in the child's best interests. No party bears a burden of proof at this stage. The burdens set forth in this instruction apply solely to the fact-finding (grounds) phase.

9. This sample verdict is in single-period form. In a multi-abandonment period case, use a separate copy of the seven-question verdict form for each alleged abandonment period. Caption each form: "Special Verdict for Alleged Period From (beginning date) Through (ending date).” Questions 1 and 2 remain the same on each form. Insert the specific dates of that period in questions 3 through 7. The jury must answer each form independently.

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**324 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS:
CONTINUING NEED OF PROTECTION OR SERVICES [WIS. STAT.
§ 48.415(2)(a)]¹ (AS AMENDED BY 2017 WISCONSIN ACT 256) (SEE 324B
FOR PREVIOUSLY NUMBERED JURY INSTRUCTION 324)**

The petition in this case alleges that (child) is in continuing need of protection or services, which is a ground for termination of parental rights. Your role as jurors will be to answer the following questions in the special verdict.

1. Has (child) been adjudged to be in need of protection or services and placed outside the home for a cumulative total period of six months or longer pursuant to one or more court orders containing the termination of parental rights notice required by law?

If the answer to question 1 is “yes,” answer the following question:

2. Did the _____ County Department of Social Services make a reasonable effort to provide the services ordered by the court?

If the answer to question 2 is “yes,” answer the following question:

3. Has (parent) failed to meet the conditions established for the safe return of (child) to (parent)’s home?

[NOTE: If the child has been placed outside the home for less than 15 of the most recent 22 months, give the following:

If the answer to question 3 is “yes,” answer the following question:

4. Is there a substantial likelihood that (parent) will not meet these conditions by the date on which (child) will have been placed outside the home for 15 of the most

recent 22 months, not including any period during which (child) was a runaway from the out-of-home placement or was residing in a trial reunification home?]

Before (child) may be found to be in continuing need of protection or services, (petitioner) must prove the following (three) (four) elements by evidence that is clear, satisfactory, and convincing, to a reasonable certainty.

First, that (child) was adjudged to be a child (an unborn child) in need of protection or services and placed or continued in placement outside the home of (parent) for a cumulative total period of six months or longer pursuant to one or more court orders containing the termination of parental rights notice required by law. **[Add the following language if there is no dispute as to this element:** Because there is no dispute as to the evidence to this question, I have answered this question. My answer has no bearing whatsoever on what your answer should be to the other questions in the special verdict form.]

Second, that (agency) has made a reasonable effort to provide the services ordered by the court. “Reasonable effort” means an earnest and conscientious effort to take good faith steps to provide those services, taking into consideration the characteristics of the parent or child [or of the expectant mother or child], the level of cooperation of the parent [or expectant mother], and other relevant circumstances of the case. You may find the agency’s effort was reasonable even though there were minor or insignificant deviations from the court’s order. Question 2 of the special verdict addresses this element. **[Possible additional language applicable only in cases where the child has been placed outside the home**

for less than 15 of the most recent 22 months, and post-petition evidence has been admitted: In answering question 2, you may consider all evidence bearing on that question, including evidence of events and efforts occurring since the filing of the petition on (_____). Your answer must reflect your finding as of today's date.]²

Third, that (parent) has failed to meet the conditions established for the safe return of the child to the home. Question 3 of the special verdict addresses this element. In answering question 3, you must consider the facts and circumstances as they existed on (_____), which was the date on which this petition was filed. Your answer must reflect your finding as of that date.

[NOTE: Add the following paragraph if the child has been placed outside the home for less than 15 of the most recent 22 months:

Fourth, that there is a substantial likelihood that (parent) will not meet the conditions for the safe return of (child) by the date on which the child will have been placed outside the home for 15 of the most recent 22 months, not including any period during which the child was a runaway from the out-of-home placement or was residing in a trial reunification home. (Note: If there is no dispute as to this date, add: That date will be (_____).) “Substantial likelihood” means that there is a real and significant probability rather than a mere possibility that (parent) will not meet the conditions for the safe return by that date. Question 4 of the special verdict addresses this element. In answering question 4, you may consider all evidence bearing on that question, including evidence of events and conduct

occurring since the filing of the petition on (_____). Your answer must reflect your finding as of today's date.]

In determining whether (parent) failed to meet the conditions established for the safe return of (child) to the home or whether there is a substantial likelihood that (parent) will not meet the conditions for the safe return of (child) by (_____), you may consider the following: the length of time (child) has been in placement outside the home; the number of times (child) has been removed from the home; the parent's performance in meeting the conditions for return of the child; the parent's cooperation with the social service agency; parental conduct during periods in which (child) had contact with (parent); and all other evidence presented during this hearing which assists you in making these determinations.

Before you may answer any question in the special verdict "yes," you must be convinced by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that the question should be answered "yes." If you are not so convinced, you must answer the question "no."³

SPECIAL VERDICT

1. Has (child) been adjudged to be in need of protection or services and placed outside the home for a cumulative total period of six months or longer pursuant to one or more court orders containing the termination of parental rights notice required by law?

Answer: _____
Yes or No

If the answer to question 1 is “yes,” answer the following question:

2. Did the _____ County Department of Social Services make a reasonable effort to provide the services ordered by the court?

Answer: _____
Yes or No

If the answer to question 2 is “yes,” answer the following question:

3. Has (parent) failed to meet the conditions established for the safe return of (child) to (parent)’s home?

Answer: _____
Yes or No

[NOTE: Add the following verdict question if the child has been placed outside the home for less than 15 of the most recent 22 months:

If the answer to question 3 is “yes,” answer the following question:

4. Is there a substantial likelihood that (parent) will not meet these conditions by the date on which (child) will have been placed outside the home for 15 of the most recent 22 months, not including any period during which (child) was a runaway from the out-of-home placement or was residing in a trial reunification home?

Answer: _____
Yes or No]

NOTE

1. This instruction was drafted in accordance with 2017 Wisconsin Act 256. Refer to Children's JI-324B for the instructions that were formerly numbered as Children's JI-324.

2. Earlier versions of this instruction recommended consulting the unpublished case State v. Stacey P., 2012AP167-169, for guidance if the user intended to incorporate the optional bracketed language into the instruction. In that matter, the court held that "whether the agency has, since the petition's filing, continued to help the parent to meet the conditions of return is a factor that the jury must consider." However, since the Stacey P. decision, there has been a significant amendment to Wis. Stat. § 48.415(2)(a)3.

Prior to April 2018, the statute provided:

...there is a substantial likelihood that the parent will not meet these conditions within the 9-month period following the fact-finding hearing under s. 48.424.

Thus, under the previous version of the statute, at the grounds hearing, the fact finder was required to look to the future nine months from the date of the grounds hearing to determine whether the parent had a substantial likelihood of meeting the conditions established by the court for the safe return of the child.

However, when Wis. Stat. § 48.415(2)(a)3. was amended in April 2018, it replaced the forward-looking nine-month period with a 15 of the most recent 22 months timeframe. As the court of appeals clarified in the unpublished decision In re Z.Y., 2021AP1729, "Only if the child has been placed outside the home for less than 15 of the most recent 22 months may the factfinder consider whether there 'is a substantial likelihood that the parent will not meet the conditions as of the date on which the child will have been placed outside the home for 15 of the most recent 22 months.' If the child has been placed outside the home for more than 15 of the most recent 22 months, the third subpart is satisfied by evidence proving that the parent failed to meet the conditions established for the safe return of the child." Id., citing In re T.L.E.-C., 2021 WI 56, ¶19, 397 Wis. 2d 462, 960 N.W.2d 391.

The amendment eliminated the petitioner's obligation to show a substantial likelihood that the parent will not meet the conditions of return within the nine months following the fact-finding hearing in cases where the child has been in out-of-home care for over 15 months. In cases like these, the fact finder should not be asked if there is a substantial likelihood that the parent will not meet the conditions by some future date. Therefore, the court should refrain from incorporating the optional bracketed language in situations where the child has been in out-of-home care for more than 15 months.

3. Once the jury finds that grounds for termination have been established, the court proceeds to a separate dispositional hearing. Under Wis. Stat. § 48.426(2), and as clarified in State v. H.C., 2025 WI 20, ¶¶20, 26, 32, 416 Wis. 2d 233, 21 N.W.3d 330, the court exercises its discretion to determine whether termination of parental rights is in the child's best interests. No party bears a burden of proof at this stage. The burdens set forth in this instruction apply solely to the fact-finding (grounds) phase.

COMMENT

This instruction was approved in 2018 following the enactment of 2017 Wisconsin Act 256. It replaced an earlier version of Wis JI-Children 324, which was based on Wis. Stat. § 48.415(2)(a) prior to a 2006 revision. The earlier version of Wis JI-Children 324 was renumbered Wis JI-Children 324B. The comment

was revised in 2020, 2021, and 2023. The 2023 revision entailed updating footnote one and providing additional clarification in the “possible additional language” section of the second element, specifying that it does not apply in situations where a child has been placed outside the home for fifteen out of the most recent twenty-two months. This revision was approved by the Committee in May 2026. It amended the comment to reflect the opinion in State v. H.C., 2025 WI 20.

New Legislation. 2017 Wisconsin Act 256 removes the requirement of showing that there is a substantial likelihood that the parent will continue to fail for the next nine months to meet the conditions established for the safe return of the child to the home in a continuing CHIPS TPR proceeding. The act replaces this requirement with a requirement for the petitioner to show that if the child has been placed outside the home under a CHIPS order for less than 15 of the most recent 22 months, there is a substantial likelihood that the parent will not meet the conditions established for the safe return of the child to the home at the time the child will have been placed outside of the home for 15 of the last 22 months. For the instruction to be used in cases predating the law change, see Wis JI–Children 324A and 324B.

Wis. Stat. § 48.415(2)(a) (as amended by 2017 Wis. Act 256) reads:

48.415. Grounds for involuntary termination of parental rights. At the fact-finding hearing, the court or jury shall determine whether grounds exist for the termination of parental rights. If the child is an Indian child, the court or jury shall also determine at the fact-finding hearing whether continued custody of the Indian child by the Indian child’s parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child under s. 48.028 (4) (e) 1. and whether active efforts under s. 48.028 (4) (e) 2. have been made to prevent the breakup of the Indian child’s family and whether those efforts have proved unsuccessful unless partial summary judgment on the grounds for termination of parental rights is granted, in which case the court shall make those determinations at the dispositional hearing. Grounds for termination of parental rights shall be one of the following:

(2) Continuing need of protection or services. Continuing need of protection or services, which shall be established by proving any of the following:

(a) 1. That the child has been adjudged to be a child or an unborn child in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders under s. 48.345, 48.347, 48.357, 48.363, 48.365, 938.345, 938.357, 938.363 or 938.365 containing the notice required by s. 48.356 (2) or 938.356 (2).

2. a. In this subdivision, “reasonable effort” means an earnest and conscientious effort to take good faith steps to provide the services ordered by the court which takes into consideration the characteristics of the parent or child or of the expectant mother or child, the level of cooperation of the parent or expectant mother and other relevant circumstances of the case.

b. That the agency responsible for the care of the child and the family or of the unborn child and expectant mother has made a reasonable effort to provide the services ordered by the court.

3. That the child has been placed outside the home for a cumulative total period of 6 months or longer pursuant to an order listed under subd. 1., not including time spent

outside the home as an unborn child; that the parent has failed to meet the conditions established for the safe return of the child to the home; and, if the child has been placed outside the home for less than 15 of the most recent 22 months, that there is a substantial likelihood that the parent will not meet these conditions as of the date on which the child will have been placed outside the home for 15 of the most recent 22 months, not including any period during which the child was a runaway from the out-of-home placement or was residing in a trial reunification home.

Applicability of this Instruction. 2017 Wis. Act 256 was effective as of April 6, 2018. The Supreme Court has affirmed the application of the revised Continuing CHIPS elements in a TPR case filed after the Act's effective date, although the underlying CHIPS case predated the revision. See Eau Claire County Department of Human Services v. S.E., 2021 WI 56, 397 Wis. 2d 462.

Note that 2005 Wis. Act 293 previously modified the fourth element of Wis. Stat. § 48.415(2)(a) to shorten, from twelve months to nine months, the post-petition timeline for parents to meet conditions for the safe return of the child. That enactment specifically provided that it applied to cases where orders for out-of-home placement were granted on or after the effective date. 2017 Wis. Act 256 does not contain such a provision.

In a 2019 decision, the Court of Appeals affirmed the application of revised § 48.415(2) to a TPR case that was filed after April 6, 2018, even though the original underlying CHIPS order and several extensions were made prior to that date. See Dane County Department of Human Services v. J.R., 2020 WI App 5, 390 Wis. 2d 326, 938 N.W.2d 614. In 2021, the Wisconsin Supreme Court affirmed a court of appeals' decision agreeing with the circuit court and held that the amended version of Wis. Stat. § 48.415(2)(a)3. applied during a TPR proceeding, even though the underlying CHIPS order was entered in 2016. See Eau Claire County DHS v. S.E., 2021 WI 56, 960 N.W.2d 391.

Failure of Prior Order to Contain Warning. In 2016, the Wisconsin Supreme Court reviewed an earlier decision, Waukesha County v. Steven H., 2000 WI 28, 233 Wis. 2d 344, 607 N.W.2d 607, which involved whether the parent was given a proper warning of possible termination. The Wisconsin Supreme Court in St. Croix County Dep't of Health and Human Services v. Michael D., 2016 WI 35, 368 Wis. 2d 170, 880 N.W.2d 107, said the plain language of § 48.415(2) does not require that the written notice be in the last order or that six months must pass after the last order before the petition to terminate parental rights may be filed.

The Court held that the notice the mother received satisfied the statutory notice element of a TPR action grounded in continuing CHIPS set forth in Wis. Stat. § 48.415(2). The notice required under Wis. Stat. § 48.356(2)(a)1. was satisfied. Specifically, the Court said:

In a TPR case based on the continuing CHIPS ground, Wisconsin Stat. §

48.415(2) does not require proof that notice was given in every CHIPS order removing a child from the home or extension thereof; it also does not require proof that notice was in the last CHIPS order. Rather, it requires proof that one or more of the CHIPS orders removing a child from the home, or extension thereof, contain the written notice required under § 48.356(2).

The court further held that Steven H. did not establish an unequivocal “last order, plus six-months rule.” It said:

Wisconsin Stat. § 48.415(2) does not use the term last order; rather, the legislature chose to use the phrase “one or more.” Accordingly, if “one or more” of the CHIPS orders in a TPR case contains the statutorily prescribed written notice, regardless of whether it was the first, last, or any order in between, the notice satisfies the phrase “one or more.” Likewise, the statutes do not require that six months must pass after the last CHIPS order before a TPR petition can be filed. Rather, the relevant statute requires proof that a child was “outside the home for a cumulative total period of 6 months or longer.” Wis. Stat. § 48.415(2)(a)3.

Relevancy of Post-Petition Evidence on Substantial Likelihood of Not Meeting Conditions. The Committee believes that evidence of post-petition conduct may be relevant to the allegation that there is a substantial likelihood that the parent will not meet the conditions for the return of the child in the future. A sentence was added to the instruction on the fourth element to allow the jury to consider events and conduct since the petition was filed. See In re T.M.S., 152 Wis. 2d 345, 448 N.W.2d 282 (Ct. App. 1989). For a decision discussing a parent’s argument that the court erred in not admitting post-petition efforts of a parent, see the unpublished opinion Jefferson County Dep’t of Human Services v. J.V., Appeal No. 2015AP2622. In another unpublished opinion, the court said it was error to instruct the jury with both Wis JI–Children 180 and 324A. In the case, the court said it was harmless error to give Wis JI–Children 180 because the jury was not asked to answer any question “comporting with Wis JI–Children 180.” Portage County Dep’t of Health and Human Services v. Tanya G., Appeal No. 2014AP86.

In Utero. The time while the child is in utero should not be counted when calculating the duration of a placement outside the parent’s home.

Relevancy of Pre-CHIPS Disposition Events. Pre-CHIPS disposition events may be admissible as relevant to the element of the likelihood that a parent will meet the conditions of return within the requisite period following the TPR hearing. La Crosse Cty. v. Tara P., 2002 WI App 84, 252 Wis. 2d 179, 643 N.W.2d 194. The court rejected the argument that this type of evidence is barred as “other acts” evidence. The court of appeals also noted that “events predating dispositional orders may be relevant to another issue at termination proceedings: whether a county department of social services made ‘reasonable’ efforts to provide services ordered by a court.” 2002 WI App 84, fn.4.

For a decision discussing Tara P. and involving the admissibility of “historical information” about the parent pre-dating the CHIPS order, see State v. Roberta W., Appeal No. 2013AP936 (not published; one-judge decision).

Indian Child Welfare Cases. For the use of this instruction and verdict in a TPR case involving the Indian Child Welfare Act 25 U.S.C. §§ 1901-1963 and Wis. Stat. § 48.028(4)(e), see Wis JI–Children 420-424.

Impossibility to Perform. The trial judge must decide on a case-by-case basis whether to ask the jury about impossibility to perform where the parent alleges impossibility to meet the conditions of the dispositional order. See Kenosha County v. Jodie W., 2006 WI 93, 293 Wis. 2d 530, 716 N.W.2d 845, where the Supreme Court examined whether a court may constitutionally find a parent unfit based solely

on the parent's failure to meet an impossible condition of return. If the jury is asked to make a finding on impossibility, then the following special verdict question could be asked:

5. Was it impossible for (parent) to meet all the conditions established for the safe return of (child) to (parent)'s home?

For a decision discussing Jodie W. and whether the ground for termination was based on conditions for return that were impossible for the parent to meet, see Portage County Department of Health and Human Services v. Julie G., Appeal No. 2014AP1057 (one-judge decision, July 31, 2014). See also State v. Kiwana L., Appeal No. 2014AP2306 (one-judge decision, January 13, 2015). In Kiwana L., the parent argued that the circuit court violated her substantive due process rights when it found grounds for termination because she believed that the conditions of return were not narrowly tailored to address her mental health needs and financial hardships.

Verdict Question Answered by the Court. In most cases, there will be a determination by the trial judge as to question 1. It is recommended that the phrase "Answered Yes by the Court" be typed on the line. See SM-2 for a discussion of partial summary judgments, directed verdicts, and jury waivers/stipulations.

Judicial Notice of Underlying CHIPS Procedure. In some cases, it may be helpful to the jury and reduce the need for trial testimony to have the judge explain to the jury what CHIPS procedures have occurred leading up to the TPR proceeding. An optional explanation that could be used for this purpose is presented in SM-2 (Section No. 4). The Committee recommends that the parties stipulate to its use.

Stating the Specific Services to be Provided. In Sheboygan County DHHS v. Tanya M.B., 2010 WI 55, 325 Wis. 2d 524, 785 N.W.2d 369, the parents argued that the CHIPS dispositional orders were insufficient because they did not separately list the "specific services" to be provided by the department. The Supreme Court disagreed. Wisconsin Stat. § 48.355(2)(b)1. provides that the dispositional order be in writing and contain the following:

1. The specific services to be provided to the child and family, to the child expectant mother and family, or to the adult expectant mother and, if custody of the child is to be transferred to effect the treatment plan the identity of the legal custodian.

The Wisconsin Supreme Court concluded:

As stated, we conclude that the dispositional orders contained "specific services," as required by Wis. Stat. § 48.355(2)(b)1. We so conclude because § 48.355(2)(b)1. does not require a CHIPS dispositional order to separately list each individual service that the Department is ordered to provide so long as the Department is ordered to provide "supervision," "services," and "case management," and the order also provides detailed conditions that the parents must complete in compliance with the dispositional order.

The court said the dispositional order's conditions "implicitly" required the county department to provide services necessary to assist the parents in meeting the court-ordered conditions for the return of their children. The Supreme Court reasoned that the apparent purpose of § 48.355(2)(b)1. is to assure that

the department will arrange services that are necessary to assist parents in meeting court-ordered conditions for the return of their children. However, the court recognized that how best to assist parents in meeting those conditions may change as parents make progress or encounter difficulty in changing their behavior. The court said that allowing the department flexibility in the manner in which it provides services to parents permits the department to accommodate a parent's changing needs.

The decision in Tanya M.B. has been applied in several unpublished appellate decisions. Dane County DHS v. Samuel W., Appeal No. 2009 AP 2606 (decided October 14, 2010); Ozaukee County DHS v. Sarah H., Appeal No. 2010 AP 416 (decided August 18, 2010); Dane County DHS v. Tierra M., Appeal No. 2010 AP 1646 (decided September 23, 2010).

In Sarah H., *supra*, the court applied Tanya M.B. to the parent's claim that the dispositional order did not specify the services to be provided. The parent contended that the order was defective because it did not require the department to provide "supervision," "services," or "case management." The court of appeals disagreed with the parent's position stating:

¶5 We disagree. What this comes down to is an argument that the dispositional order must contain a magical phrase— "supervision, services and case management" and that the order specifically be directed, in the same breath, with a named social service department. We reject that argument. What the supreme court pointedly held was that "specific services" need not be listed in the order—all that is needed is a command by the trial court that the named social services department *do* services, *do* supervise the parent and *do* manage the parent and that the parent knows and the department knows that this is what needs to be done. The order in this case did just that. It orders services to be provided by the department and it orders the Department to take "responsibility" for the care of the parent-child relationship.

Opinions of Case Manager on Parenting Skills as Expert Testimony. For a discussion characterizing the testimony of a case manager that the parent would not be able to meet conditions necessary for the return of children in the future, see an unpublished decision (decided by one judge), State v. Gloria C., Appeal No. 2012AP1693. This decision considered whether expert testimony was required on this element in the TPR case based on continuing need. The trial court held that there is no requirement that an expert testify as to the fourth prong of a continuing CHIPS TPR case. The appellate decision held that a social worker with proper experience may testify as an expert witness as to a party's parenting skills. The court also noted that the legislation enacted on expert witness testimony (Wis. Stat. § 907.01, 907.02, and 907.03) was not effective when this action was commenced, 2011 Wisconsin Act 2, § 45.

Criminal History of Parent. In a 2012 case, a parent argued that the trial court should not have let the jury know about "his criminal history in its entirety." The trial court ruled that the parent's criminal history was relevant to whether the parent had met court-ordered conditions for the return of his children and, if not, whether the parent would be able to meet those conditions. The appellate court said the trial court was correct in permitting the jury to see how the parent lived and how that affected where he placed his children on the spectrum of what he deemed important and where he would likely place them in the future. State v. Stacey P., 2012 AP167 (unpublished); decided June 12, 2012.

Cognitive Limitations of Parent. For a case involving a parent's argument that her cognitive limitations made it impossible for her to fulfill the conditions of return, see State v. Ebony D., Appeal No.

2013AP619 (not published; one-judge decision). The parent argued that the conditions for return were not narrowly tailored to the children's safety needs and to her cognitive limitations.

For a case involving a parent's request that this instruction be modified to require the jury to first separately answer whether the county's services took into account the parent's characteristics ("specifically her learning disability") before answering whether the county had made a "reasonable effort to provide the parent the necessary services," see the unpublished opinion Barron County Dep't of Health and Human Services v. J.H., Appeal No. 2015AP1529 (one-judge). The decision said that modification of the verdict form to require the jury to separately answer whether the services the county provided considered the parent's characteristics was not legally required and was unnecessary given the circuit court's instruction to the jury and the parent's counsel's closing argument and questioning on the issue.

Parental Failures Prior to Incarceration. For a case examining whether the jury should have received a special instruction that an incarcerated parent's rights may not be terminated based solely upon conditions that were impossible to perform while incarcerated, see Ozaukee County Dep't of Human Services v. Callen D.M., Appeal No. 2013AP1157 (not published; one-judge decision). The court noted that the parent's inability to fulfill the conditions of return was due to her own failures prior to incarceration, not after. The decision differentiated the facts of the case from those in Kenosha Cty. DHS v. Jodie W., 2006 WI 93, ¶19, 293 Wis. 2d 530, 716 N.W.2d 845. There were 14 conditions in the dispositional order, several of which the parent failed to meet long before her incarceration. The court in Callen D.M. noted that the parent had over two and one-half years to comply with the CHIPS conditions before she entered custody.

For another decision discussing Jodie W. and a parent's conduct prior to incarceration, see Portage County Department of Health and Human Services v. Julie G., Appeal No. 2014AP1057 (one-judge decision, July 31, 2014).

Dispositional Phase—No Burden of Proof. In State v. H.C., 2025 WI 20, 416 Wis. 2d 233, 21 N.W.3d 330, the Wisconsin Supreme Court held that neither the Due Process Clause nor Wis. Stat. § 48.426 imposes a burden of proof on any party at the dispositional phase of a TPR proceeding.

**325 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS:
CONTINUING NEED OF PROTECTION OR SERVICES: THREE OR
MORE CHIPS ORDERS [WIS. STAT. § 48.415(2)(am)]**

The petition in this case alleges that (child) is in continuing need of protection or services, which is a ground for termination of parental rights. Your role as jurors will be to answer the following questions in the special verdict.

1. Has (child) on three or more occasions been adjudged to be in need of protection or services and placed outside (his) (her) home pursuant to court orders containing the termination of parental rights notice required by law?
2. Were the conditions that led to (child)'s placement outside (his) (her) home on each of these occasions caused by (parent)?

Before (child) may be found to be in continuing need of protection or services, (petitioner) must prove the following elements by evidence that is clear, satisfactory, and convincing, to a reasonable certainty.

First, that (child) on three or more occasions was adjudged to be in need of protection or services¹ and placed outside (his) (her) home pursuant to court orders containing the termination of parental rights notice required by law. **[Add the following language if there is no dispute as to this element:** Because there is no dispute in the evidence as to this question, I have answered this question. My answer has no bearing whatsoever on what your answer should be to the other questions in the special verdict form.]

Second, that the conditions that led to (child)’s placement outside (his) (her) home under each of these orders were caused by (parent).² This question asks whether there was a causal connection between (parent)’s acts or (parent)’s failure to act and the conditions that led to each of the orders placing (child) outside (his) (her) home. The question does not require you to find that (parent) was “the cause” but rather “a cause.” The reason for this is that there may be more than one cause producing the conditions. Before you answer this question “yes,” you must find that (parent)’s acts or failure to act was a substantial factor in producing the conditions.

Before you may answer a question in the special verdict “yes,” you must be convinced by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that the question should be answered “yes.” If you are not so convinced, you must answer the question “no.”³

SPECIAL VERDICT

1. Has (child) on three or more occasions been adjudged to be in need of protection or services and placed outside (his) (her) home pursuant to court orders containing the termination of parental rights notice required by law?

Answer: (Answered by the Court)
Yes or No

2. Were the conditions that led to (child)’s placement on each of these occasions outside (his) (her) home caused by (parent)?

Answer: _____
Yes or No

COMMENT

Wis JI–Children 325 and comment were approved by the Committee in 1999 and revised in 2004. The change in 2004 conformed the burden of proof language to Wis JI–Civil 205. The comment was revised in 2007 and 2011. This revision was approved by the Committee in May 2026. It adding note 3 and a new Comment paragraph addressing State v. H.C., 2025 WI 20, 416 Wis. 2d 233, 21 N.W.3d 330.

This instruction covers the elements of a TPR based on Wis. Stat. § 48.415(2)(am)1. See 1997 Wisconsin Act 294.

Wis. Stat. § 48.415(2) reads:

48.415. Grounds for involuntary termination of parental rights. At the fact-finding hearing the court or jury may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following:

(2) Continuing need of protection or services. Continuing need of protection or services, which shall be established by proving any of the following:

(am)1. That on 3 or more occasions the child has been adjudicated to be in need of protection or services under s. 48.13 (3), (3m), (10) or (10m) and, in connection with each of those adjudications, has been placed outside his or her home pursuant to a court order under s. 48.345 containing the notice required by s. 48.356 (2).

2. That the conditions that led to the child’s placement outside his or her home under each order specified in subd. 1. were caused by the parent.

If you have three or more orders with the proper warnings, they do not have to be consecutive.

Dispositional Phase—No Burden of Proof. In State v. H.C., 2025 WI 20, 416 Wis. 2d 233, 21 N.W.3d 330, the Wisconsin Supreme Court held that neither the Due Process Clause nor Wis. Stat. § 48.426 imposes a burden of proof on any party at the dispositional phase of a TPR proceeding.

Indian Child Welfare Act. For a termination case involving an Indian child, see Wis JI–Children 420-424.

NOTES

1. The CHIPS orders must be based on Wis. Stat. § 48.13(3), (3m), (10), or (10m).
2. The parent's conduct must have caused each of the orders.
3. Once the jury finds that grounds for termination have been established, the court proceeds to a separate dispositional hearing. Under Wis. Stat. § 48.426(2), and as clarified in State v. H.C., 2025 WI 20, ¶¶20, 26, 32, the court exercises its discretion to determine whether termination of parental rights is in the child's best interests. No party bears a burden of proof at this stage. The burdens set forth in this instruction apply solely to the fact-finding (grounds) phase.

**330 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS:
CONTINUING PARENTAL DISABILITY [WIS. STAT. § 48.415(3)]**

Continuing parental disability is a ground for termination of parental rights. Your role as jurors will be to answer the following special verdict questions:

1. Was (parent), as of (date petition was filed), an inpatient at a (hospital) (licensed treatment facility) (state treatment facility) on account of mental illness, developmental disability, or other like incapacities?
2. Has (parent) for a cumulative total period of at least two years within the time period from (date five years prior to filing) to (date of filing) been an inpatient at one or more hospitals, licensed treatment facilities, or state treatment facilities on account of mental illness, developmental disability, or other like incapacities?
3. Is the condition of (parent) likely to continue indefinitely?
4. Has (petitioner) proved that (child) is not being provided with adequate care by a relative who has legal custody, by a parent, or by a guardian?

To establish continuing parental disability, (petitioner), must prove the following four elements by evidence that is clear, satisfactory, and convincing, to a reasonable certainty.

First, that (parent) was, as of (date of filing), the date the petition was filed, an inpatient at a (hospital) (licensed treatment facility) (state treatment facility) on account of mental illness, developmental disability, or other like incapacities. Question 1 of the special verdict addresses this element.

Second, that (parent) for a cumulative total period of at least two years within the time period from (date five years prior to filing) to (date of filing) has been an inpatient at one or more hospitals, licensed treatment facilities, or state treatment facilities on account of mental illness, developmental disability, or other like incapacities. Question 2 of the special verdict addresses this element.

Third, that the condition of (parent) is likely to continue indefinitely. Question 3 of the special verdict addresses this element.

Fourth, that (child) is not being provided with adequate care by a relative who has legal custody, by a parent, or by a guardian. “Adequate care” means the provision of necessary food, clothing, medical care, dental care, shelter, protection, and training. Question 4 of the special verdict addresses this element.

“Mental illness” means mental disease to such extent that a person so afflicted requires care and treatment for his or her own welfare, or the welfare of others, or of the community. It also means a substantial disorder of thought, mood, perception, orientation, or memory which grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life, but does not include alcoholism.

“Developmental disability” means a disability attributable to intellectual disability, cerebral palsy, epilepsy, autism or another neurological condition closely related to an intellectual disability or requiring treatment similar to that required for individuals with an intellectual disability, which has continued or can be expected to continue indefinitely,

substantially impairs an individual from adequately providing for his or her own care or custody, and constitutes a substantial handicap to the afflicted individual. The term does not include dementia that is primarily caused by degenerative brain disorder.

“Other like incapacities” means those conditions incurred at any age which are the result of accident, organic brain damage, mental or physical disability or continued consumption or absorption of substances, producing a condition which substantially impairs an individual from adequately providing for his or her care or custody.

Before you may answer any question in the special verdict “yes,” you must be convinced by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that the question should be answered “yes.” If you are not so convinced, you must answer the question “no.”¹

SPECIAL VERDICT

1. Was (parent), as of (date petition was filed), an inpatient at a (hospital) (licensed treatment facility) (state treatment facility) on account of mental illness, developmental disability, or other like incapacities?

Answer: _____

Yes or No

2. Has (parent) for a cumulative total period of at least two years within the time period from (date five years prior to filing) to (date of filing) been an inpatient at one or more hospitals, licensed treatment facilities, or state treatment facilities on account of mental illness, developmental disability, or other like incapacities?

Answer: _____

Yes or No

3. Is the condition of (parent) likely to continue indefinitely?

Answer: _____

Yes or No

4. Has (petitioner) proved that (child) is not being provided with adequate care by a relative who has legal custody, by a parent, or by a guardian?

Answer: _____

Yes or No

COMMENT

Wis JI-Children 330 and comment were originally approved by the Committee in 1996 and revised in 1997, 2008, and 2011. The revision in 2008 was based on 2007 Wisconsin Act 45, effective February 1, 2008. This revision was approved by the Committee in May 2026. It amended the comment to add note 1 and a new paragraph addressing State v. H.C., 2025 WI 20, 416 Wis. 2d 233, 21 N.W.3d 330.

Wis. Stat. § 48.415(3) (2008) reads:

48.415. Grounds for involuntary termination of parental rights. At the fact-finding hearing the court or jury may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following:

(3) CONTINUING PARENTAL DISABILITY. Continuing parental disability, which shall be established by proving that:

(a) The parent is presently, and for a cumulative total period of at least 2 years within the 5 years immediately prior to the filing of the petition has been, an inpatient at one or more hospitals as defined in s. 50.33 (2) (a), (b) or (c), licensed treatment facilities as defined in s. 51.01 (2) or state treatment facilities as defined in s. 51.01 (15) on account of mental illness as defined in s. 51.01 (13) (a) or (b), developmental disability as defined in s. 55.01 (2), or other like incapacities, as defined in s. 55.01(5);

(b) The condition of the parent is likely to continue indefinitely; and

(c) The child is not being provided with adequate care by a relative who has legal custody of the child, or by a parent or a guardian.

Dispositional Phase—No Burden of Proof. In State v. H.C., 2025 WI 20, 416 Wis. 2d 233, 21 N.W.3d 330, the Wisconsin Supreme Court held that neither the Due Process Clause nor Wis. Stat. § 48.426 imposes a burden of proof on any party at the dispositional phase of a TPR proceeding.

Indian Child Welfare Act. For a termination case involving an Indian child, see Wis JI–Children 420-424.

NOTES

1. Once the jury finds that grounds for termination have been established, the court proceeds to a separate dispositional hearing. Under Wis. Stat. § 48.426(2), and as clarified in State v. H.C., 2025 WI 20, ¶¶20, 26, 32, the court exercises its discretion to determine whether termination of parental rights is in the child’s best interests. No party bears a burden of proof at this stage. The burdens set forth in this instruction apply solely to the fact-finding (grounds) phase.

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**340 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: ABUSE:
PATTERN OF ABUSIVE BEHAVIOR AND FELONY CONVICTION [WIS.
STAT. § 48.415(5)(a)]**

Child abuse is a ground for the termination of parental rights. Your role as jurors will be to answer the following questions in the special verdict.

1. Has (parent) caused the (death) (injury) of a child, as a result of which (parent) was convicted of a felony?
2. Has (parent) exhibited a pattern of (physically) (sexually) abusive behavior which is a substantial threat to the health of (child)?

Before this ground may be established, (petitioner) must prove the following two elements by evidence that is clear, satisfactory, and convincing, to a reasonable certainty.

First, that (parent) has caused (the death) (the injury) of a child, and as a result of that (death) (injury), (parent) was convicted of a felony.¹ Question 1 of the special verdict addresses this element. [I have answered this question in the special verdict. The fact that I have answered question 1 “yes” should have no bearing on what your answer should be to question 2.]

Second, that (parent) has exhibited a pattern of (physically) (or) (sexually) abusive behavior which is a substantial threat to the health of (child). Question 2 of the special verdict addresses this element.

“Abusive behavior,” as that term is used in the second element, means any conduct by (parent) which causes abuse to another person. A “pattern of abusive behavior” requires

more than a single instance of abusive behavior. In determining whether a pattern has been shown, you may consider the number and frequency of incidents, the nature of (parent)’s behavior, the nature and seriousness of any injuries, and all of the circumstances surrounding any incidents of abusive behavior.

While it is not required that the abusive behavior be directed at (child), it is required that the pattern of abusive behavior constitutes a substantial threat to the health of (child). “Health” includes physical, emotional, or mental health.

[For cases involving allegations of physical abuse to a child, give the following:

“Abuse” means physical injury which is intentionally or recklessly caused by another person. “Intentionally” means that the person who causes the physical abuse has the purpose to cause physical abuse or is aware that his or her conduct is practically certain to cause that result. “Recklessly” means conduct which creates a situation of unreasonable risk of harm to another and demonstrates a conscious disregard for the safety of another. “Abuse” does not include injury which is inflicted by accident.

“Physical injury” includes but is not limited to lacerations, fractured bones, burns, internal injuries, or severe or frequent bruising. It also includes bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.]²

[For cases involving allegations of sexual abuse to a child, give the following:

“Abuse” means that a child has been subjected to (sexual intercourse) (sexual contact) (exploitation) (exposure of genitals) (forced viewing of sexual activity) (prostitution).

(Add relevant definition(s) from Wis JI–Children 217, 218, 218A, 218B, 218C, 218D, or 219.)]³

Before you may answer either of the questions in the special verdict “yes,” you must be convinced by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that the question should be answered “yes.” If you are not so convinced, you must answer the question “no.”⁴

SPECIAL VERDICT

1. Has (parent) caused the (death) (injury) of a child, as a result of which (parent) was convicted of a felony?

Answer: _____

Yes or No

2. Has (parent) exhibited a pattern of (physically) (sexually) abusive behavior which is a substantial threat to the health of (child)?

Answer: _____

Yes or No

COMMENT

Wis JI–Children 340 and the comment were originally approved by the Committee in 1996 and revised in 1997, 1999, and 2004. The change in 2004 conformed the burden of proof language to Wis JI–Civil 205. An editorial correction was made to Note No. 1 in 2005. The comment was revised in 2008, 2011, 2014, 2016, and 2025. This revision was approved by the Committee in May 2026. It amended the comment to add note 4 and a new paragraph addressing State v. H.C., 2025 WI 20, 416 Wis. 2d 233, 21 N.W.3d 330.

Wis. Stat. § 48.415(5)(a) reads:

48.415. Grounds for involuntary termination of parental rights. At the fact-finding hearing the court or jury may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following:

(5) Child abuse. Child abuse, which shall be established by proving that the parent has exhibited a pattern of physically or sexually abusive behavior which is a substantial threat to the health of the child who is the subject of the petition and proving either of the following:

(a) That the parent has caused death or injury to a child or children resulting in a felony conviction.

Cases brought under this ground for termination of parental rights will be rare. Subsection (5)(a) requires the circumstance that a parent has a felony conviction relating to the death or injury of a child.

In an unpublished opinion, the court of appeals stated that “in addition to a felony conviction, this specific statutory ground for termination requires the showing of a pattern of abusive behavior that poses an ongoing substantial threat to the child” and that “a single conviction does not demonstrate a pattern of abusive behavior under Wis. Stat. § 48.415(5).” K.C. v. B.S.-S., No. 2015AP1702, unpublished slip op. ¶5 (WI App Jan. 13, 2016) (citing Monroe County v. Jennifer V., 200 Wis. 2d 678, 683–84, 548 N.W.2d 837 (Ct. App. 1996)).

Because of the absence of any clear definitions for the terms “pattern of abusive behavior” and “health,” the scope of this ground is uncertain. Does this ground allow for proof of emotional abuse? If it is limited to physical and sexual abuse, does it include physical abuse harmful to the emotional health of the child? Some Committee members believe the section was intended to address only physical and sexual abuse, pointing to the terms of the alternative second elements. Others feel it should be read broadly. Other ambiguities include whether this ground for termination includes a parent who allows or encourages abuse by others, abusive conduct by a parent towards a spouse or other adult which emotionally harms a child, or abuse of property or animals that arguably harms a child.

The Committee has drafted the instruction to address cases involving physical or sexual abuse to a child. As drafted, this instruction also covers physical abuse by the parent to another adult. However, the definition of “abuse” needs to be modified where the pattern of abuse involves sexual abuse to an adult. See note 3 below. The Committee also agreed that “health” necessarily includes emotional and mental health. If a court permits proof of other “child abuse” theories, the instruction will need to be altered.

Summary Judgment and Directed Verdict. The Committee believes it is appropriate for the trial judge to answer question 1 where evidence of the conviction is received. See SM-2 following the instructions in this publication regarding the use of summary judgment and directed verdict in a TPR case.

For an unpublished decision involving summary judgment on “pattern of behavior” that is a substantial threat to the child, see Racine County v. Renee D., Appeal No. 2012AP1974 (2013) (not published; one-judge decision).

Dispositional Phase—No Burden of Proof. In State v. H.C., 2025 WI 20, 416 Wis. 2d 233, 21 N.W.3d 330, the Wisconsin Supreme Court held that neither the Due Process Clause nor Wis. Stat. § 48.426 imposes a burden of proof on any party at the dispositional phase of a TPR proceeding.

Indian Child Welfare Act. For a termination case involving an Indian child, see Wis JI–Children 420-424.

NOTES

1. In most cases, it should not be necessary to define “caused” or “causes.” If a definition is needed, the Committee suggests the following:

(“Caused”) (“Causes”) means that parent’s behavior was a substantial factor in producing the bodily harm. It is not required that the parent’s behavior was the sole cause or the only factor causing the death.

2. This definition of “abuse” is the same as in Wis JI–Children 215.

3. If the court has received evidence of “sexual abuse” which includes exploitation, exposure, or other matters discussed in Wis JI–Children 217, 218, 218A, 218B, 218C, 218D, or 219, the definitions used in those instructions should be included as appropriate. However, where the pattern of abuse involves allegations of sexual abuse to an adult, the definition of “sexual abuse” will need to be modified, because the definitions in the listed instructions (Wis JI–Children 217 to 219) relate to sexual abuse to a child and not an adult.

4. Once the jury finds that grounds for termination have been established, the court proceeds to a separate dispositional hearing. Under Wis. Stat. § 48.426(2), and as clarified in State v. H.C., 2025 WI 20, ¶¶20, 26, 32, the court exercises its discretion to determine whether termination of parental rights is in the child’s best interests. No party bears a burden of proof at this stage. The burdens set forth in this instruction apply solely to the fact-finding (grounds) phase.

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342 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: ABUSE: PATTERN OF ABUSIVE BEHAVIOR AND PRIOR REMOVAL BY COURT ORDER [WIS. STAT. § 48.415(5)(b)] (REMOVAL OF ABUSED CHILD FROM PARENT'S HOME)

Child abuse is a ground for the termination of parental rights. Your role as jurors will be to answer the following questions in the special verdict.

1. Has (parent) exhibited a pattern of abusive behavior which is a substantial threat to the health of (child)?
2. Has a child been removed from (parent)'s home pursuant to a court order after an adjudication that the child is in need of protection or services because (he) (she) (has been the victim of abuse) (is at substantial risk of becoming the victim of abuse)?

Before this ground may be established, (petitioner) must prove the following two elements by evidence that is clear, satisfactory, and convincing, to a reasonable certainty.

First, that (parent) has exhibited a pattern of abusive behavior which is a substantial threat to the health of (child). Question 1 of the special verdict addresses this element.

Second, that a child has previously been removed from (parent)'s home pursuant to a court order after an adjudication that the child is in need of protection or services because (he) (she) (has been the victim of abuse) (is at substantial risk of becoming the victim of abuse). The child referred to in this element need not be the same child referred to in the first element. **[Add the following language if there is no dispute as to this element:**

Because there is no dispute in the evidence as to this question, I have answered this question. My answer has no bearing whatsoever on what your answers should be to the other questions in the special verdict form.]

“Abusive behavior,” as that term is used in the first element, means any conduct by (parent) which causes abuse to another person. A “pattern of abusive behavior” requires more than a single instance of abusive behavior. In determining whether a pattern has been shown, you may consider the number and frequency of incidents, the nature of the parent’s behavior, the nature and seriousness of any injuries, and all of the circumstances surrounding any incident of abusive behavior.

While it is not required that the abusive behavior be directed at (child), it is required that the pattern of abusive behavior constitutes a substantial threat to the health of (child). “Health” includes physical, emotional, or mental health.

[For cases involving allegations of physical abuse, give the following:

“Abuse” means physical injury which is intentionally or recklessly caused by another person. “Intentionally” means that the person who causes the physical abuse has the purpose to cause physical abuse or is aware that his or her conduct is practically certain to cause that result. “Recklessly” means conduct which creates a situation of unreasonable risk of harm to another and demonstrates a conscious disregard for the safety of another. “Abuse” does not include injury which is inflicted by accident.

“Physical injury” includes, but is not limited to lacerations, fractured bones, burns, internal injuries, severe or frequent bruising. It also includes bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.]

[For cases involving allegations of sexual abuse, give the following: “Abuse” means that a child has been subjected to (sexual intercourse) (sexual contact) (exploitation) (exposure of genitals) (forced viewing of sexual activity) (prostitution).

(Add relevant definition(s) from Wis JI–Children 217, 218, 218A, 218B, 218C, 218D, or 219.)]¹

Before you may answer either of the questions on the special verdict “yes,” you must be convinced by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that the question should be answered “yes.” If you are not so convinced, you must answer the question “no.”²

SPECIAL VERDICT

1. Has (parent) exhibited a pattern of abusive behavior which is a substantial threat to the health of (child)?

Answer: _____

Yes or No

2. Has a child been removed from (parent)’s home pursuant to a court order after an adjudication that the child is in need of protection or services because (he) (she) (has been the victim of abuse) (is at substantial risk of becoming the victim of abuse)?

Answer: _____

Yes or No

COMMENT

Wis JI–Children 342 and comment were originally approved by the Committee in 1996 and revised in 1997, 1999, 2004, and 2011. The change in 2004 conformed the burden of proof language to Wis JI–Civil 205. This revision was approved by the Committee in May 2026. It amended the comment to add note 2 and a new paragraph addressing State v. H.C., 2025 WI 20, 416 Wis. 2d 233, 21 N.W.3d 330.

Wis. Stat. § 48.415(5)(b) reads:

48.415. Grounds for involuntary termination of parental rights. At the fact-finding hearing the court or jury may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following:

(5) Child abuse. Child abuse, which shall be established by proving that the parent has exhibited a pattern of physically or sexually abusive behavior which is a substantial threat to the health of the child who is the subject of the petition and proving either of the following:

(b) That a child has previously been removed from the parent’s home pursuant to a court order under s. 48.345 after an adjudication that the child is in need of protection or services under s. 48.13(3) or (3m).

See also Comment to Wis JI–Children 340.

Summary Judgments and Directed Verdicts. See Special Materials, SM-2, at the end of this publication for a discussion of the use of summary judgments and directed verdicts in CHIPS and TPR proceedings.

Dispositional Phase—No Burden of Proof. In State v. H.C., 2025 WI 20, 416 Wis. 2d 233, 21 N.W.3d 330, the Wisconsin Supreme Court held that neither the Due Process Clause nor Wis. Stat. § 48.426 imposes a burden of proof on any party at the dispositional phase of a TPR proceeding.

Indian Child Welfare Act. For a termination case involving an Indian child, see Wis JI–Children 420-424.

1. If the court has received evidence of “sexual abuse” which includes exploitation, exposure, or other matters discussed in Wis JI–Children 217, 218, 218A, 218B, 218C, 218D, or 219, the definitions used in those instructions should be included as appropriate. However, where the pattern of abuse involves allegations of sexual abuse to an adult, the definition of sexual abuse will need to be modified, because the definitions in the listed instructions (Wis JI–Children 217 to 219) relate to sexual abuse to a child and not an adult.

2. Once the jury finds that grounds for termination have been established, the court proceeds to a separate dispositional hearing. Under Wis. Stat. § 48.426(2), and as clarified in State v. H.C., 2025 WI 20, ¶¶20, 26, 32, 416 Wis. 2d 233, 21 N.W.3d 330, the court exercises its discretion to determine whether termination of parental rights is in the child’s best interests. No party bears a burden of proof at this stage. The burdens set forth in this instruction apply solely to the fact-finding (grounds) phase.

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346 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: FAILURE TO ASSUME PARENTAL RESPONSIBILITY [WIS. STAT. § 48.415(6)(a)]

The petition in this case alleges that (parent) has failed to assume parental responsibility, which is a ground for termination of parental rights. Your role as jurors will be to answer the following question in the special verdict:

1. Has (parent) failed to assume parental responsibility for (child)?

To establish a failure to assume parental responsibility, (petitioner) must prove by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that the parent or the (person) (or) (persons) who may be the parent of (child) (has) (have) not had a substantial parental relationship with (child).

The term “substantial parental relationship” means the acceptance and exercise of significant responsibility for the daily supervision, education, protection, and care of (child). Substantial parental relationship is assessed based on the totality of the circumstances throughout the child’s entire life. In evaluating whether (parent) has had a substantial parental relationship with (child), you may consider factors, including, but not limited to, whether (parent) has expressed concern for or interest in the support, care, or well-being of (child), whether (parent) has neglected or refused to provide care or support for the child, whether (parent) exposed the child to a hazardous living environment, whether, with respect to a person who is or may be the father of the child, the person has expressed concern for or interest in the support, care, or well-being of the mother during

her pregnancy, and all other evidence bearing on that issue which assists you in making this determination. You may consider the reasons for the parent's lack of involvement when you assess all of the circumstances throughout the child's entire life.

Before you may answer the special verdict question "yes," you must be convinced by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that the question should be answered "yes." If you are not so convinced, you must answer the question "no."¹

SPECIAL VERDICT

1. Has (parent) failed to assume parental responsibility for (child)?

Answer: _____

Yes or No

COMMENT

Wis JI-Children 346 and comment were originally approved in 1996 and revised in 1997, 2001, 2004, 2005, 2007, and 2012. The comment was revised in 2008, 2010, 2011, 2012, 2014, 2015, and 2017. This revision was approved by the Committee in May 2026. It amended the comment to add note 1 and a new paragraph addressing State v. H.C., 2025 WI 20, 416 Wis. 2d 233, 21 N.W.3d 330.

Wis. Stat. § 48.415(6)(a) and (b) read:

48.415. Grounds for involuntary termination of parental rights. At the fact-finding hearing the court or jury may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following:

(6)(a) Failure to assume parental responsibility, which shall be established by proving that the parent or the person or persons who may be the parent of the child have not had a substantial parental relationship with the child.

(b) In this subsection, “substantial parental relationship” means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

Amendments. This ground for involuntary termination of parental rights was substantially amended in 1996 and 2006. Provisions in 1995 Wisconsin Act 275 expanded the former statutory language to include: (1) mothers as well as fathers; (2) marital children as well as nonmarital children; and (3) fathers for whom paternity was adjudicated prior to the filing of the TPR petition. 2005 Wisconsin Act 293 amended the language in (6)(a) from “have never had a substantial parental relationship” to “have not had a substantial parental relationship.”

Totality-of-the-Circumstances Analysis. In reviewing a termination of parental rights based on this statutory ground, the supreme court in Tammy W-G. v. Jacob T., 2011 WI 30, 333 Wis. 2d 273, 797 N. W.2d 854 adopted a totality-of-the-circumstances test. It said:

¶ 3 We conclude that Wis. Stat. § 48.415(6) (2007-08) prescribes a totality-of-the-circumstances test. When applying this test, the fact-finder should consider any support or care, or lack thereof, the parent provided the child throughout the child's entire life. This analysis may include the reasons why a parent was not caring for or supporting her child and exposure of the child to a hazardous living environment.

For an unpublished decision applying the “totality-of-the-circumstances” analysis from Tammy W-G., *supra*, see Patrick J.T. v. Shelly S., Appeal No. 2013AP778 (not published; one -judge decision). The parent in this case had a substantial parental relationship with her children during the first half of their lives, but had sporadic contact and failed to accept significant responsibility for them during the second half of their lives.

This instruction was cited in State v. Michelle M., Appeal No. 2014AP1539 (unpublished; one-judge decision, January 27, 2015). This decision discussed the exposure of the child to “a hazardous living environment.”

Lack of Opportunity. The court in Tammy W-G., at ¶ 38, held that “although a parent’s lack of opportunity to establish a substantial relationship is not a defense to failure to assume parental responsibility, the reasons for a parent’s lack of involvement still may be considered in the totality-of-the-circumstances analysis.”

Previously, this instruction contained the following sentence: “A parent's lack of opportunity and ability to establish a substantial parental relationship is not a defense to failure to assume parental

responsibility.” In 2011, the committee withdrew this sentence when it revised this instruction to reflect the holding in Tammy W-G. v. Jacob T., *supra*. The revisions to the instruction replaced the withdrawn sentence with language instructing the jury to consider “reasons for the parent’s lack of involvement” when assessing the circumstances. In deciding to withdraw the sentence, the Committee noted that: (1) the case law supporting this withdrawn sentence was dicta in Ann M.M. v. Rob S., 176 Wis. 2d 673, 683, 500 N.W.2d 649 (1993); and (2) was unanimously overruled sub silentio in State v. Bobby G., 2007 WI 77, 301 Wis. 2d 531, 734 N.W.2d 81. In Bobby G., the court ruled:

Were the court or any member thereof to interpret the statute as not requiring that an unmarried biological father have the opportunity to develop a relationship with his child after he learns of the child, the constitutional issue that parties address at length would have to be decided. 2007 WI 77, at par. 3

Statutory Factors for Evaluating Substantial Parental Relationship. The list of examples in Wis. Stat. § 48.415(6)(b) of what a court may consider in evaluating whether a person has had a substantial parental relationship with a child is “non-exclusive.” State v. Bobby G., 2007 WI 77, ¶ 46.

Father’s Knowledge of Paternity. In 2007, the Wisconsin Supreme Court considered whether the application of Wis. Stat. § 48.415(6) is constitutional when the father did not know of the child’s existence until the TPR proceeding began. The parent in this appeal argued he was unaware that he was the father until the TPR petition was filed, and therefore he had no opportunity to assume parental responsibility. State v. Bobby G., 2007 WI 77. The supreme court held that the circuit court must consider the biological father’s efforts undertaken after he discovers that he is the father, but before the court adjudicates the grounds phase of the TPR proceeding. Wis JI–Children 346A should be used in a case involving the issue of whether the father knew or had reason to know that he was the parent.

In establishing the procedure to be used in termination of parental rights actions, Wis. Stat. § 48.42(2m) directs that notice is not required to a parent as a result of sexual assault or a parent of a nonmarital child. Section 48.42(2m)(b) provides that “by virtue of the fact that [a person] has engaged in sexual intercourse with the mother of the child, [the person] is considered to be on notice that a pregnancy and a termination of parental rights proceeding concerning the child may occur, and has the duty to protect his own rights and interests.”

Neglect or Refusal to Provide. The court in Bobby G., *supra*, said the words “willful” and “refused” in § 48.415(6)(b) carry with them “the sense that the father knew or had reason to believe he was the father but . . . did not provide care or support.” State v. Bobby G., 2007 WI 77, ¶ 49.

Incarcerated Parent. See Wis JI–Children 346B in cases involving an incarcerated parent.

Mother’s Pre-Birth Behavior. The Committee believes this ground allows the introduction of evidence as to the mother’s pre-birth behavior. For a discussion of the issues on prebirth behavior, see the unpublished decision, In re Termination of Parental Rights to Gabriella M., Case No. 00-3207.

Parent’s Marital Status. In a case where the effect of the marital status of the parent is argued, the following sentence can be added to the instruction:

A parent's marital status, in and of itself, has no bearing on whether the parent has or has not failed to assume parental responsibility.

Dispositional Phase—No Burden of Proof. In State v. H.C., 2025 WI 20, 416 Wis. 2d 233, 21 N.W.3d 330, the Wisconsin Supreme Court held that neither the Due Process Clause nor Wis. Stat. § 48.426 imposes a burden of proof on any party at the dispositional phase of a TPR proceeding.

Indian Child Welfare Act. For a termination case involving an Indian child, see Wis JI–Children 420-424.

1. Once the jury finds that grounds for termination have been established, the court proceeds to a separate dispositional hearing. Under Wis. Stat. § 48.426(2), and as clarified in State v. H.C., 2025 WI 20, ¶¶20, 26, 32, the court exercises its discretion to determine whether termination of parental rights is in the child’s best interests. No party bears a burden of proof at this stage. The burdens set forth in this instruction apply solely to the fact-finding (grounds) phase.

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346A INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: FAILURE TO ASSUME PARENTAL RESPONSIBILITY: KNOWLEDGE OF PATERNITY [WIS. STAT. § 48.415(6)(a)]

The petition in this case alleges that (parent) has failed to assume parental responsibility, which is a ground for termination of parental rights. Your role as jurors will be to answer the following question in the special verdict:

1. Has (parent) failed to assume parental responsibility for (child), after knowing or having reason to believe that he was (child)'s father?

A man has a duty to assume parental responsibility for a child as of the time he knows or has reason to believe he is the father of the child. To establish a failure to assume parental responsibility, (petitioner) must prove by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that the parent or the (person) (or) (persons) who may be the parent of (child) (has) (have) not had a substantial parental relationship with (child) once he knew or had reason to believe that he was (child)'s father.

In determining when a father had reason to believe he was the father of the child, you may consider the circumstances of and likelihood of conception; what efforts, if any, he undertook or reasonably should have undertaken to establish whether a child was conceived; his knowledge or lack of knowledge of the birth of the child; whether he did or did not file a declaration of paternal interest; his efforts or lack of efforts to establish paternity or assist authorities in establishing paternity; what efforts others, including the mother, relatives, child support enforcement, or child welfare authorities made to establish

paternity or apprise him of his paternity; his knowledge or lack of knowledge of those efforts; his responsiveness or lack of responsiveness to those efforts; any information that would lead him to believe that he was not the father of the child; any efforts to preclude him from determining that status or of the existence of the child and all other evidence bearing on that issue.

The term “substantial parental relationship” means the acceptance and exercise of significant responsibility for the daily supervision, education, protection, and care of (child). Substantial parental relationship is assessed based on the totality of the circumstances throughout the child’s entire life. In evaluating whether (parent) has had a substantial parental relationship with (child), you may consider factors, including, but not limited to, whether (parent) has expressed concern for or interest in the support, care, or well-being of (child), whether (parent) has neglected or refused to provide care or support for the child, whether (parent) exposed the child to a hazardous living environment, whether, with respect to a person who is or may be the father of the child, the person has expressed concern for or interest in the support, care, or well-being of the mother during her pregnancy, and all other evidence bearing on that issue which assists you in making this determination. You may consider the reasons for the parent’s lack of involvement when you assess all of the circumstances throughout the child’s entire life.

Before you may answer the special verdict question “yes,” you must be convinced by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that the

question should be answered “yes.” If you are not so convinced, you must answer the question “no.”¹

SPECIAL VERDICT

1. Has (parent) failed to assume parental responsibility for (child), after knowing or having reason to believe that he was (child)’s father?

Answer: _____

Yes or No

COMMENT

Wis JI–Children 346A and comment were approved by the Committee in 2010 and revised in 2011 and 2017. The comment was also revised in 2012, 2014, and 2019. The revision to the instruction in 2017 provided for a single verdict question. This revision was approved by the Committee in May 2026. It amended the comment to reflect the opinion in State v. H.C., 2025 WI 20.

Previously, the instruction used a two-question format, i.e.:

- “1. Did (parent) know or have reason to believe he was (child)’s father?
2. Has (parent) failed to assume parental responsibility for (child)?”

Wis. Stat. § 48.415(6)(a) and (b) read:

48.415. Grounds for involuntary termination of parental rights. At the fact-finding hearing the court or jury may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following:

(6)(a) Failure to assume parental responsibility, which shall be established by proving that the parent or the person or persons who may be the parent of the child have not had a substantial parental relationship with the child.

(b) In this subsection, “substantial parental relationship” means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental

relationship with the child, the court may consider such factors, including, but not limited to, whether the person has expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

Totality-of-the-Circumstances Analysis. In reviewing a termination of parental rights based on this statutory ground, the supreme court in Tammy W-G. v. Jacob T., 2011 WI 30, 333 Wis. 2d 273, 797 N.W.2d 854, adopted a totality-of-the-circumstances test. It said:

¶ 3 We conclude that Wis. Stat. § 48.415(6) (2007-08) prescribes a totality-of-the-circumstances test. When applying this test, the fact-finder should consider any support or care, or lack thereof, the parent provided the child throughout the child's entire life. This analysis may include the reasons why a parent was not caring for or supporting her child and exposure of the child to a hazardous living environment.

Lack of Opportunity. The court in Tammy W-G., at ¶ 38, held that “although a parent's lack of opportunity to establish a substantial relationship is not a defense to failure to assume parental responsibility, the reasons for a parent's lack of involvement still may be considered in the totality-of-the-circumstances analysis.”

Previously, this instruction contained the following sentence: “A parent's lack of opportunity and ability to establish a substantial parental relationship is not a defense to failure to assume parental responsibility.” In 2011, the Committee withdrew this sentence when it revised this instruction to reflect the holding in Tammy W-G. v. Jacob T., *supra*. The revisions to the instruction replaced the withdrawn sentence with language instructing the jury to consider “reasons for the parent's lack of involvement” when assessing the circumstances. In deciding to withdraw the sentence, the Committee noted that: (1) the case law supporting this withdrawn sentence was dicta in Ann M.M. v. Rob S., 176 Wis. 2d 673, 683, 500 N.W.2d 649 (1993); and (2) was unanimously overruled sub silentio in State v. Bobby G., 2007 WI 77, 301 Wis. 2d 531, 734 N.W.2d 81. In Bobby G., the court ruled:

Were the court or any member thereof to interpret the statute as not requiring that an unmarried biological father have the opportunity to develop a relationship with his child after he learns of the child, the constitutional issue that parties address at length would have to be decided. 2007 WI 77, at par. 3

For an unpublished decision discussing this instruction, see Dane County Dep't of Human Services, Appeal No. 2013AP462 (not published; one-judge decision).

Statutory Factors for Evaluating Substantial Parental Relationship. The list of examples in Wis. Stat. § 48.415(6)(b), shown on page 3, of what a court may consider in evaluating whether the person has had a substantial parental relationship with the child is “non-exclusive.” State v. Bobby G., 2007 WI 77, ¶ 46.

Father's Knowledge of Paternity. In 2007, the Wisconsin Supreme Court considered whether the application of Wis. Stat. § 48.415(6) is constitutional when the parent did not know of the child's existence until the TPR proceeding began. The parent in this appeal argued he was unaware that he was the father

until the TPR petition was filed, and therefore he had no opportunity to assume parental responsibility. State v. Bobby G., 2007 WI 77. The supreme court held that the circuit court must consider the biological father's efforts undertaken after he discovers that he is the father, but before the court adjudicates the grounds phase of the TPR proceeding.

In establishing the procedure to be used in termination of parental rights actions, Wis. Stat. § 48.42(2m) directs that notice is not required to a parent as a result of sexual assault or a parent of a nonmarital child. Section 48.42(2m)(b) provides that “by virtue of the fact that [a person] has engaged in sexual intercourse with the mother of the child, [the person] is considered to be on notice that a pregnancy and a termination of parental rights proceeding concerning the child may occur, and has the duty to protect his own rights and interests.”

For an unpublished decision discussing this instruction, see Dane County Dep't of Human Services v. John L.-B., 2013AP462 (May 16, 2013) (not published; one-judge decision). This decision discusses whether the trial court should have directed a verdict and changed the jury's answer on whether the father had knowledge of paternity. See also E.M.K. v. Z.T.R., 2018AP1896 (May 1, 2019) (not published; one-judge decision), affirming the trial court's decision to provide Wis JI–Children 346 rather than 346A. The court ruled that there was no dispute that the respondent had reason to believe he was the father before the child's birth, although another man had sexual relations with the child's mother during the conceptive period.

Neglect or Refusal to Provide. The court in Bobby G., *supra*, said the words “willful” and “refused” in § 48.415(6)(b) carry with them “the sense that the father knew or had reason to believe he was the father but . . . did not provide care or support.” State v. Bobby G., 2007 WI 77, ¶ 49.

Mother's Pre-Birth Behavior. The Committee believes this ground allows the introduction of evidence as to the mother's pre-birth behavior. For a discussion of the issues on prebirth behavior, see the unpublished decision, In re Termination of Parental Rights to Gabriella M., Case No. 00-3207.

Parent's Marital Status. In a case where the marital status of the parent is argued, the following sentence can be added to the instruction:

A parent's marital status, in and of itself, has no bearing on whether the parent has or has not failed to assume parental responsibility.

Dispositional Phase—No Burden of Proof. In State v. H.C., 2025 WI 20, 416 Wis. 2d 233, 21 N.W.3d 330, the Wisconsin Supreme Court held that neither the Due Process Clause nor Wis. Stat. § 48.426 imposes a burden of proof on any party at the dispositional phase of a TPR proceeding.

Indian Child Welfare Act. For a termination case involving an Indian child, see Wis JI–Children 420-424.

NOTES

1. Once the jury finds that grounds for termination have been established, the court proceeds to a separate dispositional hearing. Under Wis. Stat. § 48.426(2), and as clarified in State v. H.C., 2025 WI 20, ¶¶20, 26, 32, the court exercises its discretion to determine whether termination of parental rights is in the

child's best interests. No party bears a burden of proof at this stage. The burdens set forth in this instruction apply solely to the fact-finding (grounds) phase.

**346B INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: FAILURE TO
ASSUME PARENTAL RESPONSIBILITY: INCARCERATED PARENT
[WIS. STAT. § 48.415(6)(a)]**

The petition in this case alleges that (parent) has failed to assume parental responsibility, which is a ground for termination of parental rights. Your role as jurors will be to answer the following question in the special verdict:

1. Has (parent) failed to assume parental responsibility for (child)?

To establish a failure to assume parental responsibility, (petitioner) must prove by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that the parent or the (person) (or) (persons) who may be the parent of (child) (has) (have) not had a substantial parental relationship with (child).

The term “substantial parental relationship” means the acceptance and exercise of significant responsibility for the daily supervision, education, protection, and care of (child). Substantial parental relationship is assessed based on the totality of the circumstances throughout the child’s entire life. In evaluating whether (parent) has had a substantial parental relationship with (child), you may consider factors, including, but not limited to, whether (parent) has expressed concern for or interest in the support, care, or well-being of (child), whether (parent) has neglected or refused to provide care or support for (child), whether (parent) exposed (child) to a hazardous living environment, whether, with respect to a person who is or may be the father of (child), the person has expressed concern for or interest in the support, care, or well-being of the mother during her

pregnancy, and all other evidence bearing on that issue which assists you in making this determination.¹ You may consider the reasons for the parent's lack of involvement when you assess all of the circumstances throughout the child's entire life.

The evidence in this case indicates that (parent) was incarcerated during some of the periods of time under consideration in this case. Incarceration of a parent does not in itself establish failure to assume parental responsibility.

In determining whether an incarcerated parent has or does not have a substantial parental relationship with the child, in addition to the considerations indicated in other parts of this instruction, you may consider the following factors and all other evidence bearing on this issue:²

- The reasons for the incarceration; the nature of the underlying criminal behavior; whether the parent engaged in that behavior knowing that the resultant incarceration or potential incarceration would prevent or hinder the parent from assuming his or her parental responsibilities.
- Efforts to establish a substantial parental relationship despite incarceration, including but not limited to:
 - Whether the parent offered to pay child support and the parent's financial ability or inability to do so;
 - Requests for visitation with the child and, if permitted, the success and quality of those visits;

- Appropriate efforts to communicate with the child or with those responsible for the care and welfare of the child; whether any such efforts were prohibited or impeded by other individuals;
- Requests or absence of requests for information relating to the child's education, health, and welfare;
- Responsiveness or lack of responsiveness of the parent to efforts, if any, of others to involve the parent in the life of the child;
- Efforts, or lack of efforts, to enlist available, appropriate family members or friends in meeting the physical, financial, and emotional needs of the child; the extent and success of any such efforts.

Before you may answer the special verdict question “yes,” you must be convinced by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that the question should be answered “yes.” If you are not so convinced, you must answer the question “no.”³

SPECIAL VERDICT

1. Has (parent) failed to assume parental responsibility for (child)?

Answer: _____
Yes or No

COMMENT

The instruction was approved in 2010 and revised in 2011. The comment was approved in 2010 and revised in 2011, 2012, 2013, 2014, 2015, and 2017. This revision was approved by the Committee in December 2023; it added footnotes 1 and 2. This revision was approved by the Committee in May 2026. It amended the comment to reflect the opinion in State v. H.C., 2025 WI 20.

Wis. Stat. § 48.415(6)(a) and (b) read:

48.415. Grounds for involuntary termination of parental rights. At the fact-finding hearing, the court or jury may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following:

(6)(a) Failure to assume parental responsibility, which shall be established by proving that the parent or the person or persons who may be the parent of the child have not had a substantial parental relationship with the child.

(b) In this subsection, “substantial parental relationship” means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

This instruction was cited with approval in State v. Delano W., Appeal No. 2013AP2445 (unpublished; one-judge decision, March 14, 2014).

Totality-of-the-Circumstances Analysis. In reviewing a termination of parental rights based on this statutory ground, the supreme court in Tammy W-G. v. Jacob T., 2011 WI 30, 333 Wis. 2d 273, 797 N.W.2d 854, adopted a totality-of-the-circumstances test. It said:

¶ 3 We conclude that Wis. Stat. § 48.415(6) (2007-08) prescribes a totality-of-the-circumstances test. When applying this test, the fact-finder should consider any support or care, or lack thereof, the parent provided the child throughout the child's entire life. This analysis may include the reasons why a parent was not caring for or supporting her child and exposure of the child to a hazardous living environment.

Lack of Opportunity. The court in Tammy W-G., at ¶ 38, held that “although a parent’s lack of opportunity to establish a substantial relationship is not a defense to failure to assume parental responsibility, the reasons for a parent’s lack of involvement still may be considered in the totality-of-the-circumstances analysis.”

Previously, this instruction contained the following sentence: “A parent’s lack of opportunity and ability to establish a substantial parental relationship is not a defense to failure to assume parental responsibility.” In 2011, the Committee withdrew this sentence when it revised this instruction to reflect the holding in Tammy W-G. v. Jacob T., *supra*. The revisions to the instruction replaced the withdrawn sentence with language instructing the jury to consider “reasons for the parent’s lack of involvement” when assessing the circumstances. In deciding to withdraw the sentence, the Committee noted that: (1) the case law supporting this withdrawn sentence was dicta in Ann M.M. v. Rob S., 176 Wis. 2d 673, 683, 500 N.W.2d 649 (1993); and (2) was unanimously overruled *sub silentio* in State v. Bobby G., 2007 WI 77, 301 Wis. 2d 531, 734 N.W.2d 81. In Bobby G., the court ruled:

Were the court or any member thereof to interpret the statute as not requiring that an unmarried biological father have the opportunity to develop a relationship with his child after he learns of the child, the constitutional issue that parties address at length would have to be decided. 2007 WI 77, at par. 3

For an unpublished decision discussing this instruction, see Dane County Dep't of Human Services v. John L.-B., Appeal No. 2013AP462 (not published; one-judge decision).

Father's Knowledge of Paternity. If knowledge of paternity is also at issue by an incarcerated father, then JI-Children 346A and 346B should be merged and a verdict question on knowledge or belief of paternity should be added. In 2007, the Wisconsin Supreme Court considered whether the application of Wis. Stat. § 48.415(6) is constitutional when the parent did not know of the child's existence until the TPR proceeding began. The parent in this appeal argued he was unaware that he was the father until the TPR petition was filed, and, therefore, he had no opportunity to assume parental responsibility. State v. Bobby G., 2007 WI 77. The Supreme Court held that the circuit court must consider the biological father's efforts undertaken after he discovers that he is the father, but before the court adjudicates the grounds phase of the TPR proceeding.

In establishing the procedure to be used in termination of parental rights actions, Wis. Stat. § 48.42(2m) directs that notice is not required to a parent as a result of sexual assault or a parent of a nonmarital child. Section 48.42(2m)(b) provides that "by virtue of the fact that [a person] has engaged in sexual intercourse with the mother of the child, [the person] is considered to be on notice that a pregnancy and a termination of parental rights proceeding concerning the child may occur, and has the duty to protect his own rights and interests."

For an unpublished decision discussing this instruction, see Dane County Dep't of Human Services v. John L.-B., Appeal No. 2013AP462 (not published; one-judge decision). This decision discusses whether the trial court should have directed a verdict and changed the jury's answer on whether the father had knowledge of paternity.

Neglect or Refusal to Provide. The court in Bobby G., *supra*, said the words "willful" and "refused" in § 48.415(6)(b) carry with them "the sense that the father knew or had reason to believe he was the father but . . . did not provide care or support." State v. Bobby G., 2007 WI 77, ¶ 49.

Parent's Marital Status. In a case where the marital status of the parent is argued, the following sentence can be added to the instruction:

A parent's marital status, in and of itself, has no bearing on whether the parent has or has not failed to assume parental responsibility.

Dispositional Phase—No Burden of Proof. In State v. H.C., 2025 WI 20, 416 Wis. 2d 233, 21 N.W.3d 330, the Wisconsin Supreme Court held that neither the Due Process Clause nor Wis. Stat. § 48.426 imposes a burden of proof on any party at the dispositional phase of a TPR proceeding.

Indian Child Welfare Act. For a termination case involving an Indian child, see Wis JI-Children 420-424.

1. The factors listed for consideration in evaluating whether a substantial parental relationship exists are provided in Wis. Stat. § 48.415(6)(b). This statutory list is “non-exclusive.” State v. Bobby G., 2007 WI 77, ¶ 46, 301 Wis. 2d 531, 734 N.W.2d 81.

2. The additional factors listed for consideration in evaluating whether an incarcerated parent has or does not have a substantial parental relationship with the child are not codified. As a result, a trial court is not required to take into account every factor listed in the jury instruction. These factors may be considered in addition to the statutory requirements. However, the primary focus must remain on the statutory requirement of establishing a substantial parental relationship as provided in Wis. Stat. § 48.415(6).

3. Once the jury finds that grounds for termination have been established, the court proceeds to a separate dispositional hearing. Under Wis. Stat. § 48.426(2), and as clarified in State v. H.C., 2025 WI 20, ¶¶ 20, 26, 32, the court exercises its discretion to determine whether termination of parental rights is in the child’s best interests. No party bears a burden of proof at this stage. The burdens set forth in this instruction apply solely to the fact-finding (grounds) phase.

**350 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS:
INCESTUOUS PARENTHOOD [WIS. STAT. § 48.415(7)]**

Incestuous parenthood is a ground for termination of parental rights. Your role as jurors will be to answer the following special verdict question:

1. Are (mother) and (father) of (child) related by (blood) (adoption) in a degree of kinship closer than second cousin?

Before you may answer this question “yes,” (petitioner) must prove by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that the (mother) (father) of (child) is related, either by blood or adoption, to (child)’s (father) (mother) in a degree of kinship closer than second cousin.

“Degree of kinship” means the distance or degree which separates two persons who are descended from a common ancestor. [(If appropriate) add: Under the law governing this ground for termination of parental rights, a person who is adopted is considered to have the same degree of kinship to related persons as if that person had been a natural child.] (Insert specific kinship from list in the comment) is a degree of kinship closer than second cousin.

If you find that the parents of (child) are related to each other by (blood) (adoption) in a degree of kinship closer than second cousin, you should answer the question “yes.” Otherwise, you must answer the question “no.”¹

SPECIAL VERDICT

1. Are (mother) and (father) of (child) related by (blood) (adoption) in a degree of kinship closer than second cousin?

Answer: _____

Yes or No

COMMENT

Wis JI–Children 350 and its comment were originally approved by the Committee in 1996 and revised in 1997. The comment was revised in 2004, 2005, and 2011. This revision was approved by the Committee in May 2026. It amended the comment to reflect the opinion in State v. H.C., 2025 WI 20.

Wis. Stat. § 48.415(7) reads:

48.415. Grounds for involuntary termination of parental rights. At the fact-finding hearing the court or jury may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following:

(7) Incestuous parenthood. Incestuous parenthood, which shall be established by proving that the person whose parental rights are sought to be terminated is also related, either by blood or adoption, to the child’s other parent in a degree of kinship closer than 2nd cousin.

Degrees of Kinship. “Second cousin” is defined in Black’s Law Dictionary (4th edition) as: “Persons who are related to each other by descending from the same great-grandfather or great-grandmother.”

Some degrees of kinship closer than second cousin are (see Wis. Stat. § 990.001(16) and Wis. JI–Criminal 2130):

Parent	Grandparent	Great Uncle, Aunt	Great Grandchild
Child	Uncle, Aunt	First Cousin Once Removed	Grand Nephew, Niece
Brother	Nephew, Niece	Great Grandparent	Great Grand Nephew,
Sister	First Cousin	Grandchild	Niece

Paternity. There may be circumstances in which paternity is an issue. If so, add the following question to the special verdict and give Wis JI–Civil 5001, Paternity.

Is (respondent) the father of (child) born on _____, 20__?

Constitutionality. In Monroe County Department of Human Services v. Kelli B., 2004 WI 48, 271 Wis. 2d 51, 678 N.W.2d 831, the supreme court ruled that the application of this ground to a parent who was “victimized” in an incestuous relationship was unconstitutional.

Dispositional Phase—No Burden of Proof. In State v. H.C., 2025 WI 20, 416 Wis. 2d 233, 21 N.W.3d 330, the Wisconsin Supreme Court held that neither the Due Process Clause nor Wis. Stat. § 48.426 imposes a burden of proof on any party at the dispositional phase of a TPR proceeding.

Indian Child Welfare Act. For a termination case involving an Indian child, see Wis JI–Children 420-424.

1. Once the jury finds that grounds for termination have been established, the court proceeds to a separate dispositional hearing. Under Wis. Stat. § 48.426(2), and as clarified in State v. H.C., 2025 WI 20, ¶¶20, 26, 32, the court exercises its discretion to determine whether termination of parental rights is in the child’s best interests. No party bears a burden of proof at this stage. The burdens set forth in this instruction apply solely to the fact-finding (grounds) phase.

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**371 INVOLUNTARY TERMINATION OF PARENTAL RIGHTS:
PARENTHOOD AS A RESULT OF A SEXUAL ASSAULT [WIS. STAT. §
48.415(9)] (WHERE A JUDGMENT OF CONVICTION OR
ADJUDICATION OF DELINQUENCY EXISTS)**

Parenthood as a result of a sexual assault is a ground for termination of parental rights.

Your role as jurors will be to answer the following questions in the special verdict:

1. Did (respondent) sexually assault (child's mother)? Because there is [a final judgment of conviction] [an adjudication of delinquency] indicating that (respondent) sexually assaulted (child's mother) on (date), there is no dispute on this question and I have answered the question.

If the answer to question 1 is “yes,” answer question 2:

2. Did this sexual assault result in the conception of (child)?

In answering question 2, you should consider all the evidence regarding the possible time of conception. Wisconsin law allows (petitioner) to prove that (respondent) is the parent of (child) as a result of a sexual assault by proving that (respondent) sexually assaulted (child)'s mother during a time (child) could have been conceived.

[Where evidence is presented that the child weighed 5 ½ pounds or more at birth, give the following: If you find that (child) weighed 5 pounds, 8 ounces or more at birth, (he) (she) is presumed to have been conceived within a time period extending from 240 to 300 days before birth. Therefore, you may find the conceptive period for (child) to have

been between the _____ day of _____, 20____, and the _____ day of _____, 20____, unless you are persuaded to the contrary by other evidence.]

SPECIAL VERDICT

1. Did (respondent) sexually assault (child's mother)? Because there is [a final judgment of conviction] [an adjudication of delinquency] indicating that (respondent) sexually assaulted (child's mother) on (date), there is no dispute on this question and I have answered the question.

Answer: _____

Yes or No

If the answer to question 1 is “yes,” answer question 2:

2. Did this sexual assault result in the conception of (child)?

Answer: _____

Yes or No

COMMENT

Wis JI-Children 371 and comment were approved by the Committee in 2001. An editorial correction was made to paragraph 3 of the instruction in 2005. The comment was revised in 2007, 2008, and 2011. This revision was approved by the Committee in May 2026. It amended the comment to reflect the opinion in State v. H.C., 2025 WI 20.

Wis. Stat. § 48.415(9) reads:

48.415. Grounds for involuntary termination of parental rights. At the fact-finding hearing the court or jury may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following:

(9) PARENTHOOD AS A RESULT OF SEXUAL ASSAULT. (a) Parenthood as a result of sexual assault, which shall be established by proving that the child was conceived as a result of sexual assault in violation of s. 940.225(1), (2) or (3), 948.02(1) or (2), 948.025, or 948.085. Conception as a result of sexual assault as specified in this paragraph may be proved by a final judgment of conviction or other evidence produced at a fact-finding hearing under § 48.424 indicating that the person who may be the father of the child committed, during a possible time of conception, a sexual assault as specified in this paragraph against the mother of the child.

Wis. Stat. § 940.225(1), (2), and (3) apply to sexual assaults; Wis. Stat. § 948.02(1) and (2) apply to a sexual assault of a child. Wis. Stat. § 948.025 applies to repeated acts of sexual assault to a child.

Conceptive Period. The bracketed paragraph is adapted from Wis JI–Civil 5001 (paternity) and Wis. Stat. § 891.395 which establishes a presumption as to the conceptive period. According to the presumption, there is a 60-day period of conception if the child’s birth weight is 5 ½ pounds or more. A court may limit the period of conception to less than 60 days when a child is full term and competent evidence of a conceptive period contrary to the 60-day period is presented. See State ex rel. J.A.S. v. M.E.S., 142 Wis. 2d 300, 418 N.W.2d 32 (Ct. App. 1987) (a paternity proceeding).

Use of This Instruction. The language of this TPR statutory ground is of concern to the Committee. The heading to the subsection, “Parenthood as a Result of Sexual Assault,” suggests that petitioner must prove that the assault of the mother by the respondent resulted in the conception of the child. This interpretation is bolstered by the subsection’s language which requires the petitioner to prove that the child was conceived as a result of sexual assault in violation of designated provisions of the criminal code.

The statutory framework for this TPR ground is best understood and applied where the only contact between the respondent and the child’s mother during the conceptive period was in the context of a sexual assault that biologically could cause a pregnancy. The petitioner, under these facts, must only establish: (1) the sexual assault (through the final judgment of conviction or other evidence) and (2) the possible time of conception. A paternity test is not required because paternity is not challenged by the respondent.

This statutory ground is not so easily understood and applied, however, in scenarios involving incidents between the respondent and the mother of both consensual intercourse and one or more sexual assaults during the conceptive period. Paternity tests are obviously not yet sophisticated enough to identify the specific physical event “causing” or “resulting” in a child’s conception. In these scenarios, the statutory framework is problematic, seemingly requiring the petitioner to prove what is scientifically impossible to prove.

In attempting to resolve this statutory conundrum, some believe the legislature recognized this proof problem and eased the petitioner’s burden by allowing “conception as a result of sexual assault” to be proved by a conviction of a sexual assault committed during a possible time of conception. This language in effect establishing a statutory presumption seems to permit termination of a father’s rights for sexually assaulting the mother during her conceptive period. This interpretation conflicts, however, with the clear language of the subsection’s title and first sentence which requires that the assaultive behavior resulted in conception.

Notice and Standing Issues. See Wis. Stat. § 48.42(2m). According to this subsection, a person who under the subsection is not given notice does not have standing to appear and contest a TPR petition. This limitation on notice, and therefore standing, does not apply to a male who is under 18 years of age at the time of the sexual assault.

Dispositional Phase—No Burden of Proof. In State v. H.C., 2025 WI 20, 416 Wis. 2d 233, 21 N.W.3d 330, the Wisconsin Supreme Court held that neither the Due Process Clause nor Wis. Stat. § 48.426 imposes a burden of proof on any party at the dispositional phase of a TPR proceeding.

Indian Child Welfare Act. For a termination case involving an Indian child, see Wis JI–Children 420-424.

**371A INVOLUNTARY TERMINATION OF PARENTAL RIGHTS:
PARENTHOOD AS A RESULT OF A SEXUAL ASSAULT [WIS. STAT. §
48.415(9)] (WHERE NO JUDGMENT OF CONVICTION OR
ADJUDICATION OF DELINQUENCY EXISTS)**

Parenthood as a result of a sexual assault is a ground for termination of parental rights.

Your role as jurors will be to answer the following questions in the special verdict:

1. Did (respondent) sexually assault (child's mother)?

If the answer to question 1 is “yes,” answer question 2:

2. Did this sexual assault result in the conception of (child)?

In answering question 1, a sexual assault occurs when [describe the elements of the appropriate sexual assault statute; see the appropriate jury instruction from Wisconsin Jury Instructions-Criminal for Wis. Stat. § 940.225(1), (2), or (3); § 948.02(1) or (2); or § 948.025.]

In answering question 2, you should consider all the evidence regarding the possible time of conception. Wisconsin law allows (petitioner) to prove that (respondent) is the parent of (child) as a result of a sexual assault by proving that (respondent) sexually assaulted (child)'s mother during a time (child) could have been conceived.

[Where evidence is presented that the child weighed 5 ½ pounds or more at birth give the following: If you find that (child) weighed 5 pounds, 8 ounces or more at birth, (he) (she) is presumed to have been conceived within a time period extending from 240 to 300 days before birth. Therefore, you may find the conceptive period for (child) to have

been between the ____ day of ____, 20__, and the ____ day of ____, 20__, unless you are persuaded to the contrary by other evidence.]

SPECIAL VERDICT

1. Did (respondent) sexually assault (child's mother)?

Answer: _____

Yes or No

If the answer to question 1 is “yes,” answer question 2:

2. Did this sexual assault result in the conception of (child)?

Answer: _____

Yes or No

COMMENT

Wis JI-Children 371.1 and comment were approved in 2001. The instruction was renumbered in 2005. An editorial correction was made to paragraph 4 of the instruction in 2005. The comment was revised in 2007 and 2011. This revision was approved by the Committee in May 2026. It amended the comment to reflect the opinion in State v. H.C., 2025 WI 20.

Wis. Stat. § 48.415(9m) reads:

48.415. Grounds for involuntary termination of parental rights. At the fact-finding hearing the court or jury may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following:

(9) PARENTHOOD AS A RESULT OF SEXUAL ASSAULT. (a) Parenthood as a result of sexual assault, which shall be established by proving that the child was conceived as a result of sexual assault in violation of s. 940.225(1), (2) or (3), 948.02 (1) or (2), 948.025 or 948.085. Conception as a result of sexual assault as specified in this paragraph may be proved by a final judgment of conviction or other evidence

produced at a fact-finding hearing under § 48.424 indicating that the person who may be the father of the child committed, during a possible time of conception, a sexual assault as specified in this paragraph against the mother of the child.

[Note: Wis. Stat. § 940.225(1), (2), and (3) apply to sexual assaults; Wis. Stat. § 948.02(1) and (2) apply to a sexual assault of a child; and Wis. Stat. § 948.025 applies to repeated acts of sexual assault to a child.]

Conceptive Period. The bracketed paragraph is adapted from Wis JI–Civil 5001 (paternity) and Wis. Stat. § 891.395 which establishes a presumption as to the conceptive period. According to the presumption, there is a 60-day period of conception if the child’s birth weight is 5 ½ pounds or more. A court may limit the period of conception to less than 60 days when a child is full term and competent evidence of a conceptive period contrary to the 60-day period is presented. See State ex rel. J.A.S. v. M.E.S., 142 Wis. 2d 300, 418 N.W.2d 32 (Ct. App. 1987) (a paternity proceeding).

Use of This Instruction. For commentary on using this instruction, see Wis JI–Children 371. In cases where no judgment of conviction or delinquency adjudication exists, the petitioner must establish that a sexual assault in violation of specific sections of the criminal code occurred. In such cases, the instruction needs to be tailored to the specific statutory ground. The Committee recommends using the appropriate sexual assault instructions from Wisconsin Jury Instructions–Criminal to explain the elements of the crime of sexual assault.

Notice and Standing Issues. See Wis. Stat. § 48.42(2m). According to this subsection, a person who under the subsection is not given notice does not have standing to appear and contest a TPR petition. This limitation on notice, and therefore standing, does not apply to a male who is under 18 years of age at the time of the sexual assault.

Dispositional Phase—No Burden of Proof. In State v. H.C., 2025 WI 20, 416 Wis. 2d 233, 21 N.W.3d 330, the Wisconsin Supreme Court held that neither the Due Process Clause nor Wis. Stat. § 48.426 imposes a burden of proof on any party at the dispositional phase of a TPR proceeding.

Indian Child Welfare Act. For a termination case involving an Indian child, see Wis JI–Children 420-424.

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WIS JI-CHILDREN

Wis JI-Children

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