

Chapter Three Grounds for Termination of Parental Rights

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Chapter Three

GROUNDS FOR TERMINATION

Introductory Note

This Chapter provides jury instructions for the grounds for termination of parental rights found in 10 O.S. 2001 § 7006-1.1. The jury instructions are listed in the same order as the grounds for termination are found in the statute. The trial judge should select the appropriate jury instructions based on the allegations of the petition and the evidence presented at the termination hearing.

All of these instructions include the following two elements: 1) the child has been adjudicated to be deprived, and 2) termination of parental rights is in the best interests of the child.

The requirement that the child has been adjudicated to be deprived is included because of *A.E. v. State*, 1987 OK 76, ¶ 5, 743 P.2d 1041, 1043, where the Oklahoma Supreme Court held: “Any termination of parental rights pursuant to 10 O.S. 1981 § 1130 requires either a prior or a simultaneous adjudication of a child's deprived status; further, the prior adjudication must precede termination.” The Oklahoma Supreme Court distinguished *A.E. v. State* in *Matter of R.J.W.*, 1990 OK 23, ¶ 9, 789 P.2d 233, 235, where it ruled that a prior adjudication is not required for those grounds for termination that do not expressly include a prior adjudication as an element for termination of parental rights. The legislative history of the termination statute since the *R.J.W.* case indicates, however, that the Legislature's failure to include a deprived adjudication within each subdivision of the termination statute was not intended to obviate the general requirement of a prior or simultaneous adjudication. In 1986, a provision was added to the termination of parental rights statute (10 O.S. Supp. 1986, § 1130(D)) that permitted a parent or guardian of a child to petition the court for termination in certain instances without a prior finding by the court that the child was deprived. That provision was replaced in 1998, however, with a provision that “this section shall not apply to adoption proceedings and actions to terminate parental rights which do not involve a petition for deprived status of the child.” 10 O.S. 2001, § 7006-1.1(C). In addition, in 2000, a subparagraph was added that provides: “A petition for termination of parental rights may be filed by the district attorney or the attorney of a child alleged to be or adjudicated deprived.” 10 O.S. 2001, § 7006-1.1(D)(1). As a result of these amendments to the termination statute concerning the requirement for a deprived petition, the *A.E. v. State* case is once again controlling, and every ground for termination of parental rights should include a requirement for a prior or simultaneous adjudication of deprived status.

The requirement that termination of parental rights must be in the best interests of the child is included because of the preamble in 10 O.S. 2001, § 7006-1.1(A), which states “the paramount consideration in proceedings concerning termination of parental rights shall be the health, safety or welfare and best interests of the child.” The Committee further notes that the child's best interests is a separate consideration from parental harm or unfitness and that termination of parental rights cannot occur merely because it may be in a child's best interests. *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-863 (1977) (Stewart, J., concurring in judgment); *Matter of Baby Girl L.*, 2002 OK 9, ¶ 22, 51 P.3d 544, 555 (“Our cases make it clear that the parent is entitled to custody unless found to be unfit.... Natural parents will not be deprived of custody simply because another family might be able to provide more amenities and opportunities for the child.”) (quoting *Matter of Guardianship of M.R.S.*, 1998 OK 38, ¶ 21, 960 P.2d 357, 363).

Juvenile Instruction No. 3.1

Abandonment

The State seeks to terminate the parent's rights on the basis of abandonment. In order to terminate the parental rights on the basis of abandonment, the State must prove by clear and convincing evidence that:

1. The child has been adjudicated to be deprived;
2. Termination of parental rights is in the best interests of the child; and
3. [The parent has left the child alone or in the care of another who is not the parent of the child without identifying the child or furnishing a means of identification for the child;

the whereabouts of the parents are unknown; and

the child's identity cannot be ascertained by the exercise of reasonable diligence.]

OR

3. [The parent has voluntarily left the child alone or in the care of another who is not the parent of the child; and the parent expressed a willful intent by words, actions, or omissions not to return for the child.]

OR

3. [The parent has failed to establish and/or maintain a substantial and positive relationship with the child, despite an opportunity to do so, for a period of six (6) consecutive months out of the last fourteen (14) months immediately preceding the filing of a petition for termination of parental rights. The term "establish and/or maintain a substantial and positive relationship" includes, but is not limited to:

(1) frequent and regular contact with the child through frequent and regular visitation and/or frequent and regular communication to or with the child, and

(2) the exercise of parental rights and responsibilities.

Incidental or token visits or communications shall not be sufficient to establish and/or maintain a substantial and positive relationship with the child .]

Statutory Authority: 10 O.S. 2001, § 7006-1.1(A)(2)(c)(1-2).

Notes on Use

The trial judge should select the particular definition or definitions for abandonment that are supported by the evidence. The provisions of 10 O.S. 2001, §7006-1.1 (A)(2) use the term “child,” which is defined in 10 O.S. Supp. 2004, §7001-1.3.(A)(4) as “any person” under the age of eighteen. Because an infant under the age of twenty four months is a “child,” the provisions of 10 O.S. 2001, §7006-1.1 (A) (2) would also apply to children who come within the definition of “abandoned infant” in 10 O.S. Supp. 2004, §7001-1.3.(A)(1).

Committee Comments

Intent is ordinarily an element of abandonment. *Matter of James H.*, 1978 OK CIV APP 28, ¶ 6, 593 P.2d 1095, 1097 (the term abandonment “as used in the juvenile code also should be deemed to require a willful failure or neglect and not mere failure due to inability.”); *In the Matter of the Adoption of O.L.P.*, 2002 OK CIV APP 17, ¶ 17, 41 P.3d 999, 1002 (the question of abandonment “must necessarily include some inquiry into the natural parent's subjective intent, manifested by objective conduct, to exercise the duties and obligations of a parent.”). The Committee notes that the definition of abandonment in 10 O.S. 2001, §7006-1.1 (A)(2)(c) does not contain an element of intent and that there are situations where a parent may have been denied the opportunity to develop a relationship with his/her child. *See In re Swanson*, 2 S.W. 3d 180, 182-83 (Tenn. 1999) (mother prevented father from maintaining relationship with child). In order to avoid potential constitutional issues regarding conclusive presumptions in those types of situations, this instruction requires the parent to have had an opportunity to develop a relationship.

Juvenile Instruction No. 3.2**Abandoned Infant**

The State seeks to terminate the parent's rights on the basis that the child is an abandoned infant. In order to terminate the parental rights on the basis that the child is an abandoned infant, the State must prove by clear and convincing evidence that:

1. The child has been adjudicated to be deprived;
2. Termination of parental rights is in the best interests of the child; and
3. [The child was twenty-four (24) months of age or younger; and the parent:

[willfully left the child alone or in the care of another who is not the parent of the child without identifying the child or furnishing any means or methods of identification.]

OR

[willfully left the child alone or in the care of another who is not the parent of the child and expressed a willful intent by words, actions, or omissions not to return for the child.]

OR

[knowingly placed or knowingly allowed the child to be placed in or remain in conditions or surroundings that posed or constituted a serious danger to the health and safety of the child thereby demonstrating wanton disregard for the child's well-being.

Serious danger to the health and safety means that without the intervention of another person or agency, a child would likely or in all probability sustain severe or permanent disability or injury, illness, or death.]

OR

[has not established and/or maintained a substantial and positive relationship with the child, despite being given the opportunity to do so, during the six (6) months immediately prior to out-of-home placement or the six (6) continuous months while in out-of-home placement, and has not made meaningful efforts to gain or regain custody of the child, despite being given the opportunity to do so. "Establish and/or maintain a substantial and positive relationship" includes but is not limited to:

- (1) frequent and regular contact with the child through frequent and regular visitation or frequent and regular communication to or with the child, and
- (2) the exercise of parental rights and responsibilities.

Incidental or token visits, communications or contributions shall not be sufficient to establish and/or maintain a substantial and positive relationship with the child.]

OR

3. [The child was less than ninety (90) days of age and the parent is a father, or a putative father if the infant was born out of wedlock, who despite having the opportunity to do has not exercised proper parental rights and responsibilities with regard to the child, including, but not limited to, contributing to the support of the mother of the child to the extent of the father's financial ability during the mother's term of pregnancy.].

Statutory Authority: 10 O.S. Supp. 2004, §§ 7001-1.3(A)(1), (49); 10 O.S. 2001, § 7006-1.1(A)(2).

Notes on Use

This Instruction should be used if the child was twenty-four months old or younger at the time of the filing of the petition. The trial judge should select the particular ground or grounds for finding that the child is an abandoned infant that are supported by the evidence.

Committee Comments

The provisions in 10 O.S. Supp. 2004, § 7001-1.3(A)(1)(d)(2) and (3) for infants between 90 days and 14 months and between 14 and 24 months are not included in this instruction because of the Committee's concern that those provisions may violate the equal protection clause of the Fourteenth Amendment because they distinguish between fathers and mothers with respect to contributing to the support of the infant. *See Caban v. Mohammed*, 441 U.S. 380, 394 (1979) (gender-based distinction regarding need for parental consent to adoption violated the equal protection clause). In addition, the Committee notes that the statutory language, which places the burden of persuasion on the parent, is contrary to *Santosky v Kramer*, 455 U.S. 745 (1982), and therefore the language in the instruction has been modified accordingly. Finally, the statutory language in 10 O.S. Supp. 2004, § 7001-1.3(A)(1)(e) has been modified in this instruction to provide that the father must have had an opportunity to develop a relationship not only after a child has been placed in custody, but also before the child was placed in custody, in order to avoid constitutional issues regarding conclusive presumptions. *See In re Swanson*, 2 S.W.3d 180, 188 (Tenn. 1999) (holding that a portion of a termination of parental statute was unconstitutional because it created an irrebuttable presumption that a failure to provide support for four months was abandonment, regardless of whether the failure was intentional).

Juvenile Instruction No. 3.3

Noncompliance With Placement Agreement

The State seeks to terminate the parent's rights on the basis that the parent has not complied with a placement agreement. In order to terminate parental rights on the basis that the parent has not complied with a placement agreement, the State must prove by clear and convincing evidence that:

1. The child has been adjudicated to be deprived;
2. The parent voluntarily placed physical custody of the child with the Department of

-
- Human Services or with a child-placing agency for out-of-home placements;
3. The parent has not complied with the placement agreement;
 4. The parent has not demonstrated during the placement period a firm intention to resume physical custody of the child or to make permanent legal arrangements for the care of the child;
 5. Allowing the parent to have custody of the child would result in actual or potential harm to the child; and
 6. Termination of parental rights is in the best interests of the child.

Statutory Authority: 10 O.S. 2001, § 7006-1.1(A)(4).

Committee Comments

The fifth element has been included because of the Committee's concern that 10 O.S. 2001, § 7006-1.1(A)(4) does not on its face require proof of harm or parental unfitness, which is required as a prerequisite for termination of parental rights under both the Oklahoma and United States Constitutions as well as prior Oklahoma case law. In *Matter of Sherol A.S.*, 1978 OK 103, ¶ 22, 581 P.2d 884, 888, the Oklahoma Supreme Court declared:

The purpose of termination is to protect children from HARM suffered by reason of either neglect or the intentional actions of their parents. There is no authority in our Juvenile Code which allows the State to interfere with family relationships where harm to children is not involved. This is, of course, a notion of constitutional dimension. The fundamental integrity of the family unit, which has found protection in the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Ninth Amendment, is subject to intrusion and dismemberment by the State only where a "compelling"

State interest arises and protecting the child from harm is the requisite State interest.

See also Matter of S.T.G., 1991 OK 11, ¶ 10, 806 P.2d 636, 639 (“[w]e have held that in case of involuntary termination the fundamental integrity of the family unit is subject to intrusion and dismemberment by the State only where a ‘compelling’ State interest arises and protecting the child from harm is the requisite State interest.”); *In re K.C.*, 2002 OK CIV APP 58, ¶ 20, 46 P.3d 1289, 1294 (reversing termination order because the State did not clearly and convincingly show that the parent posed a harm to the children or that termination was in the children's best interests).

Juvenile Instruction No. 3.4

Failure to Correct Conditions

The State seeks to terminate the parent's rights on the basis of failure to correct the **condition/conditions** that led to the finding that a child is deprived. In order to terminate parental rights on this basis, the State must prove by clear and convincing evidence each of the following elements:

1. The child has been adjudicated to be deprived;
2. The acts or omissions of the parent caused or contributed to the **condition/conditions** that caused the child to be deprived;
3. The parent has failed to correct the **condition/conditions** that caused the child to be deprived;
4. The parent has had at least three months to correct the **condition/conditions**; and,

5. Termination of parental rights is in the best interests of the child.

Statutory Authority: 10 O.S. 2001, § 7006-1.1(A)(5).

Notes on Use

The trial judge should give Juvenile Instruction No. 3.5, *infra*, along with this Instruction.

Committee Comments

The United States Supreme Court held in *Santosky v. Kramer*, 455 U.S. 745, 769-70 (1982), that the clear and convincing evidence standard is required by the Due Process Clause of the Fourteenth Amendment for termination of parental rights. *See also In the Matter of S.B.C.*, 2002 OK 83, ¶ 5, 64 P.3d 1080, 1082 (“before a state may sever the rights of parents in their natural child, the state must support its allegations at trial *by at least clear and convincing evidence*”) (emphasis in original); *Matter of C.G.*, 1981 OK 31, ¶ 17, 637 P.2d 66, 71 (“the termination seeking claimant must prove by clear and convincing evidence parental potential for harm to the child by abuse or neglect”). The United States Supreme Court decided in the *Santosky* case that a clear and convincing evidence standard was constitutionally required because the government's interest in a preponderance standard was less than the interests of the parent and child in a higher standard and because the risk of error from using a preponderance standard was substantial. 455 U.S. at 758.

One of the grounds for termination of parental rights found in 10 O.S. 2001, § 7006-1.1(A)(5) is that “the parent has failed to show that the condition which led to the adjudication of a child deprived has been corrected.” The Oklahoma Court of Civil Appeals has stated in dicta that this provision causes the burden of proof to be shifted to the parent to show conditions have changed and been corrected since the deprived child adjudication. *In the Matter of T.M.*, 2003 OK CIV APP 1, ¶ 7, 62 P.3d 802, 804; *In the Matter of J.M.*, 1993 OK CIV APP 121, ¶ 4, 858 P.2d 118, 120. In addition, prior to the *Santosky* decision, the Oklahoma Supreme Court ruled in *In the Matter of Christopher H.*, 1978 OK 50, ¶ 8, 577 P.2d 1292, 1293, that: “after a child is adjudicated within the purview of the juvenile statutes and conditions are proven to be serious enough to warrant § 1130 sanctions, the parent has the

burden of coming forward with evidence to show conditions have been changed.”

The Committee believes that interpreting 10 O.S. 2001, § 7006-1.1(A)(5) to place the burden of persuasion on the parent would raise constitutional issues for the reasons that the United States Supreme Court articulated in *Santosky*. See 455 U.S. at 758-69. Furthermore, the Committee notes that *In the Matter of T.M.*, 2003 OK CIV APP 1, ¶ 16, 62 P.3d 802, 806, the Oklahoma Court of Civil Appeals applied a clear and convincing evidence standard of appellate review with respect to the trial court's findings that the parent failed to correct the conditions that led to the deprived child adjudication.

Accordingly, this Instruction requires the State to prove that the parent failed to correct the conditions that led to the deprived child adjudication by clear and convincing evidence.

Juvenile Instruction No. 3.5

Failure to Correct Conditions – The Treatment Plan

In order for you to find that there has been a failure to correct the **condition/conditions** which caused a child to be found deprived, you must find that the Court placed the parent on notice of the **condition/conditions** to be corrected by means of a service plan or treatment plan.

A “service plan” or “treatment plan “ provides a list of activities or standards of conduct that are designed to assist the parent to correct the **condition/conditions** that caused a child to be deprived.

In order to terminate parental rights, you must find by clear and convincing evidence that the **condition/conditions** which caused the child to be deprived **has/have** not been corrected. Failure to complete a treatment plan alone is not a basis to terminate parental rights, but it is evidence that the jury may consider in determining whether the **condition/conditions has/have** been corrected.

Statutory Authority: 10 O.S. 2001, § 7003-5.3.

Committee Comments

The Oklahoma Supreme Court has ruled that due process requires a parent to be given notice of the standards that the parent must satisfy to avoid termination of parental rights so that the parent will have an opportunity to rectify past parental abuse or neglect. *Matter of A.D.B.*, 1991 OK 96, ¶ 15, 818 P.2d 483, 489; *Matter of C.G.*, 1981 OK 31, ¶ 9, 637 P.2d 66, 68-69; *In re T.H.L.*, 1981 OK 103, ¶ 11, 636 P.2d 330, 333. The treatment plan required by 10 O.S. 2001, § 7703-5.3 provides the notice to the parent of the standards that the parent must conform to.

Juvenile Instruction No. 3.6

Previous Termination of Rights to Another Child

The State seeks to terminate the parent's rights on the basis that a child has been born to a parent whose parental rights to another child have already been terminated before. In order to terminate parental rights on this basis, the State must prove by clear and convincing evidence each of the following elements:

1. The child has been adjudicated to be deprived;
2. The parent's parental rights to another child have been terminated before;
3. The condition which led to the finding that resulted in the termination of parental rights to the other child has not been corrected; and,
4. Termination of parental rights is in the best interests of the child.

Statutory Authority: 10 O.S. 2001, § 7006-1.1(A)(6).

Juvenile Instruction No. 3.7

Failure to Contribute to Support of Child

The State seeks to terminate the parent's rights on the basis that the parent has willfully failed, refused or neglected to contribute to the support of a child. In order to terminate parental rights on the basis that the parent has willfully failed, refused or neglected to contribute to the support of a child, the State must prove by clear and convincing evidence each of the following elements:

1. The child has been adjudicated to be deprived;
2. The parent did not have custody of the child;
3. The parent has willfully failed, refused or neglected to contribute to the support of the child for twelve (12) consecutive months out of the last fourteen (14) months immediately preceding the filing of a petition for termination of parental rights in substantial compliance with a court order of support; or, if no provision for support is provided in an order, according to the parent's financial ability to contribute to the child's support; and,
4. Termination of parental rights is in the best interests of the child.

Statutory Authority: 10 O.S. 2001, § 7006-1.1(A)(7).

Juvenile Instruction No. 3.8

Conviction for Certain Crimes

The State seeks to terminate the parent's rights on the basis of a conviction for **[Specify One or More of the Following Crimes in 10 O.S. 2001, § 7006-1.1(8) or (9)]**:

[permitting a child to participate in pornography]

[rape]

[lewd molestation of a child under sixteen years of age]

[child abuse or neglect]

[enabling child abuse or neglect]

[causing the death of a child as a result of the physical or sexual abuse or chronic abuse or chronic neglect of the child]

[causing the death of a sibling of the child as a result of the physical or sexual abuse or chronic abuse or chronic neglect of the child's sibling]

[committing murder of any child or aiding or abetting, attempting, conspiring or soliciting to commit murder of any child]

[committing voluntary manslaughter of another child of the parent, or aiding or

abetting, attempting, conspiring or soliciting to commit voluntary manslaughter of another child of the parent]

[committing a felony assault that has resulted in serious bodily injury to the child or another child of the parent]

In order to terminate parental rights on the basis of a conviction for [**Specify Crime in 10 O.S. 2001, § 7006-1.1(8) or (9)**], the State must prove by clear and convincing evidence that:

1. The child has been adjudicated to be deprived;
2. The parent has been convicted in a criminal action for [**Specify Crime in 10 O.S. 2001, § 7006-1.1(8) or (9)**]; and,
3. Termination of parental rights is in the best interests of the child.

Statutory Authority: 10 O.S. 2001, § 7006-1.1(A)(8), (9).

Committee Comments

The first five crimes in this instruction are designated in 10 O.S. 2001, § 7006-1.1(A)(8) by reference to the following Oklahoma Statutes: 21 O.S. 2001, §§ 1021.3 (permitting a child to participate in pornography), 1111 (rape), 1123 (lewd molestation of a child under sixteen years of age), 10 O.S. Supp. 2004, § 7115 (child abuse or neglect and enabling child abuse or neglect). The other crimes are designated in 10 O.S. 2001, § 7006-1.1(A)(9) by name, rather than by reference to an Oklahoma statute.

Although voluntary manslaughter is listed in 10 O.S. 2001, § 7006-1.1(A) (9) as a basis for termination of parental rights, the distinction between voluntary and involuntary manslaughter found in the federal statutes is not recognized in the Oklahoma criminal law statutes. *Compare* 18 U.S.C.A § 1112 (2000) *with* 21 O.S. 2001, §§ 711 (first degree manslaughter), 716 (second degree manslaughter). The

federal statute, 18 U.S.C.A § 1112 (2000), defines voluntary manslaughter as “the unlawful killing of a human being without malice ... [u]pon a sudden quarrel or heat of passion.” This definition is similar to one type of first degree manslaughter found in 21 O.S. 2001, § 711(2) (first degree manslaughter is homicide “perpetrated without a design to effect death, and in a heat of passion”). If the State seeks termination of parental rights on the basis of a manslaughter conviction, the trial court should ascertain whether the manslaughter conviction corresponds to a voluntary manslaughter conviction under the federal statute.

Juvenile Instruction No. 3.9

Heinous or Shocking Physical or Sexual Abuse

The State seeks to terminate the parent's rights on the basis of the parent's heinous or shocking physical or sexual abuse of **(the child)/(a sibling of the child)**. In order to terminate parental rights on the basis of the parent's heinous or shocking physical or sexual abuse of **(the child)/(a sibling of the child)**, the State must prove by clear and convincing evidence that:

1. The child has been adjudicated deprived;
2. The parent has physically or sexually abused **(the child)/(a sibling of the child)**;
3. The abuse was heinous or shocking; and,
4. Termination of parental rights is in the best interests of the child.

“Abuse” means harm or threatened harm to a child's health, safety or welfare.

“Sexual abuse” includes, but is not limited to, rape, incest and lewd or indecent acts or proposals made to a child, as defined by law.

“Heinous or shocking” means extremely wicked or shockingly evil, or designed to inflict a high degree of pain; or, utter indifference to or enjoyment of the suffering of others.

Statutory Authority: 10 O.S. 2001, § 7006-1.1(A)(10)(a); 10 O.S. Supp. 2004, § 7102(B)(1), (6).

Committee Comments

Termination of parental rights is authorized under 10 O.S. 2001, § 7006-1.1(A)(10)(a) on account of a finding in a deprived child action that “the parent has physically or sexually abused the child or a sibling of such child or failed to protect the child or a sibling of such child from physical or sexual abuse that is heinous or shocking to the court.” The Committee has concluded that the requirement that the physical or sexual abuse must be heinous or shocking applies both to a parent who physically or sexually abused a child and to a parent who failed to protect a child from physical or sexual abuse. Otherwise, the provision for termination of parental rights in 10 O.S. 2001, § 7006-1.1(A)(10)(d) for physical or sexual abuse subsequent to a previous finding of physical or sexual abuse would be surplusage.

The definitions of “abuse” and “sexual abuse” are taken from 10 O.S. Supp. 2004, § 7102(B)(1) (abuse) and (6) (sexual abuse). The definition of heinous or shocking is based on the definitions of heinous, atrocious and cruel in OUJI-CR 4-73.

For examples of heinous or shocking abuse, see *Matter of S.T.G.*, 1991 OK 11, ¶ 11, 806 P.2d 636, 639 (starvation of an infant); *Matter of T.R.W.*, 1985 OK 99, ¶ 30 & n.15, 722 P.2d 1197, 1203 (medical testimony showed child suffered subarachnoid brain hemorrhages, general brain dysfunction, bruising over much of his body, and retinal hemorrhaging, all associated with trauma); *In re M.B.*, 2000 OK CIV APP 56, ¶ 6, 6 P.3d 1072, 1074 (mother placed urine in child's intravenous feeding bag, but nurse removed bag from child before child was injured).

Juvenile Instruction No. 3.10

Failure to Protect Child From Heinous or Shocking Abuse

The State seeks to terminate the parent's rights on the basis of the parent's failure to protect **(the child)/(a sibling of the child)** from heinous or shocking abuse. In order to terminate parental rights on the basis of the parent's failure to protect **(the child)/(a sibling of the child)** from heinous or shocking abuse, the State must prove by clear and convincing evidence that:

1. The child has been adjudicated deprived;
2. The parent knew or reasonably should have known of physical or sexual abuse to **(the child)/(a sibling of the child)**;
3. The physical or sexual abuse was heinous or shocking;
4. The parent failed to protect **(the child)/(a sibling of the child)** from the heinous or shocking physical or sexual abuse; and,
5. Termination of parental rights is in the best interests of the child.

“Abuse” means harm or threatened harm to a child's health, safety or welfare.

“Sexual abuse” includes, but is not limited to, rape, incest and lewd or indecent acts or proposals made to a child, as defined by law.

“Heinous or shocking” means extremely wicked or shockingly evil, or designed to inflict a high degree of pain; or, utter indifference to or enjoyment of the suffering of others.

Statutory Authority: 10 O.S. 2001, § 7006-1.1(A)(10)(a); 10 O.S. Supp. 2004, § 7102(B)(1), (6).

Committee Comments

The second element is based on *Matter of L.C.*, 1998 OK CIV APP 96, ¶ 15, 969 P.2d 29, 33, where the Oklahoma Court of Civil Appeals held that there must be clear and convincing evidence that the parent had notice of the abuse and failed to protect the child.

The definitions of abuse and sexual abuse are based on 10 O.S. Supp. 2004, § 7102(B)(1),(6), except that the Committee has deleted the limitation that the abuse or sexual abuse was committed by a person responsible for the child's health, safety or welfare. Section 7102 is in the Oklahoma Child Abuse Reporting Act, rather than the Oklahoma Children's Code, and therefore the definitions of abuse and sexual abuse may not be applicable to termination of parental rights. The Committee believes that in order to accommodate the provisions of 10 O.S. 2001, § 7006-1.1(A)(10), failure to protect, abuse and sexual abuse should be defined broadly to include conduct by persons other than those who are responsible for the child's health, safety or welfare. In addition, the Committee believes that the definitions utilized in this instruction reflect the views held by the courts and attorneys in Oklahoma. *Cf. Bales v. State ex. Rel. Dept. of Human Services*, 1999 OK CIV APP 96, ¶ 2, 990 P.2d 309, 310 (failure of mother to protect child from a child molester was ground for adjudication of deprived status).

Juvenile Instruction No. 3.11

Severe Harm or Injury As a Result of Physical or Sexual Abuse

The State seeks to terminate the parent's rights on the basis of the parent's causing **(the child)/(a sibling of the child)** to suffer severe harm or injury as a result of the parent's physical or sexual abuse. In order to terminate parental rights on the basis of the parent's causing **(the child)/(a sibling of the child)** to suffer severe harm or injury as a result of the parent's physical or sexual abuse, the State must prove by clear and convincing evidence that:

1. The child has been adjudicated deprived;
2. The parent physically or sexually abused **(the child)/(a sibling of the child)**;
3. **(The child)/(A sibling of the child)** suffered severe harm or injury as a result of the physical or sexual abuse; and,
4. Termination of parental rights is in the best interests of the child.

“Abuse” means harm or threatened harm to a child's health, safety or welfare.

“Sexual abuse” includes, but is not limited to, rape, incest and lewd or indecent acts or proposals made to a child, as defined by law,.

Statutory Authority: 10 O.S. 2001, § 7006-1.1(A)(10)(b); 10 O.S. Supp. 2004, § 7102(B)(1), (6).

Committee Comments

The Committee has concluded that 10 O.S. 2001, § 7006-1.1(A)(10)(b) provides an alternative ground for termination of parental rights if the child suffers severe harm or injury as a result of the parent's physical or sexual abuse. In contrast to termination of parental rights under 10 O.S. 2001, § 7006-1.1(A)(10)(a), the physical or sexual abuse need not be heinous or shocking for termination of parental rights to be authorized under 10 O.S. 2001, § 7006-1.1(A)(10)(b).

Juvenile Instruction No. 3.12

Failure to Protect Child From Severe Harm or Injury As a Result of Physical or Sexual Abuse

The State seeks to terminate the parent's rights on the basis of the parent's failure to protect **(the child)/(a sibling of the child)** from severe harm or injury as a result of physical or sexual abuse. In order to terminate parental rights on the basis of the parent's failure to protect **(the child)/(a sibling of the child)** from severe harm or injury as a result of physical or sexual abuse, the State must prove by clear and convincing evidence that:

1. The child has been adjudicated deprived;
2. The parent knew or reasonably should have known of severe harm or injury to **(the child)/(a sibling of the child)** as a result of physical or sexual abuse;
3. The parent failed to protect **(the child)/(a sibling of the child)** from the severe harm or injury; and,
4. Termination of parental rights is in the best interests of the child.

“Abuse” means harm or threatened harm to a child's health, safety or welfare.

“Sexual abuse” includes, but is not limited to, rape, incest and lewd or indecent acts or proposals made to a child, as defined by law.

Statutory Authority: 10 O.S. 2001, § 7006-1.1(A)(10) (b); 10 O.S. Supp. 2004, § 7102(B)(1), (6).

Committee Comments

The second element is based on *Matter of L.C.*, 1998 OK CIV APP 96, ¶ 15, 969 P.2d 29, 33, where the Oklahoma Court of Civil Appeals held that there must be clear and convincing evidence that the parent had notice of the abuse and failed to

protect the child.

The definitions of abuse and sexual abuse are based on 10 O.S. Supp. 2004, § 7102(B)(1),(6), except that the Committee has deleted the limitation that the abuse or sexual abuse was committed by a person responsible for the child's health, safety or welfare. Section 7102 is in the Oklahoma Child Abuse Reporting Act, rather than the Oklahoma Children's Code, and therefore the definitions of abuse and sexual abuse may not be applicable to termination of parental rights. The Committee believes that in order to accommodate the provisions of 10 O.S. 2001, § 7006-1.1(A)(10), failure to protect, abuse and sexual abuse should be defined broadly to include conduct by persons other than those who are responsible for the child's health, safety or welfare. In addition, the Committee believes that the definitions utilized in this instruction reflect the views held by the courts and attorneys in Oklahoma. *Cf. Bales v. State ex. Rel. Dept. of Human Services*, 1999 OK CIV APP 96, ¶ 2, 990 P.2d 309, 310 (failure of mother to protect child from a child molester was ground for adjudication of deprived status).

Juvenile Instruction No. 3.13

Abuse Subsequent to Previous Adjudication

The State seeks to terminate the parent's rights on the basis of abuse subsequent to a previous adjudication of **(the child)/(a sibling of the child)** as a deprived child. In order to terminate parental rights on the basis of abuse or neglect subsequent to a previous adjudication, the State must prove by clear and convincing evidence each of the following elements:

1. The child has been adjudicated to be deprived;
2. There has been a previous finding by a court that the parent has physically or sexually abused **(the child)/(a sibling of the child)** or failed to protect **(the child)/(a sibling of the child)** from physical or sexual abuse;

3. After the previous finding of physical or sexual abuse, the parent has physically or sexually abused **(the child)/(a sibling of the child)** or failed to protect **(the child)/(a sibling of the child)** from physical or sexual abuse; and,
4. Termination of parental rights is in the best interests of the child.

Statutory Authority: 10 O.S. 2001, § 7006-1.1(A)(10)(c).

Juvenile Instruction No. 3.14

Severe Abuse or Neglect

The State seeks to terminate the parent's rights on the basis of severe abuse or neglect to **(the child)/(a sibling of the child)/(another child within the household where the child resides)**. In order to terminate parental rights on the basis of severe abuse or neglect to **(the child)/(a sibling of the child)/(another child within the household where the child resides)**, the State must prove by clear and convincing evidence that:

1. The child has been adjudicated to be deprived;
2. As a result of even a single incident
 - a) of severe sexual abuse, severe neglect or the infliction of serious bodily injury or torture by the parent

b) to **(the child)/(a sibling of the child)/(another child within the household where the child resides)**; and,

3. Termination of parental rights is in the best interests of the child.

“Serious bodily injury” means a bodily injury that involves:

- 1) substantial risk of death,
- 2) extreme physical pain,
- 3) protracted and obvious disfigurement, or
- 4) protracted loss or impairment of the function of a bodily member, organ or mental faculty.

“Torture” means inflicting:

- 1) intense emotional or psychological anguish to or suffering by the child, or
- 2) physical pain for the purpose of coercing or terrorizing the child.

Statutory Authority: 10 O.S. 2001, §§ 7006-1.1(A)(10)(d); 7001-1.3(A)(48) (definition of serious bodily injury); 7001-1.3(A)(54) (definition of torture).

Juvenile Instruction No. 3.15**Chronic Abuse or Neglect**

The State seeks to terminate the parent's rights on the basis of chronic abuse or neglect to **(the child)/(a sibling of the child)/(another child within the household where the child resides)**. In order to terminate parental rights on the basis of chronic abuse or neglect to **(the child)/(a sibling of the child)/(another child within the household where the child resides)**, the State must prove by clear and convincing evidence that:

1. The child has been adjudicated to be deprived;
2. The parent has inflicted chronic abuse, chronic neglect, or torture on **(the child)/(a sibling of the child)/(another child within the household where the child resides)**; and,
3. Termination of parental rights is in the best interests of the child.

“Chronic abuse or chronic neglect” is a pattern of physical or sexual abuse or neglect that is repeated or continuing.

Statutory Authority: 10 O.S. 2001, §§ 7006-1.1(A)(10)(e), 7001-1.3(A)(8) (definition of chronic abuse or chronic neglect).

Juvenile Instruction No. 3.16**Child Conceived As a Result of Rape**

The State seeks to terminate the parent's rights on the basis that the child was conceived as a result of rape. In order to terminate parental rights on the basis that the child was conceived as a result of rape, the State must prove by clear and convincing evidence that:

1. The child has been adjudicated to be deprived;
2. The child was conceived as a result of a rape committed by the parent;
3. The child has been placed out of the home; and,
4. Termination of parental rights is in the best interests of the child.

Rape is an act of sexual intercourse under the following circumstances: [**Specify Grounds for Rape in 21 O.S. 2001, § 1111**].

Statutory Authority: 10 O.S. 2001, § 7006-1.1(A)(11).

Juvenile Instruction No. 3.17**Incarceration of Parent**

The State seeks to terminate the parent's rights on the basis that the parent has been incarcerated. In order to terminate the parental rights on the basis that the parent has been incarcerated, the State must prove by clear and convincing evidence that:

1. The child has been adjudicated deprived;
2. Custody of the child has been placed outside the home of the natural or adoptive parent, guardian or extended family member;
3. The parent has been incarcerated;
4. The continuation of parental rights would result in harm to the child; and,
5. Termination of parental rights is in the best interests of the child.

In determining whether the continuation of parental rights would result in harm to the child you may consider the following factors, among others:

1. The duration of imprisonment and its detrimental effect on the parent/child relationship;
2. Any previous imprisonments;
3. Any history of criminal behavior, including crimes against children;
4. The age of the child;
5. The evidence of abuse or neglect of the child or siblings of the child by the parent; and

6. The current relationship between the parent and the child and the manner in which the parent has exercised parental rights and duties in the past.

The fact that a parent has been incarcerated is not, in and of itself, sufficient to deprive a parent of parental rights.

Statutory Authority: 10 O.S. 2001, § 7006-1.1(A)(12).

Juvenile Instruction No. 3.18

Mental Illness or Mental Deficiency

The State seeks to terminate the parent's rights on the basis of the parent's mental illness or mental deficiency. In order to terminate parental rights on the basis of a parent's mental illness or mental deficiency, the State must prove by clear and convincing evidence each of the following elements:

1. The child has been adjudicated deprived;
2. Custody of the child has been placed outside the home of a natural or adoptive parent, guardian or extended family member;
3. The parent has a mental illness or mental deficiency, as defined in these instructions, which renders the parent incapable of adequately and appropriately exercising parental rights, duties and responsibilities;

4. The continuation of parental rights would result in harm or threatened harm to the child;
5. The mental illness or mental deficiency of the parent is such that it will not respond to treatment, therapy or medication and, based upon competent medical opinion, the condition will not substantially improve; and,
6. Termination of parental rights is in the best interests of the child.

A finding that a person suffers from a mental illness is not in and of itself sufficient to terminate parental rights.

Statutory Authority: 10 O.S. 2001, § 7006-1.1(A)(13).

Notes on Use

The trial judge should give Juvenile Instruction No. 3.19, *infra*, along with this Instruction.

Juvenile Instruction No. 3.19

Definitions of Mental Illness and Mental Deficiency

A “mental illness” means a mental disease to such extent that a person so afflicted requires care and treatment for **his/her** own welfare, or the welfare of others, or of the community.

A “mental deficiency” means mental deficiency to such extent that a person so afflicted is

incapable of managing **himself/herself** and **his/her** affairs, but does not include a mental illness.

Statutory Authority: 43A O.S. 2001, § 6-201 Article II(f),(g) .

Juvenile Instruction No. 3.20

Parental History of Chronic Drug or Alcohol Abuse

The State seeks to terminate the parent's rights on the basis that the parent has a history of chronic drug or alcohol abuse. In order to terminate parental rights on the basis that the parent has a history of chronic drug or alcohol abuse, the State must prove by clear and convincing evidence that:

1. The child has been adjudicated to be deprived;
 2. The parent has a history of extensive, abusive and chronic use of drugs or alcohol;
 3. The parent has resisted treatment for the chronic drug or alcohol use during a three year period immediately before the filing of the petition;
 4. Allowing the parent to have custody of the child would result in actual or potential harm to the child; and,
 5. Termination of parental rights is in the best interests of the child.
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Statutory Authority: 10 O.S. 2001, § 7006-1.1(A)(14).

Committee Comments

The Oklahoma provision in 10 O.S. 2001, § 7006-1.1(A)(14) is identical to a California statute, Cal. Welf. & Inst. Code § 361.5 (West 2002), prior to the California statute's amendment in 2002 to expressly provide that the treatment must have been ordered by the court.

The Committee notes that the word “during” in the third element above and in the text of 10 O.S. 2001, § 7006-1.1(A)(14), is ambiguous. It means either “throughout the duration ... of” or “at some time or point in the course of.” The RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 608 (2nd ed. 1987). The Committee recommends defining “during” as “throughout the duration of” because this is consistent with preserving family integrity.

In interpreting an identical statute in *Karen S. v. Superior Court*, 69 Cal. App.4th 1006, 1010, 81 Cal.Rptr.2d 858, 861 (1999), the California Court of Appeal held that “resisting treatment” encompassed both active and passive behavior. It reasoned:

Thus, a parent can actively resist treatment for drug or alcohol abuse by refusing to attend a program or by declining to participate once there. The parent also can passively resist by participating in treatment but nonetheless continuing to abuse drugs or alcohol, thus demonstrating an inability to use the skills and behaviors taught in the program to maintain a sober life. In either case, a parent has demonstrated a resistance to eliminating the chronic use of drugs or alcohol which led to the need for juvenile court intervention to protect the parent's child. In other words, the parent has demonstrated that reunification services would be a fruitless attempt to protect the child because the parent's past failure to benefit from treatment indicates that future treatment also would fail to change the parent's destructive behavior.

The fourth element has been included because of the Committee's concern that 10 O.S. 2001, § 7006-1.1(A)(14) does not on its face require proof of harm or parental unfitness, which is required as a prerequisite for termination of parental rights under both the Oklahoma and United States Constitutions as well as prior Oklahoma case law. In *Matter of Sherol A.S.*, 1978 OK 103, ¶ 22, 581 P.2d 884,

888, the Oklahoma Supreme Court declared:

The purpose of termination is to protect children from HARM suffered by reason of either neglect or the intentional actions of their parents. There is no authority in our Juvenile Code which allows the State to interfere with family relationships where harm to children is not involved. This is, of course, a notion of constitutional dimension. The fundamental integrity of the family unit, which has found protection in the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Ninth Amendment, is subject to intrusion and dismemberment by the State only where a “compelling” State interest arises and protecting the child from harm is the requisite State interest.

See also Matter of S.T.G., 1991 OK 11, ¶ 10, 806 P.2d 636, 639 (“[w]e have held that in case of involuntary termination the fundamental integrity of the family unit is subject to intrusion and dismemberment by the State only where a ‘compelling’ State interest arises and protecting the child from harm is the requisite State interest.”); *In re K.C.*, 2002 OK CIV APP 58, ¶ 20, 46 P.3d 1289, 1294 (reversing termination order because the State did not clearly and convincingly show that the parent posed a harm to the children or that termination was in the children's best interests).

Juvenile Instruction No. 3.21

Child in Foster Care for Fifteen Months

The State seeks to terminate the parent's rights on the basis that the child has been in foster care for 15 months. In order to terminate parental rights on the basis that the child has been in foster care for 15 months, the State must prove by clear and convincing evidence that:

1. The child has been adjudicated to be deprived;

2. The child has been placed in foster care by the Department of Human Services for 15 months out of the most recent 22 months before the filing of the petition;
3. The parent was responsible for the child's being in foster care for 15 of the most recent 22 months;
4. Allowing the parent to have custody of the child would result in actual or potential harm to the child; and,
5. Termination of parental rights is in the best interests of the child.

A child is deemed to have entered foster care on the earlier of:

1. The date of the adjudication that the child was deprived; or,
2. Sixty days after the date the child was removed from the home.

Statutory Authority: 10 O.S. 2001, §§ 7006-1.1(A)(15), 7003-4.7(A)(1).

Committee Comments

This instruction is based on 10 O.S. 2001, §§ 7006-1.1(A)(15), which provides for termination of parental rights if “[a] child has been placed in foster care by the Department of Human Services for fifteen (15) of the most recent twenty-two (22) months preceding the filing of the petition.” The Oklahoma Court of Civil Appeals stated in *Matter of M.C.*, 1999 OK CIV APP 128, ¶ 6, 993 P.2d 137, 139, that “the plain purpose [of this provision] is to protect children from extended foster care.”

The third element in the instruction is included because of the ruling by the Oklahoma Court of Civil Appeals in *Matter of C.R.T.*, 2003 OK CIV APP 29, ¶ 33, 66 P.3d 1004, 1012, that:

In the context of extended foster care, the evidence must also

show that the parent bears the culpable responsibility for the fact that the child has been in foster care for the requisite period and that the parent is not the subject of an uncorrected condition which is by its nature beyond the parent's power to correct.

The fourth element has been included because of the Committee's concern that 10 O.S. 2001, § 7006-1.1(A)(15) does not on its face require proof of harm or parental unfitness, which is required as a prerequisite for termination of parental rights under both the Oklahoma and United States Constitutions as well as prior Oklahoma case law. In *Matter of Sherol A.S.*, 1978 OK 103, ¶ 22, 581 P.2d 884, 888, the Oklahoma Supreme Court declared:

The purpose of termination is to protect children from HARM suffered by reason of either neglect or the intentional actions of their parents. There is no authority in our Juvenile Code which allows the State to interfere with family relationships where harm to children is not involved. This is, of course, a notion of constitutional dimension. The fundamental integrity of the family unit, which has found protection in the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Ninth Amendment, is subject to intrusion and dismemberment by the State only where a "compelling" State interest arises and protecting the child from harm is the requisite State interest.

See also Matter of S.T.G., 1991 OK 11, ¶ 10, 806 P.2d 636, 639 ("[w]e have held that in case of involuntary termination the fundamental integrity of the family unit is subject to intrusion and dismemberment by the State only where a 'compelling' State interest arises and protecting the child from harm is the requisite State interest."); *In re K.C.*, 2002 OK CIV APP 58, ¶ 20, 46 P.3d 1289, 1294 (reversing termination order because the State did not clearly and convincingly show that the parent posed a harm to the children or that termination was in the children's best interests).

Juvenile Instruction No. 3.22**Definitions**

Abuse – “Abuse” means harm or threatened harm to a child's health, safety or welfare.

Statutory Authority: 10 O.S. Supp. 2004, § 7102(B)(1).

Chronic abuse or chronic neglect – “Chronic abuse or chronic neglect” is a pattern of physical or sexual abuse or neglect that is repeated or continuing.

Statutory Authority: 10 O.S. 2001, § 7001-1.3(A)(8).

Heinous or Shocking – “Heinous or shocking” means extremely wicked or shockingly evil, or designed to inflict a high degree of pain; or, utter indifference to or enjoyment of the suffering of others.

Mental Illness – A “mental illness” means a mental disease to such extent that a person so afflicted requires care and treatment for his/her own welfare, or the welfare of others, or of the community.

Statutory Authority: 43A O.S. 2001, § 6-201 Article II(f).

Mental Deficiency – A “mental deficiency” means mental deficiency to such extent that a person so afflicted is incapable of managing himself and his affairs, but does not include a mental illness.

Statutory Authority: 43A O.S. 2001, § 6-201 Article II(g).

Serious Bodily Injury – “Serious bodily injury” means a bodily injury that involves: 1)

substantial risk of death, 2) extreme physical pain, 3) protracted and obvious disfigurement, or 4) protracted loss or impairment of the function of a bodily member, organ or mental faculty.

Statutory Authority: 10 O.S. 2001, § 7001-1.3(A)(48).

Sexual abuse – “Sexual abuse” includes, but is not limited to, rape, incest and lewd or indecent acts or proposals made to a child, as defined by law.

Statutory Authority: 10 O.S. Supp. 2004, § 7102(B)(6).

Torture – “Torture” means inflicting: 1) intense emotional or psychological anguish to or suffering by the child, or 2) physical pain for the purpose of coercing or terrorizing the child.

Statutory Authority: 10 O.S. 2001, § 7001-1.3(A)(54).
