

WICWA WEBINAR SERIES: QUALIFIED EXPERT WITNESS, PLACEMENT PREFERENCE, AND BURDEN OF PROOF

Outagamie County
June 25, 2021

Introductions

Bridget Bauman
Director
Children's Court Improvement Program
Bridget.Bauman@wicourts.gov

Tania Cornelius
Tribal Affairs Specialist
Department of Children and Families
Tania.Cornelius@wisconsin.gov

Question: Which WICWA webinar series sessions have you attended?

Qualified Expert Witness

Question: Qualified expert witness (QEW) testimony is required for which finding(s)?

Serious Damage Finding

- When proving serious damage, including QEW testimony, evidence must show:
 - ▣ A causal relationship between conditions in the home AND
 - ▣ Likelihood that continued custody of the child will result in serious emotional or physical damage to this child

Information regarding the causal relationship requirement is included in the form summary for orders containing the serious damage finding.

Qualified Expert Witness Requirements

- The party seeking to place the Indian child in out-of-home care or to terminate parental rights to the Indian child **must** utilize a qualified expert witness
- Any other party **may** utilize a qualified expert witness
- Qualified expert witnesses **must** have knowledge of the Indian child's tribe's family organization and child-rearing practices

Question: Is QEW testimony required for an out-of-home consent decree?

Qualified Expert Witness Order of Preference

- In descending order of preference, qualified expert witnesses are the following, each of whom **must** have knowledge of the child's tribe:
 - A member of the Indian child's tribe
 - A member of another tribe
 - A professional person
 - A layperson
- County social worker regularly assigned to the child may not serve as QEW

Qualified Expert Witness Order of Preference

- The level of the order of preference of qualified expert witnesses:
 - may not be the sole consideration in weighing their testimony
 - may not be chosen based on the need for alternative participation means in the court proceeding
 - may not be chosen based on preference of testimony
- "In weighing the testimony of all witnesses, the court shall consider as paramount the best interests of the Indian child as provided in s. 48.01(2)" § 48.028(4)(f)

Qualified Expert Witness Practical Considerations

- QEW testimony is required even when the tribe is in agreement with removal and the out-of-home placement
- QEW is now required for all full, temporary, and limited guardianships under § 48.9795
 - Was previously not explicitly required by statute under Ch. 54
- QEW testimony is not required in § 48.977 guardianships if conducted in underlying CHIPS case

Case Example: Discover Indian Child After Disposition

A child is placed in a foster home under a CHIPS Dispositional Order. The mother claimed that she did not know the identity of the father. Subsequently, the father is identified and paternity is established. The father is a member of a federally-recognized tribe, the child is eligible for membership and now meets the definition of an Indian child and the case is subject to WICWA. How should you proceed?

Case Law

Kewaunee County D.H.S. v. D.I., 2017AP1697
(Wisconsin Court of Appeals)

- Relies upon *Adoptive Couple v. Baby Girl* (U.S. Supreme Court)
- Under ICWA and WICWA, serious damage finding and active efforts are not required for a parent who has never had legal or physical custody of the child
- Practice notes:
 - Fact-specific judicial determination
 - Other provisions of ICWA/WICWA would still apply
 - Serious damage and active efforts findings would be required for the other parent, regardless of tribal status

Placement Preferences

Placement Preferences

- Indian children placed in out-of-home care or for adoption must be placed pursuant to identified preferences unless good cause exists to depart from those preferences
- The standard to be applied in meeting placement preference requirements shall be the prevailing social and cultural standards of the child's Tribe

Question: If the child's tribe has established its own order of placement preferences, it supersedes the order provided in ICWA/WICWA.

Placement Preferences Out-of-Home Care Placements

- Preferences for out-of-home care placements:
 - An extended family member
 - A foster home licensed, approved, or specified by the Indian child's Tribe
 - An Indian foster home licensed by another licensing agency
 - Group home or RCC approved by an Indian Tribe
- (Unless preference otherwise indicated by the child's Tribe.)

Placement Preferences Adoptive Placements

- Preferences for adoptive or delegation of powers placements:
 - An extended family member
 - Another member of the Indian child's tribe
 - Another Indian family

Good Cause to Depart from Placement Preferences: WICWA

- Good cause to depart shall be based on one or more of the following:
 1. Request of parent
 2. Request of child (if of sufficient age/development)
 3. Extraordinary needs of the child as established by expert witness testimony
 4. Unavailability of suitable placement after diligent efforts have been made to place in order of preference
- Length of time in placement does not in itself constitute an extraordinary need
- County agency must maintain records of efforts made to comply with placement preferences

Good Cause to Depart from Placement Preferences: ICWA Regulations

- May not depart from preferences based on:
 - Socioeconomic status of any placement compared to another placement
 - Solely on ordinary bonding or attachment from time spend in non-preferred placement made in violation of ICWA
- Reason for asserting good cause must be stated orally on record or provided in writing to court and parties
- Court's determination of good cause must be made on the record or in writing

Placement Preferences Practical Considerations

- The burden of establishing good cause is on the person seeking departure from the placement preferences.
- Placement preferences must **also** be followed when changing placement from one out-of-home placement to another out-of-home placement.
- For a child held in temporary physical custody, placement preferences must be followed once the emergency conditions that necessitated departing from the order of preference is resolved.
 - § 48.028(7)(bm)

Burden of Proof

Serious Damage Finding: Out-of-Home Placement

For out-of-home placement, court or jury must find *by clear and convincing evidence*, including testimony of a qualified expert witness, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Question: In a TPR case subject to WICWA, the judge or jury must apply a beyond a reasonable doubt burden when determining whether TPR grounds have been proven.

Serious Damage Finding: TPR

For termination of parental rights, court or jury must find *beyond a reasonable doubt*, including testimony of a qualified expert witness, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

- ▣ Burden of proof does NOT change for grounds for TPR (e.g., Failure to Assume, Abandonment, Continuing CHIPS).

Standard of Evidence for Active Efforts

In both cases, court or jury must find *by clear and convincing evidence* that active efforts have been made to prevent the breakup of the Indian child's family and that those efforts have proved unsuccessful.

[Wis. Stat. §§ 48.028(4)(d) and (e)]

Determination by Judge or Jury

The active efforts and “serious damage” determinations shall be made at the fact-finding hearing by the judge or jury, unless partial summary judgment on the TPR grounds is granted, in which case the judge shall make those determinations at the dispositional hearing.

[Wis. Stat. §§ 48.31(1) and (5)]

Voluntary Consent

Question: Which of the following is required when a parent consents to TPR involving an Indian child?

Voluntary Consent

- Under ICWA/WICWA, consent by either parent to TPR, out-of-home placement, pre-adoptive, or adoptive parent must be:
 - ▣ in writing;
 - ▣ recorded before a judge; and
 - ▣ accompanied by judge's written certification that terms and consequences were explained and understood
 - ▣ **ICWA regulations also require that the court explain the limitations on withdrawal of consent**
 - ▣ The child must also be over 10 days old

Forms

- Voluntary Placement Agreement (VPA) - Use the VPA for an Indian Child (DCF-F-CFS-2425)
- Delegation of Parental Powers
 - Consent to Delegation of Powers under 48.979, Wis. Stats. of an Indian Child (IW-1783A)
- Termination of Parental Rights
 - Use Consent to Termination of Parental Rights-Judicial (IW-1637)
 - DO NOT use Consent to Termination of Parental Rights-Affidavit (JC-1636)

Withdrawal of Consent

- For a voluntary placement agreement, the parent may withdraw consent for any reason at any time and the child must be returned
- For voluntary TPR, the parent may withdraw consent for any reason at any time prior to entry of final TPR order and the child must be returned unless an agreement under §§ 48.368(1) or 938.368(1) provides for a different placement [§§ 48.028(5)(a)-(b)]

Withdrawal of Consent After Order Granting Adoption

- If parent consented to TPR, parent may withdraw consent and move the court for relief from the judgment on the grounds that the consent was obtained through fraud or duress.
- Motion must be filed within 2 years after the order granting the adoption.
- If court finds there was fraud or duress, court must vacate the TPR order and the adoption order and return the Indian child to the parent unless an agreement under s. 48.368(1) or 938.368(1) provides for a different placement. [§ 48.028(5)(c)]

Invalidation of Action

- An Indian child, parent, Indian custodian, or Tribe may move the court to invalidate an order placing the child in out-of-home care or for TPR for a violation of:
 - ▣ § 1911: Exclusive jurisdiction, transfer of jurisdiction, intervention, full faith and credit
 - ▣ § 1912: Notice, time, counsel, active efforts, evidentiary standard, qualified expert witness, damage to child
 - ▣ § 1913: Voluntary consent and withdrawal
- Wis. Stat. § 48.028(6)

Resources

- Judicial Checklist - WICWA:
www.wicourts.gov/courts/programs/docs/ccipwicwa.pdf
- ICWA circuit court forms:
<https://www.wicourts.gov/forms1/circuit/formcategory.jsp?Category=21>
- CCIP E-Learning Project: www.wicciptraining.com
- DCF Resources (e.g., Active Efforts Guide, forms):
<https://dcf.wisconsin.gov/wicwa>
- WICWA Online Resource for Case Workers:
https://media.wcwpds.wisc.edu/foundation/WICWA_Online_Resource/index.html
- Native American Rights Fund-A Practical Guide to the Indian Child Welfare Act: <https://narf.org/nill/documents/icwa/index.html>

Questions?

**410 INDIAN CHILD WELFARE: CHIPS (OUT-OF-HOME CARE PLACEMENT):
VERDICT [WIS. STAT. § 48.028(4)(d)]**

[NOTE: INSERT VERDICT QUESTION(S) COVERING THE CHIPS GROUND(S)]

If the answer to question ____ is "yes," answer the following question:

____. Is continued custody of (child) by (parent or Indian custodian) likely to result in serious emotional damage or serious physical damage to (child)?

Answer: _____
Yes or No

If the answer to question ____ is "yes," answer the following question:

____. Have active efforts been made to provide remedial services and rehabilitative programs designed to prevent the breakup of (Indian child)'s family?

Answer: _____
Yes or No

____. Have the efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of (Indian child)'s family proved unsuccessful?

Answer: _____
Yes or No

COMMENT

The verdict and comment were approved in 2010. The comment was updated in 2015.

Wis. Stat. § 48.028(4)(d) provides:

Out-of-home care placement; serious damage and active efforts. The court may not order an Indian child to be removed from the home of the Indian child's parent or Indian custodian and placed in an out-of-home care placement unless all of the following occur:

1. The court or jury finds by clear and convincing evidence, including the testimony of one or more qualified expert witnesses chosen in the order of preference listed in par. (f), that continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.
2. The court or jury finds by clear and convincing evidence that active efforts, as described in par. (g) 1., have been made to provide remedial services and rehabilitation programs designed to prevent the breakup of the Indian child's family and that those efforts have proved unsuccessful. The court or jury shall make that finding notwithstanding that a circumstance specified in Wis. Stat. § 48.355(2d)(b)1. to 5. applies.

Burden of Proof. The middle civil burden (by clear and convincing evidence, to a reasonable certainty) applies to the question or questions establishing CHIPS grounds under state law, *i.e.* Wis. Stat. § 48.13.

In 2009, the Wisconsin Legislature created Wis. Stat. § 48.028(4) for court proceedings dealing with out-of-home care placements to Indian children. The statute requires that, in addition to the question or questions necessary to establish the state CHIPS ground(s), the jury answer three additional questions if the child is an Indian child. The burden of proof for these three questions, shown on the suggested verdict, is the middle civil burden. Wis. Stat. § 48.028(4)(d).

Verdict. In CHIPS cases involving an Indian child, agreement by ten (five) of twelve (six) or more jurors is sufficient on all questions in the verdict.

**412 INDIAN CHILD WELFARE: CHIPS (OUT-OF-HOME CARE PLACEMENT):
SERIOUS EMOTIONAL DAMAGE OR SERIOUS PHYSICAL DAMAGE
[WIS. STAT. § 48.028 (4)(d)1.]**

Question _____ of the special verdict asks:

Is continued custody of (child) by (parent) (Indian custodian) likely to result in serious emotional damage or serious physical damage to (child)?

"Serious emotional damage" means severe harm to a child's psychological or intellectual functioning. The term "serious emotional damage" includes one or more of the following characteristics exhibited to a severe degree: anxiety; depression; withdrawal; outward aggressive behavior; a substantial and observable change in behavior; emotional response or cognition that is not within the normal range for the child's age and stage of development.

"Serious physical damage" means severe harm to a child's bodily health or functioning. The term "serious physical damage" includes injuries which create a substantial risk of death or which cause serious permanent disfigurement or permanent or protracted loss or impairment of the function of any bodily member or organ. It also includes frequent bruising or one or more of the following injuries exhibited to a severe degree: laceration, fractured bone, burns, internal injury, or bruising.

COMMENT

Wis. Stat. § 48.028(4)(d)1 states:

1. The court or jury finds by clear and convincing evidence, including the testimony of one or more qualified expert witnesses chosen in the order of preference listed in par. (f), that continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Burden of Proof Verdict. The burden of proof on this finding in a CHIP case under Wis. Stat. § 48.028(4)(d)1 is the middle civil burden. The committee believes that at least five-sixths of the jury must agree on the answer to this question.

"Serious Emotional or Physical Damage." The term "serious emotional or physical damage" in Wis. Stat. § 48.028(4)(d)1. is not defined in Chapter 48 or in the federal Indian Child Welfare Act. The Children's Code, Wis. Stats. Ch. 48, defines the terms "emotional damage" and "physical injury."

In drafting this instruction, the Committee considered whether the term "serious" in § 48.028(4)(d)1. modifies both "emotional" and "physical" or whether the legislation calls for physical damage and serious emotional damage. The Committee concluded that because "emotional or physical" is embedded between the words "serious" and "damage," the word "serious" modifies both "emotional damage" and "physical damage."

The instruction's definition of "serious emotional damage" is taken from the definition of "emotional damages" in Wis. Stat. § 48.02(5j) which requires characteristics "exhibited to a severe degree."

The instruction's definition of "serious physical damage" is adapted from the Children's Code definition of "physical injury" (Wis. Stat. § 48.02(14g)). which reads:

"Physical injury" includes but is not limited to lacerations, fractured bones, burns, internal injuries, severe or frequent bruising or great bodily harm, as defined in s. 939.22(14).

Expert Testimony. Wis. Stat. § 48.028(4)(d)1 requires that the jury find likelihood of serious emotional damage or physical damage by the middle burden "including the testimony of one or more qualified expert witnesses." Determination of what will be permitted as expert testimony will be a matter of pretrial rulings. The general civil jury instruction on expert testimony, Wis JI-Civil 260, can be added.

**414 INDIAN CHILD WELFARE: CHIPS (OUT-OF-HOME CARE PLACEMENT):
ACTIVE EFFORTS [WIS. STAT. § 48.028 (4)(d)2.]**

Question _____ asks:

Have active efforts been made to provide remedial services and rehabilitation programs designed to prevent the breakup of (Indian child)'s family¹?

If the answer to Question ___ is "yes," answer the following question:

Have the efforts to provide remedial services and rehabilitation programs designed to prevent the breakup of (Indian child)'s family proved unsuccessful?

["Remedial services and rehabilitation programs" are services to give support to families to help them become safe placements for a child.² These services are intended to provide support to a family to prevent the removal of a child by "rehabilitating" or strengthening the family in their parenting and other related skills, and to provide support that assists in "remediating" or correcting the situation in a home that led to the removal of a child.]

To find that "active efforts" have been made, you must determine that there has been an ongoing, vigorous, and concerted level of case work and that the active efforts were made in a manner that takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe and that utilizes the available resources of the Indian child's tribe, tribal and other Indian child welfare agencies, extended family members of the Indian child, other individual Indian caregivers, and other culturally appropriate service providers.³

Your consideration of whether active efforts were made shall include whether all of the following activities were conducted⁴:

1. Representatives designated by the Indian child's tribe with substantial knowledge of the prevailing social and cultural standards and child-rearing practice within the tribal community were requested to evaluate the circumstances of the Indian child's family and to assist in developing a case plan that uses the resources of the tribe and of the Indian community, including traditional and customary support, actions, and services, to address those circumstances.

2. A comprehensive assessment of the situation of the Indian child's family was completed, including a determination of the likelihood of protecting the Indian child's health, safety, and welfare effectively in the Indian child's home.

3. Representatives of the Indian child's tribe were identified, notified, and invited to participate in all aspects of the Indian child custody proceeding at the earliest possible point in the proceeding and their advice was actively solicited throughout the proceeding.

4. Extended family members of the Indian child, including extended family members who were identified by the Indian child's tribe or parents, were notified and consulted with to identify and provide family structure and support for the Indian child, to assure cultural connections, and to serve as placement resources for the Indian child.

5. Arrangements were made to provide natural and unsupervised family interaction in the most natural setting that can ensure the Indian child's safety, as appropriate to the goals of the Indian child's permanency plan, including arrangements for transportation and other assistance to enable family members to participate in that interaction.

6. All available family preservation strategies were offered or employed and the involvement of the Indian child's tribe was requested to identify those strategies and to ensure that those strategies are culturally appropriate to the Indian child's tribe.

7. Community resources offering housing, financial, and transportation assistance and in-home support services, in-home intensive treatment services, community support services, and specialized services for members of the Indian child's family with special needs were identified, information about those resources was provided to the Indian child's family, and the Indian child's family was actively assisted or offered active assistance in accessing those resources.

8. Monitoring of client progress and client participation in services was provided.

9. A consideration of alternative ways of addressing the needs of the Indian child's family was provided, if services did not exist or if existing services were not available to the family.

[If one or more of the listed activities were not accomplished, give the following:

In your consideration of whether active efforts were made to provide services and programs designed to prevent the breakup of the family, you may take into consideration that some of the nine activities were not accomplished and the reasons they were not accomplished. You may still find that active efforts were made after considering all evidence bearing on the question, including whether you are satisfied with the reasons given as to why some activities were not accomplished.]⁵

COMMENT

This instruction and comment were approved in 2010. A format revision was made in 2013.

The "active efforts" standard is set forth in Wis. Stat. § 48.028(4)(g). Wis. Stat. § 48.028(4)(g)2. provides that if any of the nine activities listed in the instruction were not conducted, the person seeking the out-of-home care placement or involuntary termination of parental rights must submit documentation to the court explaining why the activity was not conducted. The final bracketed paragraph instructs the jury to consider any failure to conduct an activity and the reasons given for that failure. The Committee concludes that proof for active efforts requires consideration of the activities listed, but a failure to prove that a particular activity was provided is not determinative of "active efforts."

Wis. Stat. § 48.028(4)(g)1. does not designate a particular person or agency as responsible for making active efforts.

NOTES

1. In appropriate cases, language may be added to the instruction to clarify for the jury to which "family" the verdict question is referring.
2. This paragraph is adapted from instructional material prepared by the National Indian Child Welfare Association. The paragraph is optional and should be tailored to the facts.
3. Wis. Stat. § 48.028(4)(g)1.
4. Wis. Stat. § 48.028(4)(g)1. In determining if active efforts to provide services and programs have been made, the jury must "consider" whether nine activities were "conducted." The Committee believes that the word "consider" means that if some activities are not proven, the jury may still determine that active efforts were made. Thus, the list is not a mandatory checklist of what must be found, but instead only includes factors to guide the jury in determining if an "active effort" to provide services and programs was conducted.
5. This paragraph can be revised based on the evidence presented on the accomplishment of, or failure to accomplish the listed activities.

420 INDIAN CHILD WELFARE: INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: VERDICT [WIS. STAT. § 48.028(4)(e)]

[NOTE: INSERT VERDICT QUESTION(S) COVERING THE INVOLUNTARY TERMINATION OF PARENTAL RIGHTS GROUND(S)]

If the answer to question ____ is "yes," answer the following question:

____. Is continued custody of (Indian child) by (parent or Indian custodian) likely to result in serious emotional damage or serious physical damage to (Indian child)?

Answer: _____

Yes or No

If the answer to question ____ is "yes," answer the following question:

____. Have active efforts been made to provide remedial services and rehabilitative programs designed to prevent the breakup of (Indian child)'s family?

Answer: _____

Yes or No

If the answer to question ____ is "yes," answer the following question:

____. Have the efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of (Indian child)'s family proved unsuccessful?

Answer: _____

Yes or No

COMMENT

This verdict and comment were approved in 2010. The comment was updated in 2014 and 2019.

Wis. Stat. § 48.028(4)(e) provides:

Involuntary termination of parental rights; serious damage and active efforts. The court may not order an involuntary termination of parental rights to an Indian child unless all of the following occur:

1. The court or jury finds beyond a reasonable doubt, including the testimony of one or more qualified expert witnesses chosen in the order of preference listed in par. (f), that the continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.
2. The court or jury finds by clear and convincing evidence that active efforts, as described in par. (g) 1., have been made to provide remedial services and rehabilitation programs designed to prevent the breakup of the Indian child's family and that those efforts have proved unsuccessful.

Burden of Proof. The middle civil burden (by clear and convincing evidence, to a reasonable certainty) applies to the questions establishing grounds for involuntary termination of parental rights under state law, *i.e.* Wis. Stat. § 48.415.

In 2009, the Wisconsin Legislature created Wis. Stat. § 48.028(4) for court proceedings dealing with involuntary termination of parental rights to Indian children. The statute requires that in addition to answering the question or questions on the TPR grounds, the jury answer three additional questions if the child is an Indian child. The burden of proof for each of these three questions is stated in § 48.028(4)(e). A finding of serious emotional damage or serious physical damage must be beyond a reasonable doubt. The explanation of "beyond a reasonable doubt" in the instruction is taken from Wis JI-Criminal 140. The question inquiring whether active efforts have been provided and the question whether the efforts have been unsuccessful must be proven by the middle civil burden.

Verdict. Agreement by ten (five) of twelve (six) or more jurors on the verdict question(s) establishing the TPR ground(s) and the verdict questions on active efforts is sufficient.

Indian Child Welfare Act. For a summary of the Indian Child Welfare Act by the Wisconsin Legislative Council, see the Legislative Council's Information Memorandum (IM-2013-08) at (www.legis.wisconsin.gov/lc/publications/im/IM2013_08.pdf). The memorandum also includes an analysis of the decision of the United States Supreme Court in *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013). The Court's decision interpreted portions of the act barring an involuntary TPR absent a showing that serious physical or emotional damage to the Indian child will likely result from the parent's continued custody of the child; and requiring a showing of remedial efforts to prevent the breakup of an Indian family before a TPR may be ordered. The Court held that the ICWA did not require a finding of harm in continuing the child's custody with her Indian parent because the father never had custody of the child. The opinion also held that *Baby Girl's* placement with the adoptive couple did not constitute a breakup of an Indian family because there was no existing Indian family that could be broken up since the father had abandoned the child before her birth.

The Wisconsin Court of Appeals applied *Baby Girl* to the Wisconsin Indian Child Welfare Act in *Kewaunee County Dept. of Human Services v. R.I.*, 397 Wis.2d 750, (Wis. App. 2017). In that case, the Court held that fact-finding regarding the serious physical or emotional damage and active efforts elements are not required under WICWA in order to terminate the parental rights of a parent who never had custody of the

Indian Child. The Court further held that WICWA provided a greater level of protection than ICWA for parents who never had custody of their children, stating that “[w]e also reject R.I.’s argument that Wis. Stat. § 48.028(4)(e)1. and 2. apply to him regardless of his lack of custody and conclude WICWA does not establish a higher level of protection for R.I.’s parental rights than ICWA.” *Id.* at 754.

422 INDIAN CHILD WELFARE: INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: SERIOUS EMOTIONAL DAMAGE OR SERIOUS PHYSICAL DAMAGE [WIS. STAT. § 48.028 (4)(e)1.]

Question _____ of the special verdict asks:

Is continued custody of (Indian child) by (parent) (Indian custodian) likely to result in serious emotional damage or serious physical damage to (Indian child)?

"Serious emotional damage" means severe harm to a child's psychological or intellectual functioning. The term "serious emotional damage" includes one or more of the following characteristics exhibited to a severe degree: anxiety; depression; withdrawal; outward aggressive behavior; a substantial and observable change in behavior; emotional response or cognition that is not within the normal range for the child's age and stage of development.

"Serious physical damage" means severe harm to a child's bodily health or functioning. The term "serious physical damage" includes injuries which create: a substantial risk of death or which cause serious permanent disfigurement or permanent or protracted loss or impairment of the function of any bodily member or organ. It also includes frequent bruising or one or more of the following exhibited to a severe degree: laceration, fractured bone, burns, internal injury, or bruising.

BURDEN OF PROOF

As to Question _____ only, the burden is on (_____) to prove beyond a reasonable doubt that the answer should be "yes." The term "reasonable doubt" means a doubt based upon reason and common sense. It is a doubt for which a reason can be given, arising from a fair and rational consideration of the evidence or lack of evidence. It means such a doubt as

would cause a person of ordinary prudence to pause or hesitate when called upon to act in the most important affairs of life.

A reasonable doubt is not a doubt which is based on mere guesswork or speculation. A doubt which arises merely from sympathy or from fear to return a verdict is not a reasonable doubt. A reasonable doubt is not a doubt such as may be used to escape the responsibility of a decision.

While it is your duty to give (parent) (each parent) the benefit of every reasonable doubt, you are not to search for doubt. You are to search for the truth.

As to Question _____, all 12 (6) jurors must agree to arrive at a verdict.

COMMENT

This instruction and comment were approved in 2010. The comment was updated in 2014 and 2018.

Wis. Stat. § 48.028(4)(e) provides:

1. The court or jury finds beyond a reasonable doubt, including the testimony of one or more qualified expert witnesses chosen in the order of preference listed in par. (f), that the continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Burden of Proof; Unanimous Verdict on Damage. The burden of proof on this finding in a TPR case under Wis. Stat. § 48.028(4)e1 is beyond a reasonable doubt. The explanation of "beyond a reasonable doubt" is taken from Wis JI-Criminal 140. The committee believes that the jury must unanimously agree on the answer to this question.

"Serious Emotional or Physical Damage." The term "serious emotional or physical damage" in Wis. Stat. § 48.028(4)(e)1. is not defined in Chapter 48 or in the federal Indian Child Welfare Act. The Children's Code, Wis. Stats. Ch. 48, defines the terms "emotional damage" and "physical injury."

In drafting this instruction, the Committee considered whether the term "serious" in § 48.028(4)(e)1. modifies both "emotional" and "physical" or whether the legislation calls for physical damage and serious emotional damage. The Committee concluded that because "emotional or physical" is embedded between the words "serious" and "damage," the word "serious" modifies both "emotional damage" and "physical damage."

The instruction's definition of "serious emotional damage" is taken from the definition of "emotional damages" in Wis. Stat. § 48.02(5j) which requires characteristics "exhibited to a severe degree."

The instruction's definition of "serious physical damage" is adapted from the Children's Code definition of "physical injury" (Wis. Stat. § 48.02(14g)) which reads:

"Physical injury" includes but is not limited to lacerations, fractured bones, burns, internal injuries, severe or frequent bruising or great bodily harm, as defined in s. 939.22(14).

Expert Testimony. Wis. Stat. § 48.028(4)(e)1 requires that the jury find beyond a reasonable doubt "including the testimony of one or more qualified expert witnesses." Determination of what will be permitted as expert testimony will be a matter of pretrial rulings. The general civil jury instruction on expert testimony, Wis JI-Civil 260, can be added.

Indian Child Welfare Act. For a summary of the Indian Child Welfare Act by the Wisconsin Legislative Council, see the Legislative Council's Information Memorandum (IM-2013-08) at (www.legis.wisconsin.gov/lc/publications/im/IM2013_08.pdf). The memorandum also includes an analysis of the decision of the United States Supreme Court in *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013). The Court's decision interpreted portions of the act barring an involuntary TPR absent a showing that serious physical or emotional damage to the Indian child will likely result from the parent's continued custody of the child; and requiring a showing of remedial efforts to prevent the breakup of an Indian family before a TPR may be ordered. The Court held that the ICWA did not require a finding of harm in continuing the child's custody with her Indian parent because the father never had custody of the child. The opinion also held that Baby Girl's placement with the adoptive couple did not constitute a breakup of an Indian family because there was no existing Indian family that could be broken up since the father had abandoned the child before her birth.

The Wisconsin Court of Appeals applied *Baby Girl* to the Wisconsin Indian Child Welfare Act in *Kewaunee County Dept. of Human Services v. R.I.*, 397 Wis.2d 750, (Wis. App. 2017). In that case, the Court held that fact-finding regarding the serious physical or emotional damage and active efforts elements are not required under WICWA in order to terminate the parental rights of a parent who never had custody of the Indian Child. The Court further held that WICWA provided a greater level of protection than ICWA for parents who never had custody of their children, stating that "[w]e also reject R.I.'s argument that Wis. Stat. § 48.028(4)(e)1. and 2. apply to him regardless of his lack of custody and conclude WICWA does not establish a higher level of protection for R.I.'s parental rights than ICWA." *Id.* at 754.

424 INDIAN CHILD WELFARE: INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: "ACTIVE EFFORTS" [WIS. STAT. § 48.028 (4)(e)2.]

Question ____ asks:

Have active efforts been made to provide remedial services and rehabilitation programs designed to prevent the breakup of (Indian child)'s family¹?

If the answer to Question ____ is "yes," answer the following question:

Have the efforts to provide remedial services and rehabilitation programs designed to prevent the breakup of (Indian child)'s family proved unsuccessful?

["Remedial services and rehabilitation programs" are services to give support to families to help them become safe placements for a child.² The intention of these services is to provide support to a family to prevent the removal of a child by "rehabilitating" or strengthening the family in their parenting and other related skills, and to provide support that assists in "remediating" or correcting the situation in a home that led to the removal of a child.]

To find that "active efforts" have been made, you must determine that there has been an ongoing, vigorous, and concerted level of case work and that the active efforts were made in a manner that takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe and that utilizes the available resources of the Indian child's tribe, tribal and other Indian child welfare agencies, extended family members of the Indian child, other individual Indian caregivers, and other culturally appropriate service providers.³

Your consideration of whether active efforts were made shall include whether all of the following activities were conducted⁴:

1. Representatives designated by the Indian child's tribe with substantial knowledge of the prevailing social and cultural standards and child-rearing practice within the tribal community were requested to evaluate the circumstances of the Indian child's family and to assist in developing a case plan that uses the resources of the tribe and of the Indian community, including traditional and customary support, actions, and services, to address those circumstances.

2. A comprehensive assessment of the situation of the Indian child's family was completed, including a determination of the likelihood of protecting the Indian child's health, safety, and welfare effectively in the Indian child's home.

3. Representatives of the Indian child's tribe were identified, notified, and invited to participate in all aspects of the Indian child custody proceeding at the earliest possible point in the proceeding and their advice was actively solicited throughout the proceeding.

4. Extended family members of the Indian child, including extended family members who were identified by the Indian child's tribe or parents, were notified and consulted with to identify and provide family structure and support for the Indian child, to assure cultural connections, and to serve as placement resources for the Indian child.

5. Arrangements were made to provide natural and unsupervised family interaction in the most natural setting that can ensure the Indian child's safety, as appropriate to the goals of the Indian child's permanency plan, including arrangements for transportation and other assistance to enable family members to participate in that interaction.

6. All available family preservation strategies were offered or employed and the involvement of the Indian child's tribe was requested to identify those strategies and to ensure that those strategies are culturally appropriate to the Indian child's tribe.

7. Community resources offering housing, financial, and transportation assistance and in-home support services, in-home intensive treatment services, community support services, and specialized services for members of the Indian child's family with special needs were identified, information about those resources was provided to the Indian child's family, and the Indian child's family was actively assisted or offered active assistance in accessing those resources.

8. Monitoring of client progress and client participation in services was provided.

9. A consideration of alternative ways of addressing the needs of the Indian child's family was provided, if services did not exist or if existing services were not available to the family.

[If one or more of the listed activities were not accomplished, give the following:

In your consideration of whether active efforts were made to provide services and programs designed to prevent the breakup of the family, you may take into consideration that some of the nine activities were not accomplished and the reasons they were not accomplished. You may still find that active efforts were made after considering all evidence bearing on the question, including whether you are satisfied with the reasons given as to why some activities were not accomplished.]⁵

COMMENT

The instruction and comment were approved in 2010. A format change was made in 2013. The comment was updated in 2014 and 2018.

The "active efforts" standard is set forth in Wis. Stat. § 48.028(4)(g). Wis. Stat. § 48.028(4)(g)2. provides that if any of the nine activities listed in the instruction were not conducted, the person seeking the

out-of-home care placement or involuntary termination of parental rights must submit documentation to the court explaining why the activity was not conducted. The final bracketed paragraph instructs the jury to consider any failure to conduct an activity and the reasons given for that failure. The Committee concludes that proof for active efforts requires consideration of the activities listed, but a failure to prove that a particular activity was provided is not determinative of "active efforts."

Wis. Stat. § 48.028(4)(g)1. does not designate a particular person or agency as responsible for making active efforts.

Indian Child Welfare Act. For a summary of the Indian Child Welfare Act by the Wisconsin Legislative Council, see the Legislative Council's Information Memorandum (IM-2013-08) at (www.legis.wisconsin.gov/lc/publications/im/IM2013_08.pdf). The memorandum also includes an analysis of the decision of the United States Supreme Court in *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013). The Court's decision interpreted portions of the act barring an involuntary TPR absent a showing that serious physical or emotional damage to the Indian child will likely result from the parent's continued custody of the child; and requiring a showing of remedial efforts to prevent the breakup of an Indian family before a TPR may be ordered. The Court held that the ICWA did not require a finding of harm in continuing the child's custody with her Indian parent because the father never had custody of the child. The opinion also held that Baby Girl's placement with the adoptive couple did not constitute a breakup of an Indian family because there was no existing Indian family that could be broken up since the father had abandoned the child before her birth.

The Wisconsin Court of Appeals applied *Baby Girl* to the Wisconsin Indian Child Welfare Act in *Kewaunee County Dept. of Human Services v. R.I.*, 397 Wis.2d 750, (Wis. App. 2017). In that case, the Court held that fact-finding regarding the serious physical or emotional damage and active efforts elements are not required under WICWA in order to terminate the parental rights of a parent who never had custody of the Indian Child. The Court further held that WICWA provided a greater level of protection than ICWA for parents who never had custody of their children, stating that "[w]e also reject R.I.'s argument that Wis. Stat. § 48.028(4)(e)1. and 2. apply to him regardless of his lack of custody and conclude WICWA does not establish a higher level of protection for R.I.'s parental rights than ICWA." *Id.* at 754.

NOTES

1. In appropriate cases, language may be added to the instruction to clarify for the jury to which "family" the verdict question is referring.
2. This paragraph is adapted from instructional material prepared by the National Indian Child Welfare Association. The paragraph is optional and should be tailored to the facts.
3. Wis. Stat. § 48.028(4)(g)1.
4. Wis. Stat. § 48.028(4)(g)1. In determining if active efforts to provide services and programs have been made, the jury must "consider" whether a list of nine activities were "conducted." The Committee believes that the word "consider" means that if some activities are not proven, the jury may still determine that active efforts were made. Thus, the list is not a mandatory checklist of what must be found, but instead only includes factors to guide the jury in determining if an "active effort" to provide services and programs was conducted.
5. This paragraph can be revised based on the evidence presented on the accomplishment of, or failure to accomplish, the listed activities.