

**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.