

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.