

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.