

424 INDIAN CHILD WELFARE: INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: “ACTIVE EFFORTS” [WIS. STAT. § 48.028 (4)(e)2.]¹

Question ____ asks:

Have active efforts been made to provide remedial services and rehabilitation programs designed to prevent the breakup of (Indian child)’s family²?

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.³ 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.⁴

Your consideration of whether active efforts were made shall include whether all of the following activities were conducted⁵:

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.]⁶

NOTES

1. In the opinion of this Committee, this special verdict question and instruction should not be used in lieu of the special verdict question and instruction for Question No. 2 in JI-Children 324. These questions and instructions, while there may be some overlap in the facts presented, fundamentally pertain to differing situations. For example, active efforts to prevent the breakup of the Indian family would predate orders contained in a CHIPS Dispositional Order. Additionally, there would be a different standard of proof for Question No. 2 in JI-Children 324 (beyond a reasonable doubt) than for the other questions (clear, satisfying, and convincing), which may lead to juror confusion. This special verdict question should stand alone and be answered only after a jury has found one or more grounds for termination of parental rights contained in Sec. 48.415, Wis. Stats.

2. In appropriate cases, language may be added to the instruction to clarify for the jury to which “family” the verdict question is referring.

3. 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.

4. Wis. Stat. § 48.028(4)(g)1.

5. 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.

6. This paragraph can be revised based on the evidence presented on the accomplishment of, or failure to accomplish, the listed activities.

COMMENT

The instruction and comment were approved in 2010. A format change was made in 2013. The comment was updated in 2014 and 2018. This revision was approved by the Committee in November 2022; it added Note No.1, supra.

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.