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IN THE
SUPREME COURT OF CALIFORNIA

In re DEZI C.,
A Person Coming Under the Juvenile Court Law.

THE LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

A.A.,

Defendant and Appellant.

From a Decision by the Court of Appeal
Second Appellate District, Division Two, Case No. B317935
Los Angeles Superior Court Case No. 19CCJP08030A-B
On Appeal from the Superior Court of Los Angeles County,
Honorable Robin R. Kesler, Judge Presiding

RESPONDENT LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES' ANSWER TO AMICUS BRIEFS IN SUPPORT OF APPELLANT FILED BY THE CALIFORNIA APPELLATE DEFENSE COUNSEL AND THE CALIFORNIA INDIAN LEGAL SERVICES AND CALIFORNIA TRIBAL FAMILIES COALITION

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Introduction

Respondent, the Los Angeles County Department of Children and Family Services (Department), submits this brief in answer to the *Amicus Curiae* briefs filed by the California Appellate Defense Counsel (CADC) and the California Indian Legal Services and California Tribal Families Coalition (CILS/CTFC) in support of Appellant, A.A. (mother). The Department incorporates and reaffirms all arguments in its Answer Brief on the Merits.

Argument

I. CADC's Arguments Are Not Persuasive.

CADC makes a number of arguments, none of which should compel this Court to reject *Dezi C.*[1]

A. *Dezi C.* Does Not Place An Inappropriate Burden Of Investigation On Parents' Appellate Counsel.

CADC contends that *Dezi C.* should be rejected because its "proffer consideration inappropriately places the burden of investigation [onto] the parents' appellate counsel." (CADC 12.) In support of this contention, CADC argues that (1) a proffer of post-judgment evidence related to Indian ancestry cannot be properly considered by a reviewing court pursuant to section 909 of the Code of Civil Procedure (CCP);[2] (2) the routine utilization

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[1] *In re Dezi C.* (2022) 79 Cal.App.5th 769.

[2] CCP section 909, states: "In all cases where trial by jury is not a matter of right or where trial by jury has been waived, the reviewing court may make factual determinations contrary to or in addition to those made by the trial court. The factual

of CCP section 909 will lead to lengthy delays and will undermine dependent children's interest in finality; and (3) the expectation to conduct an investigation into Indian ancestry will place court-appointed appellate counsel in an ethically and legally precarious position. (CADC 13-24.)

Not only are none of these arguments persuasive, it is important to note that, as further explained below, *Dezi C.* does not require investigation by appellate counsel or the utilization of CCP section 909, it simply permits these options, which actually favors the appealing parent. (*In re A.C.* (2021) 65 Cal.App.5th 1060, 1071 ["The father also argues that a 'requirement that the appellant must submit evidence *outside the record* is a substantial departure from normal appellate procedure.' We agree. However, it is a departure that favors him. Ordinarily, he would have to show prejudice based on the record, which he cannot do."].)

(…continued)
determinations may be based on the evidence adduced before the trial court either with or without the taking of evidence by the reviewing court. The reviewing court may for the purpose of making the factual determinations or for any other purpose in the interests of justice, take additional evidence of or concerning facts occurring at any time prior to the decision of the appeal, and may give or direct the entry of any judgment or order and may make any further or other order as the case may require. This section shall be liberally construed to the end among others that, where feasible, causes may be finally disposed of by a single appeal and without further proceedings in the trial court except where in the interests of justice a new trial is required on some or all of the issues."

1. *Dezi C.* Does Not Require Investigation Outside The Record By Appellate Counsel Or The Use Of CCP Section 909.

CADC implies that the *Dezi C.* holding *requires* appellate counsel to conduct an investigation outside the record and to use CCP section 909 in order to demonstrate a "reason to believe" the child is or may be an Indian child. (CADC 12-34.) This is not true, as *Dezi C.* allows for at least *nine* ways that appellate counsel may identify a "reason to believe" the child is or may be an Indian child without having to conduct an investigation outside the record or utilize CCP section 909. (*Dezi C., supra,* 79 Cal.App.5th at p. 779.) Six of the ways are defined by statute. Under the definitions provided by Welfare and Institutions Code[3] section 224.2, subdivisions (d) and (e)(1), the circumstances that provide "reason to believe" an Indian child is involved in the proceeding include, but are not limited to:

> (1) A person having an interest in the child, including the child, an officer of the court, a tribe, an Indian organization, a public or private agency, or a member of the child's extended family informs the court that the child is an Indian child.
>
> (2) The residence or domicile of the child, the child's parents, or Indian custodian is on a reservation or in an Alaska Native village.
>
> (3) Any participant in the proceeding, officer of the court, Indian tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child.

[3] Further statutory references are to this code unless otherwise designated.

> (4) The child who is the subject of the proceeding gives the court reason to know that the child is an Indian child.
>
> (5) The court is informed that the child is or has been a ward of a tribal court.
>
> (6) The court is informed that either parent or the child possess an identification card indicating membership or citizenship in an Indian tribe.

(§ 224.2, subds. (d) & (e)(1).)

Any of these six criteria could be apparent from the record of the underlying proceedings and their identification would not require appellate counsel to conduct an investigation outside the record or utilize CCP section 909.

This is also true of the three additional scenarios described in *Dezi C.*, where the Court explained that the record of the underlying proceedings would provide "reason to believe" a child may be an Indian child where (1) "someone reported possible American Indian heritage and the agency never followed up on that information;" (2) "the record indicates that the agency never inquired into one of the two parents' heritage *at all*;" or (3) "the record indicates that one or both of the parents is adopted and hence their self-reporting of 'no heritage' may not be fully informed." (*Dezi C., supra,* 79 Cal.App.5th at p. 779, italics in original.)

Therefore, *Dezi C.* provides at least nine ways that the record of the underlying proceedings may reveal "reason to believe" the child is or may be an Indian child without appellate counsel having to conduct an investigation outside the record or utilize CCP section 909. As such, *Dezi C.* does not require

appellate counsel to conduct investigations outside the record or utilize CCP section 909 in order to demonstrate "reason to believe" the child is or may be an Indian child. But even if *Dezi C.* did require investigation outside the record and the use of CCP section 909, those requirements are proper, as detailed below.

2. A Reviewing Court May Properly Consider A Proffer Of Post-Judgment Evidence Related To Indian Ancestry Under CCP Section 909.

On pages 13 through 18 of its amicus brief, CADC argues that the portion of *Dezi C.*'s holding that allows for a reviewing court to receive additional evidence from an appealing parent under CCP section 909 is improper and "contrary to the purpose of CCP [section] 909." (CADC 13-18.) Then, CADC contradicts this argument in a footnote on page 18 where it acknowledges that "[t]his Court has recently approved of the use of CCP [section] 909." (CADC 18, fn. 3, citing *In re D.P.* (2023) 14 Cal.5th 266, 287 (*D.P.*).)

In *D.P.*, the Court of Appeal dismissed an appeal as moot after erroneously concluding that it did not have discretion to review the merits of the appeal because the appellant had failed to present specific legal or practical negative consequences that would flow from a dismissal. (*D.P., supra,* 14 Cal.5th at pp. 273-274, 287.) This Court reversed the dismissal and remanded the matter to the appellate court to reconsider the appellant's argument that discretionary review was warranted. (*Id.* at p. 287.) Citing CCP section 909, this Court explained that "[o]n remand, the Court of Appeal may allow [the appellant] to

introduce additional evidence in support of discretionary review if appropriate. (See [CCP], § 909 [appellate court may take additional evidence 'for the purpose of making the factual determinations or for any other purpose in the interests of justice']." (*Ibid.*)

Therefore, it is not "improper" or "contrary to the purpose of CCP [section] 909" for an appellate court to receive additional evidence from an appealing parent regarding the ICWA. (CADC 13-18.) In fact, as this Court noted, one of the *express* purposes of CCP section 909 is to further "the interests of justice." (*D.P., supra,* 14 Cal.5th at p. 287, citing CCP § 909.) Thus, CADC essentially argues it is contrary to the "interests of justice" for an appellate court to receive evidence demonstrating that a dependent child is or may be an Indian child. (CADC 18.) This seems inconsistent with CADC's position that Indian tribes' interests are served when there is "*certainty* that an Indian child has not been overlooked." (CADC 29, italics added.) The Department agrees, which is why *Dezi C.* was correct that the "interests of justice" are served by allowing appellate courts to take additional evidence so they can be *certain* that an Indian child has not been overlooked. (*Dezi C., supra,* 79 Cal.App.5th at p. 779, fn. 4.) Accordingly, CADC is wrong that a proffer of post-judgment evidence related to Indian ancestry may not be considered by a reviewing court under CCP section 909. (CADC 13-18.)

Further, the case CADC relies on to support this argument, *In re Zeth S.* (2003) 31 Cal.4th 396 (*Zeth S.*), was later discussed

in *In re Josiah Z.* (2005) 36 Cal.4th 664 (*Josiah Z.*), where this Court clarified that the use of CCP section 909 on appeal was proper. In *Zeth S.*, this Court set forth the "general" rule that appellate courts cannot "receive and consider postjudgment evidence that was never before the juvenile court . . . and rely on such evidence outside the record on appeal to reverse the judgment" but "in the rare and compelling case an exception may be warranted." (*Zeth S., supra,* 31 Cal.4th at pp. 399-400.) In *Zeth S.*, the mother appealed from the order terminating parental rights on the ground that she satisfied the beneficial parental relationship exception to adoption. (*Id.* at p. 403.) The child's appellate counsel submitted an unsworn letter brief representing that she had investigated current circumstances and learned that the mother had visited the child regularly and had assumed a parental role, and that the grandfather had felt pressured to adopt and preferred to be the child's legal guardian. (*Ibid.*)

This Court disapproved of the appellate court's consideration of postjudgment circumstances "as a means of reexamining the mother-child relationship," because "that was a settled matter which, by statutory directive, could not be reopened for reconsideration by mother, not even at the termination hearing itself." (*Zeth S., supra,* 31 Cal.4th at pp. 411-412.) This Court held that "consideration of postjudgment evidence of changed circumstances in an appeal of an order terminating parental rights, and the liberal use of such evidence to reverse juvenile court judgments and remand cases for new hearings, would violate both the generally applicable rules of

appellate procedure, and the express provisions of section 366.26 which strictly circumscribe the timing and scope of review of termination orders, for the very purpose of expediting the proceedings and promoting the finality of the juvenile court's orders and judgment." (*Id*. at p. 413, fn. omitted.)

Two years later, this Court in *Josiah Z*. clarified that in *Zeth S*. it held "an appellate court should not consider postjudgment evidence *going to the merits of an appeal* and introduced for the purposes of attacking the trial court's judgment." (*Josiah Z., supra,* 36 Cal.4th at p. 676, italics added.) In *Josiah Z.*, the children's appellate counsel moved to dismiss their appeal on the ground that she assessed that dismissal was in the children's best interests because she had investigated their current placement and found it was satisfactory. (*Ibid*.) This Court rejected the notion that *Zeth S*. precluded the children's counsel's best interests assessment, explaining that the California Rules of Court authorize a motion to dismiss and that appellate courts "routinely" consider such postjudgment evidence in support of such motions. (*Ibid*.) This Court continued:

> [T]he limited issue involved in a motion to dismiss, whether a child should be permitted to abandon a challenge to the trial court ruling, is distinct from the broader issues resolved by the trial court, and consideration of circumscribed evidence in this context does not give rise to the vice we condemned in *Zeth S*. – an appellate court's use of new evidence outside the record to second-guess the trial court's resolution of issues properly committed to it by the statutory scheme. [Citation.] [And,] the beneficial consequence of motions to dismiss, where granted, will be to 'expedit[e] the proceedings and promot[e]

> the finality of the juvenile court's orders and judgment' [citation] – precisely the policy advanced by our ruling in *Zeth S.*

(*Ibid*.)

Thus, *Josiah Z.* clarified the holding in *Zeth S.* and explained that while an appellate court should not consider postjudgment evidence under CCP section 909 for the purpose of attacking the merits of a trial court's judgment, an appellate court may properly consider postjudgment evidence under CCP section 909 for broader purposes, especially where the beneficial consequence of doing so will be to expedite the proceedings and promote the finality of the juvenile court's orders and judgment. (*Josiah Z., supra,* 36 Cal.4th at p. 676.)

After *Josiah Z.*, the appellate court in *In re A.B.* (2008) 164 Cal.App.4th 832 discussed *Josiah Z.* and *Zeth S.* while holding that an exception to the "general" rule in *Zeth S.* was warranted where the father claimed on appeal that the child welfare agency had failed to inquire into the mother's Indian ancestry. (*Id.* at p. 835.) In *In re A.B.*, the appellate court took judicial notice of an ICWA-020 form that the mother had filed in a previous dependency case where she denied having Indian ancestry and, based on that document, held that the error in failing to inquire of the mother's Indian ancestry in the current case was harmless. (*Id*. at p. 843.) In addressing the father's contention that considering the document violated *Zeth S.*, the appellate court explained:

> This case is more akin to *Josiah Z.* than *Zeth S.* In contrast to *Zeth S.*, the postjudgment evidence is not presented in an unsworn statement of counsel.

> Rather, the [child welfare agency] submitted to the juvenile court a certified copy of a court record from another county, which is subject to judicial notice. . . . Further, the [child welfare agency] did not seek to augment the record with evidence pertaining to the substantive merits of the juvenile court's termination of parental rights, and the evidence cannot be used to reverse the judgment on substantive grounds. The ICWA inquiry issue is distinct from the substantive merits of the court's ruling . . . . Also, admission of the evidence to affirm the judgment would promote the finality of the judgment and prevent further delay.

(*In re A.B., supra*, 164 Cal.App.4th at pp. 840-841.)

Subsequent to *In re A.B.*, the appellate court in *In re A.C., supra,* 65 Cal.App.5th 1060 cited to *In re A.B., Josiah Z.*, and *Zeth S.* in a case where the father appealed from the order terminating parental rights contending that reversal was necessary because he was not asked about Indian ancestry. (*In re A.C., supra,* 65 Cal.App.5th at pp. 1066-1068.) The appellate court found the error was harmless because the father had failed to make an affirmative representation on appeal that he had any Indian ancestry. (*Id.* at pp. 1068-1073.) In response to the father's argument that he should not be required to make an affirmative representation of Indian heritage on appeal, the Court acknowledged the "general" rule under *Zeth S.* that it could not "receive and consider postjudgment evidence that was never before the juvenile court . . . and rely on such evidence outside the record on appeal to reverse the judgment," but then explained:

> [T]his case, too, is more akin to *Josiah Z.* than *Zeth S.* Rather than taking judicial notice of a parent's statement that they do not have Indian

> ancestry, we are relying on a parent's telling failure to state that they do; however, these seem like two sides of the same coin. Consideration of the father's silence on this point to affirm the judgment promotes finality and prevents further delay.
>
> If the father did claim Indian ancestry, we would reverse, but only because the Department failed in its duty of inquiry, which *In re A.B.* held is distinct from the substantive merits of the trial court's ruling. We would not act as trier of fact. We would not consider any other evidence, whether corroborating or contrary; we would not make a finding on whether the claim is true. We would simply allow the facts to be developed below.

(*Id*. at pp 1071, 1073.)

Thus, *Josiah Z.*, *In re A.B.*, and *In re A.C.* make it abundantly clear that, although an appellate court should not consider postjudgment evidence going to the merits of an appeal to reverse the merits of the lower court's decision, an appellate court may properly consider postjudgment evidence regarding the ICWA on appeal from orders terminating parental rights because ICWA issues are distinct from the substantive merits of a juvenile court's termination of parental rights and because it promotes the finality of juvenile court orders and prevents further delay. (*Josiah Z., supra,* 36 Cal.4th at p. 676; *In re A.B., supra*, 164 Cal.App.4th at pp. 840-841; *In re A.C., supra,* 65 Cal.App.5th at pp 1071, 1073.)

These cases support that *Dezi C.* was correct when it explained that considering proffers on appeal under CCP section 909 is appropriate because "they bear on the collateral issue of prejudice rather than the substantive merits and because

they expedite the proceedings and promote finality of the juvenile court's orders." (*Dezi C., supra,* 79 Cal.App.5th at p. 779, fn. 4.) Accordingly, CADC is incorrect that allowing a reviewing court to receive additional evidence from an appealing parent under CCP section 909 is improper and contrary to the purpose of CCP section 909. (CADC 13-18.)

3. Counsel Should Work To Avoid The Possibility Of Delay By Resolving Issues In The Trial Courts.

CADC's next contention is that the routine utilization of CCP section 909 will lead to lengthy delays and undermine dependent children's interest in finality. (CADC 18-23.) To the extent that delay might occur, the more expeditious approach for parents would be for their attorneys to raise ICWA-related issues at the trial level, work with other counsel, and allow the trial court to resolve the issues without the parent waiting to raise the issues for the first time on appeal from the termination of parental rights. (See Cal. Rules of Court,[4] rule 5.660(d)(4) ["Attorneys . . . are expected . . . to work with other counsel and the court to resolve disputed aspects of a case without contested hearing, and to adhere to the mandated timelines."]; see also *In re Ezequiel G.* (2022) 81 Cal.App.5th 984, 1003 ["Federal, state, and local law thus recognize that requiring all parties to actively participate in the ICWA inquiry is critical to ensuring that an adequate ICWA investigation is conducted and Indian children

[4] Rules references are to the California Rules of Court unless otherwise designated.

are promptly identified at the earliest possible stages of dependency cases."]; Super. Ct. L.A. County, Local Rules, rule 7.17(a) ["An attorney representing a client in dependency court shall affirmatively inquire of their client as to whether he or she has reason to believe that any child appearing in the dependency court has Indian heritage under the ICWA. Every effort should be made by counsel to assist confirmation of a child's Indian status and tribal membership."].)

4. CADC's Expectation That Investigation Into Indian Ancestry Will Place Court-Appointed Appellate Counsel In An Ethically And Legally Precarious Position Is Not Reason To Reject *Dezi C.*

CADC next argues that the expectation that court-appointed appellate counsel will have to conduct investigation into Indian ancestry will place attorneys in an ethically and legally precarious position. (CADC 24-27.) CADC offers three scenarios with respect to this argument: First, if appellate counsel were unable to contact their clients in order to obtain authorization to conduct an ICWA investigation, appellate counsel might be placed in an ethically and legally precarious position by having to file a "no-issue" brief when they believe there is an arguable ICWA issue (CADC 24-25); second, even if appellate counsel were able to contact their clients and obtain authorization to question relatives about the ICWA, appellate counsel would be placed in an ethically and legally precarious position by questioning relatives about the ICWA because the relatives may not know the child is a dependent of the court (CADC 25-26); and third, if appellate counsel questions a non-

appealing parent's extended family members about the ICWA, "this will lead to confusion by non-appealing parents about who represents who and for what purpose." (CADC 26-27.)

None of these scenarios should compel this Court to reject *Dezi C.*'s option that a parent may make a proffer on appeal. However, before discussing these scenarios, it merits observing that *Dezi C.* does not state that *appellate counsel* is required to ask anyone about the ICWA. (*Dezi C., supra,* 79 Cal.App.5th at p. 779.) This can be done by the appealing parent. *Dezi C.* contains nothing that prevents an appealing parent from asking his or her own relatives and extended family members about the ICWA and then proffering any relevant information to the attorney or the appellate court. (*Id.* at pp. 776-786.)

Nevertheless, as to the first of the three CADC's scenarios – the ostensible dilemma caused by appellate counsel having to file a "no-issue" brief when they are unable to contact their contact but believe there is an arguable ICWA issue – CADC cites to no authority that *requires* appellate counsel to file a "no-issue" brief when appellate counsel cannot contact their client and believe there may be an arguable ICWA issue. (CADC 24-25.) Rather, CADC simply notes its "normal procedure" is to file a "no-issue" brief when an arguable issue cannot be identified. (CADC 24-25.) Because CADC fails to demonstrate that appellate counsel are required to file a "no-issue" brief when they cannot contact their client and believe there may be an arguable ICWA issue, this is a dilemma of CADC's own making. Further, if an appealing parent does not maintain contact with his or her appellate counsel and

as a result makes it impossible for appellate counsel to demonstrate prejudice on appeal, that parent simply fails to meet the burden that every appellant shoulders. (*In re A.C., supra,* 65 Cal.App.5th at p. 1070 ["[A]n appellant has the burden of producing an adequate record that demonstrates reversible error."]; *In re K.R.* (2018) 20 Cal.App.5th 701, 708 [same].) This does not create an ethical dilemma for appellate counsel, it creates a failed appeal. As such, the notion that appellate counsel might face an ethical dilemma by choosing to file a "no-issue" brief when they are unable to contact their client but believe there is an arguable ICWA issue is not a convincing reason to reject *Dezi C.*

With regard to CADC's second scenario – where appellate counsel would supposedly be placed in an ethically and legally precarious position when their clients authorized them to question relatives about the ICWA but the relatives may not be aware that the child is a dependent – it is unclear how this would place appellate counsel in a legally or ethically precarious position when that is what the appealing parent has requested appellate counsel to do and is what the statute requires, whether or not the extended relatives are aware that the child is a dependent of the juvenile court. (See § 224.2, subd. (b) [no requirement that extended relatives must be aware of the dependency proceedings before being asked about the ICWA].) Because the appealing parent in CADC's scenario authorized appellate counsel to inquire of extended family members, and

that is what the statute requires, this scenario does not present an ethical dilemma that undermines *Dezi C.*

The same is true of the third scenario – where CADC claims it would be unclear if appellate counsel can question a non-appealing parent's extended family members about the ICWA because it would "lead to confusion by non-appealing parents about who represents who and for what purpose." (CADC 26-27.) This potential problem could easily be ameliorated by appellant's counsel explaining to non-appealing parents and their extended family members who is being represented and for what purpose, and by advising non-appealing parents and their extended family members that they are being questioned about the ICWA pursuant to the requirements in section 224.2. and request of the appealing parent. (§ 224.2, subd. (b).) Therefore, the potential "confusion" that may result from non-appealing parents and their extended family members being questioned in conformity with the statute and in response to the appealing parent's request is not an adequate reason to discard *Dezi C.*

Based on the foregoing, CADC is wrong that *Dezi C.* should be rejected because its "proffer consideration inappropriately places the burden of investigation [onto] the parents' appellate counsel." (CADC 12-24.)

B. *Dezi C.* Does Not Rest On Faulty Reasoning.

CADC's next contention is that *Dezi C.* rests on faulty reasoning in that it focuses on the wrong interest and the wrong outcome, rests on an unproven assumption that parents know

their own ancestry, and inappropriately shifts the burden of the child welfare agency's error to the parents' court-appointed appellate counsel and in so doing relies on an inaccurate characterization that demeans its clients and members of its profession. (CADC 27-35.)

1. *Dezi C.* Focuses On The Correct Interest And The Correct Outcome.

CADC contends *Dezi C.* focused on the wrong outcome and the wrong interest because it failed to recognize who the appealing party was. (CADC 27-28.) CADC claims that, because the appealing parent is a "surrogate for the tribe," "it is therefore the *tribe* and not the *parent's* interest at play" and the "*outcome* must be linked to the *outcome* that the tribe would be seeking." (CADC 28, italics in original.) The outcome the tribe would be seeking, CADC explains, is the "certainty that an Indian child has not been overlooked." (CADC 29.)

CADC does not identify where in the *Dezi C.* opinion the Court focused on the wrong interest or wrong outcome. (CADC 27-29.) That is because the opinion plainly focuses on the interest of Indian tribes and the outcome they seek. By permitting an appealing parent to proffer additional evidence in the appellate court that may trigger the ICWA, *Dezi C.* increases the opportunity to advance the interests of Indian tribes and achieve the outcome they seek, which is the "certainty that an Indian child has not been overlooked." (CADC 29; *Dezi C., supra,* 79 Cal.App.5th at p. 779.) Accordingly, CADC's contention that *Dezi C.* focuses on the wrong interest and the wrong outcome is contradicted by the opinion.

2. *Dezi C.* Does Not Rest On An Unproven Assumption That Parents Know Their Own Ancestry.

CADC also contends *Dezi C.* rests on an unproven assumption that parents know their own ancestry and that such an assumption is "unsupported by the law" and "at odds with the law and logic." (CADC 29-30.) But in this portion of its brief CADC cites to *In re Ezequiel G., supra,* 81 Cal.App.5th 984, which persuasively demonstrates why such an assumption is *not* at odds with the law and logic. (CADC 30.)

The *In re Ezequiel G.* Court explained that the ICWA does not apply simply based on a child or parent's "Indian ancestry" because the "definition of 'Indian child'" is "based on the child's *political ties* to a federally recognized Indian Tribe, either by virtue of the child's own citizenship in the Tribe, or through a biological parent's citizenship and the child's eligibility for citizenship. [Citations.]" (*In re Ezequiel G., supra,* 81 Cal.App.5th at p. 1009, italics in opinion.) The Court also explained that tribal membership criteria varies from tribe to tribe and that "Tribal citizenship (aka Tribal membership) is voluntary and typically requires *an affirmative act* by the enrollee or her parent." (*Ibid.*) The Court determined that "[b]ecause tribal membership typically requires an affirmative act by the enrollee or her parent, a child's parents will, in many cases, be a reliable source for determining whether the child or parent may be a tribal member." (*Id.* at p. 1010.) Put another way, "a parent typically will know whether she has applied for membership for herself or her child – and her disclosure that she

has not will, in most cases, reliably establish that a child is not an Indian child within the meaning of [the] ICWA." (*Ibid*.) The Court concluded: "Because [a political relationship with a tribe] requires an affirmative act by an individual or her parent, we believe it will be rare that a parent is unaware of her own or her child's tribal membership." (*Id*. at p. 1011.)

Thus, *In re Ezequiel G*. establishes that parents are a reliable source of information with respect to the ICWA, which refutes CADC's assertions that *Dezi C*. rests on an unproven assumption that parents know their own ancestry and that such an assumption is "unsupported by the law" and "at odds with the law and logic." (CADC 29-32; *In re Ezequiel G., supra,* 81 Cal.App.5th at pp. 1009-1011.)

The accuracy of *In re Ezequiel G*.'s and *Dezi C*.'s assessments that parents are usually reliable sources of their own ancestry is borne out by the Department's research for this case.[5] The Department's research included reviewing its ICWA appeals between 2021 to 2023 to determine the number of reversals/remands that actually resulted in a finding that the ICWA applied. The Department's records reveal that in cases where the parent(s) had denied knowledge of Indian ancestry but extended family members were not inquired of, the number of reversals/remands that actually resulted in a finding that the

[5] See Motion To Take Additional Evidence and Declaration of Stephen Watson, filed concurrently.

ICWA applied was zero.[6] The Department also contacted the 57 other counties in California and asked for the same information, and of the 34 counties that responded, each indicated the same answer: zero. Accordingly, it is quite clear that *Dezi C.* does not rest on an "unproven assumption" that parents know their own ancestry. (CADC 29-30.)

3. *Dezi C.* Does Not Inappropriately Shift The Burden Of The Agency's Error To Parents' Counsel Or Rely On An Inaccurate Characterization That Demeans CADC's Clients And Members Of Its Profession.

In this portion of its brief, CADC makes three assertions. In a heading, it states that *Dezi C.* inappropriately shifts the burden of the child welfare agency's error to the parents' court-appointed appellate counsel. (CADC 32.) The Department addressed this assertion in its Answer Brief on the Merits, pages 43 through 45, when discussing the decision by the Supreme Court of the United States in *Weaver v. Massachusetts* (2017) 582 U.S. ___ [137 S.Ct. 1899], which held that an appellant must make an affirmative showing of prejudice when he or she has circumvented the doctrines of forfeiture and waiver.

The other two assertions CADC makes in this portion of its brief are that the "*Dezi C.* court claims without evidence that there is a problem with 'parents who hold back any objection to the adequacy of the agency's inquiry until an appeal of the

[6] As CILS/CTFC notes, Los Angeles County has the largest American Indian population in the United States. (CILS/CTFC 20-21.)

termination of their parental rights in the hopes of delaying finality of that termination'" (CADC 32, citing *Dezi C., supra,* 79 Cal.App.5th at p. 781), and that the Department and juvenile court "sat by" for years in this case without performing their continuing duty of ICWA inquiry (CADC 33-34). Neither of these is accurate.

a. CADC Is Wrong That *Dezi C.* Claimed Without Evidence That There Is A Problem With Parents Who Hold Back ICWA Objections.

Dezi C. did not claim without evidence that there is a problem with parents who hold back an objection to ICWA inquiry until an appeal from the termination of parental rights in the hopes of delaying finality of that termination. (CADC 32.) To the contrary, the section of the *Dezi C.* opinion CADC cites to in this regard pertained to the "competing policies" at issue with respect to ICWA objections asserted later in the proceedings, did not use the word "problem," and provided authority for the proposition that the judicial branch had an "interest in discouraging game playing by parents." (See *Dezi C., supra,* 79 Cal.App.5th at p. 781, citing *In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1431 ["Father is here, now, before this court. There is nothing whatever which prevented him, in his briefing or otherwise, from removing any doubt or speculation. He should have made an offer of proof or other affirmative representation that, had he been asked, he would have been able to proffer some Indian connection sufficient to invoke the ICWA. He did not. In the absence of such a representation, the matter amounts to

nothing more than trifling with the courts."].) Therefore, CADC is incorrect that *Dezi C.* claimed without evidence that there is a problem with parents who hold back an objection to ICWA inquiry until an appeal of the termination of parental rights in the hopes of delaying finality of that termination. (CADC 32.)

b. The Department And Juvenile Court Did Not Sit By For Years Without Performing Their Continuing Duty Of ICWA Inquiry.

CADC also asserts the Department and juvenile court "sat by" for years in this case without performing their continuing duty to make ICWA inquiry. (CADC 33-34.) While it is true that the Department did not fully satisfy its ICWA inquiry duties (and conceded as much on appeal), it is not true that the Department or the juvenile court "sat by" for years ignoring the ICWA. Between December 2019 (when the parents denied knowledge of Indian ancestry and the juvenile court found that the ICWA did not apply) and January 2022 (when the juvenile court terminated parental rights) the Department filed six reports indicating the juvenile court had found the ICWA did not apply (1CT 114-116, 120, 139; 2CT 380, 529; 3CT 670; 4CT 900, 970) and the juvenile court held eight hearings where it allowed the parties to be heard.[7] Not once did either of the parents' attorneys raise any ICWA-related issues or object to the juvenile court's finding that the ICWA did not apply. Therefore, the record does not support

[7] See Reporter's Transcripts dated February 19, 2020; August 26, 2020; December 15, 2020; April 13, 2021; July 13, 2021; August 25, 2021; October 18, 2021; and January 18, 2022.

that the Department and juvenile court sat by and ignored the ICWA for years – rather, the Department continually reported on the ICWA status of the case and the juvenile court allowed the parties to raise any ICWA-related concerns in the courtroom. (CADC 33-34.) Mother's appellate counsel raised the ICWA for the first time on appeal, which was over two years after mother denied knowledge of Indian ancestry and failed to object to the juvenile court's ICWA finding. (1CT 114-116, 120.)

For the foregoing reasons, CADC's contention that *Dezi C.* rests on faulty reasoning fails. (CADC 27-35.)

C. This Court Should Not Adopt The "Automatic Reversal Rule" Or The Holding Or Reasoning In *In re K.H.*[8]

In the last segment of its brief, CADC joins in mother's request that this Court adopt the "automatic reversal rule," or in the alternative, the hybrid substantial evidence/abuse of discretion standard of review in *In re K.H., supra,* 84 Cal.App.5th 566. (CADC 35-40.)

As to the contention regarding the "automatic reversal rule," the Department addressed this point on pages 17 through 78 of its Answer Brief on the Merits, particularly pages 45 through 58.

As to the contention that this Court should adopt the hybrid substantial evidence/abuse of discretion standard of review in *In re K.H.*, the Department agrees – but only to the extent that *In re K.H.* adopted the hybrid substantial

[8] *In re K.H.* (2022) 84 Cal.App.5th 566.

evidence/abuse of discretion standard of review as enunciated by *In re Ezequiel G., supra,* 81 Cal.App.5th at pages 1004-1005. (*In re K.H., supra,* 84 Cal.App.5th at pp. 600-601 ["In *In re Ezequiel G.* . . . the Court of Appeal . . . concluded that a juvenile court's finding of a 'proper and adequate further inquiry and due diligence' under section 224.2, subdivision (i)(2), is properly reviewed under a hybrid substantial evidence and abuse of discretion standard. We agree."].)

As the *In re Ezequiel G.* Court explained, the hybrid standard of review approach is appropriate because there is a factual statutory predicate to a juvenile court's ICWA finding as well as a discretionary statutory predicate to a juvenile court's ICWA finding. (*In re Ezequiel G., supra*, 81 Cal.App.5th at pp. 1004-1005.) Accordingly, the substantial evidence standard of review should apply to the factual predicate, while the abuse of discretion standard should apply to the discretionary predicate. (*Id*. at pp. 1004-1005.)

Such an approach is consistent with this Court's approach in *In re Caden C.* (2021) 11 Cal.5th 614. In *Caden C.*, this Court explained that appellate courts were using three different standards of review in dependency appeals where the parent asserted the "beneficial parental relationship exception" to the termination of parental rights – the substantial evidence standard of review, the abuse of discretion standard of review, and a hybrid of both. (*Id*. at p. 639.) This Court held that the substantial evidence standard applied to the first two elements of section 366.26, subdivision (c)(1)(B)(i), because they required

"essentially . . . factual determination[s]," while the abuse of discretion standard applied to the third element of the statute because that element required the juvenile court to conduct a series of factual determinations while also "engag[ing] in a delicate balancing of these determinations." (*Id*. at pp. 639-640.)

The same reasoning applies to the two elements of a juvenile court's ICWA finding. The first element – whether there is reason to know the child is an Indian child – is a factual determination based on six statutory criteria and should be reviewed for substantial evidence. (*In re Ezequiel G., supra*, 81 Cal.App.5th at p. 1004.) The second element – whether a "proper and adequate further inquiry and due diligence as required in this section have been conducted" – "requires more of a court than simply applying a statutory checklist to undisputed facts." (*Id*. at pp. 1004-1005.) The second element "requires the court to 'engage in a delicate balancing'" "in light of the facts of a particular case," which "requires a significant exercise of discretion." (*Id*. at pp. 1005-1006.) Therefore, *In re Ezequiel G.*'s hybrid standard of review is appropriate because it recognizes the two distinct elements of a juvenile court's ICWA finding and that dependency matters require courts to exercise a significant amount of discretion. (*Id*. at p. 1004.)

However, for the reasons explained on pages 67 to 77 in the Department's Answer Brief on the Merits, *In re Ezequiel G.* is preferable to *In re K.H.* for several reasons, including *In re K.H.*'s misapplication of case law.

Another reason *In re Ezequiel G.* is preferable to *In re K.H.* is that the *In re Ezequiel G.* Court adopted *Dezi C.*'s "reason to believe rule" as the standard for assessing whether error in conducting initial ICWA inquiry was prejudicial whereas the *In re K.H.* Court did not adopt any standard for assessing whether error in conducting ICWA inquiry was prejudicial. (*In re Ezequiel G., supra,* 81 Cal.App.5th at p. 1014, citing *Dezi C., supra,* 79 Cal.App.5th at p. 779.) Instead, the *In re K.H.* Court endorsed a vague, ad-hoc approach based on the circumstances of each case, and stated generally that automatic reversal is likely required when the appellate record is undeveloped. (*In re K.H., supra,* 84 Cal.App.5th at pp. 602-606.) Unlike *Dezi C.*, this leaves a glaring lack of guidance for future appeals, except to the extent that it encourages parents to leave an undeveloped record in order to secure a reversal.

Moreover, as opposed to *Dezi C.*, the *In re K.H.* opinion creates confusion in that on the one hand it advocates for an automatic reversal approach to lack of ICWA inquiry compliance, but on the other it indicates that full compliance with section 224.2, subdivision (b), is not required. (*In re K.H., supra,* 84 Cal.App.5th at pp. 603, 621.) Ironically, *In re K.H.* states that full compliance with section 224.2, subdivision (b), is "extreme," "arguably . . . absurd," and that despite the statute's language to contrary it should not be interpreted as requiring an exhaustive

search for relatives.[9] (*Ibid.*) However, the Court does not explain which parts of the statute should be disregarded as "absurd" or "extreme" or which relatives need not be inquired of. (*Ibid.*) Nor does the opinion mention how to assess alleged error in failing to make ICWA inquiry of "other" persons named in the statute beyond just extended family members. (*Ibid.*) By contrast, *Dezi C.*'s "reason to believe rule" does not leave a lack of guidance, provides a rule for assessing prejudice that would apply to every single entity named in section 224.2, subdivision (b), and does not suggest that parts of the statute need not be complied with. (*Dezi C., supra,* 79 Cal.App.5th at p. 779; § 224.2, subd. (b).)

As such, the Department agrees that the hybrid substantial evidence/abuse of discretion standard of review that *In re K.H.* adopted from *In re Ezequiel G.* is appropriate, but it does not believe *In re K.H.* was correct beyond the issue of the standard of review.

Based on the foregoing, the Department urges this Court to reject the arguments made by CADC and affirm *Dezi C.*

II. CILS/CTFC Appears To Urge This Court To Adopt The "Automatic Reversal Rule."

CILS/CTFC states that when reviewing ICWA inquiry error, appellate courts should consider "[w]hether information in

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[9] At the same time it promotes disregarding portions of the statute, the *In re K.H.* opinion acknowledges that appellate courts "do not sit as super-legislatures to determine the wisdom, desirability or propriety of statutes enacted by the Legislature." (*In re K.H., supra*, 84 Cal.App.5th at p. 591, fn. 6.)

the hands of the extended family members is likely to be meaningful in determining whether the child is an Indian child, not whether the information is likely to show the child is in fact an Indian child." (CILS/CTFC 24.) However, the case that CILS/CTFC cites for this quote, *In re Y.W.* (2021) 70 Cal.App.5th 542 (CILS/CTFC 24-25), does not contain that quote (see *In re Y.W., supra,* 70 Cal.App.5th at pp. 542-559).

The case that does contain that quote, *In re Antonio R.* (2022) 76 Cal.App.5th 421, cites to *In re Y.W., supra,* 70 Cal.App.5th 542. (*In re Antonio R., supra,* 76 Cal.App.5th at p. 435.) Both cases pertain to the failure to inquire of extended family members, and both cases employed the "automatic reversal rule." (See *In re K.H., supra,* 84 Cal.App.5th at pp. 617-618 [cases applying the "automatic reversal rule" include *In re Antonio R.* and *In re Y.W.*]; *In re Y.M.* (2022) 82 Cal.App.5th 901, 911, fn. 6 [*In re Y.W.* holds that "inquiry error is generally reversible per se and requires remand for ICWA compliance"].)

For the reasons set forth in pages 17 through 78 in its Answer Brief on the Merits, including that none of the "automatic reversal rule" cases discuss if their holdings would apply if the failure to inquire went beyond extended family members into other persons mentioned in the statute, the Department opposes the "automatic reversal rule."

Notably, in the portion of the *In re Antonio R.* opinion that CILS/CTFC quotes from, the Court cites to *In re Benjamin M.* (2021) 70 Cal.App.5th 735, 744. (*In re Antonio R., supra,* 76 Cal.App.4th at p. 434.) The *In re Benjamin M.* approach, which

is known as the "readily obtainable information rule" and represents one of the four major approaches in assessing ICWA inquiry error, holds that defective initial inquiry is harmless unless "the record indicates that there was readily obtainable information that was likely to bear meaningfully upon whether the child is an Indian child" and that "the probability of obtaining meaningful information is reasonable." (*In re Benjamin M., supra,* 70 Cal.App.5th at p. 744.) The fact that the *In re Antonio R.* Court applied an "automatic reversal rule" while relying on *In re Benjamin M.*'s "readily obtainable information rule" highlights the amorphousness of the "readily obtainable information rule" versus the precision of *Dezi C.*'s "reason to believe rule." (See *In re Y.M., supra,* 82 Cal.App.5th at p. 916 ["the [*In re*] *Benjamin M.* standard of prejudice is somewhat amorphous"]; see also *In re K.H., supra,* 84 Cal.App.5th at p. 617 [the *In re Benjamin M.* "approach is potentially susceptible to being read in different ways, depending on whether courts interpret it broadly or narrowly overall."]; *In re A.R.* (2022) 77 Cal.App.5th 197, 206 ["[*In re Benjamin M.*] also potentially runs afoul of the constitutional requirement that judgments can only be reversed on appeal in cases where a manifest miscarriage of justice has been shown."]; *In re Antonio R., supra,* 76 Cal.App.5th at p. 435 [arguing that the *In re Benjamin M.* rule was misapplied in *In re S.S.* (2022) 75 Cal.App.5th 575 & *In re Darian R.* (2022) 75 Cal.App.5th 502].)

In contrast to the "readily obtainable information rule," *Dezi C.*'s "reason to believe rule" is not amorphous, is defined by

statute, and can be applied with exactitude. (§ 224.2, subds. (b), (d) & (e)(1).)

With this in mind, it is important to consider that under the facts of the *In re Benjamin M.* case, the *In re Benjamin M.* approach and the *Dezi C.* approach would have both reached the same result. In *In re Benjamin M.*, the mother denied Indian ancestry but the father never made an appearance in the case and was unable to be located. (*In re Benjamin M., supra,* 70 Cal.App.5th at p. 740.) Over the course of the proceedings, the child welfare agency was able to speak with the father's sister-in-law and other "collaterals," and the mother told the juvenile court she knew the address of the father's brother. (*Ibid.*) However, the child welfare agency did not ask any of these individuals about the father's or the child's possible Indian ancestry. (*Id.* at p. 744.) The juvenile court found the ICWA did not apply and eventually terminated parental rights. (*Id.* at p. 740.) The appellate court reversed the order terminating parental rights, finding that because the father was never asked about Indian ancestry, prejudice resulted from the failure to inquire of his known relatives, who "likely would have shed meaningful light on whether there is reason to believe Benjamin is an Indian child." (*Id.* at pp. 744-746.)

Under *Dezi C.*'s "reason to believe rule," the *In re Benjamin M.* facts would provide "reason to believe" the child is or may be an Indian child and would justify remand for further ICWA inquiry. (*Dezi C., supra,* 79 Cal.App.5th at p. 779 [there is "reason to believe" where "the record indicates that the agency

never inquired into one of the two parents' heritage *at all*"].) Thus, *Dezi C.* addresses the same concern the *In re Benjamin M.* Court had and ensures that where the child welfare agency never inquired into one of the two parents' heritage at all, remand for further ICWA inquiry will occur. This underscores the wisdom and practicality of the *Dezi C.* approach, which lacks the amorphous aspect of the "readily obtainable information rule" that has led to uncertainty in appellate courts about how it should be applied. (*Dezi C., supra,* 79 Cal.App.4th at p. 786, citing *In re A.C.* (2022) 75 Cal.App.5th 1009, 1020, fn. 4 (dis. opn. of Crandall, J.) ["The uncertainty of the meaning and breadth of [the 'readily obtainable information rule'] has led at least one judge to comment that the rule 'merely shifts' the 'battleground' to the appellate courts, where there will be skirmishes over whether information was readily obtainable."].)

It is also interesting to note that the case CILS/CTFC did cite, *In re Y.W., supra,* 70 Cal.App.5th 542, which employed the "automatic reversal rule," also involved facts that would have warranted remand for further inquiry under *Dezi C.* (CILS/CTFC 24-25.) In *In re Y.W.*, the mother denied knowledge of Indian ancestry. (*In re Y.W., supra,* 70 Cal.App.5th at pp. 548-549.) However, the mother was adopted, and the child welfare agency never made ICWA inquiry of her available biological relatives. (*Id.* at pp. 547-556.) The appellate court conditionally affirmed the order terminating parental rights and remanded the matter for ICWA inquiry of the mother's biological relatives. (*Id.* at p. 559.)

The approach utilized in *Dezi C.* would have led to the same outcome. (*Dezi C., supra,* 79 Cal.App.5th at p. 779 [remand is necessary when "the record indicates that one or both of the parents is adopted and hence their self-reporting of 'no heritage' may not be fully informed."].) This is another indication of the sensibleness of the *Dezi C.* approach – it accounts for the concern of the *In re Y.W.* Court where an adoptive parent's denials of Indian ancestry may not be fully informed but lacks the undesirable consequences of the "automatic reversal rule," which include undue delay, likelihood of successive appeals, and elevation of state statutes above the constitutional mandate that reversal is prohibited absent a miscarriage of justice. (*In re Dezi C., supra,* 79 Cal.App.5th at pp. 776-786.)

Based on the foregoing, this Court should decline CILS/CTFC's request that it adopt the "automatic reversal rule." (CILS/CTFC 24.)

Conclusion

The Department respectfully asks that *Dezi C.* be affirmed.

DATED: April 5, 2023

Respectfully submitted,

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The text of this brief consists of 8,301 words as counted by the Microsoft Office Word 2016 program used to generate this brief.

DATED: April 5, 2023

Respectfully submitted,

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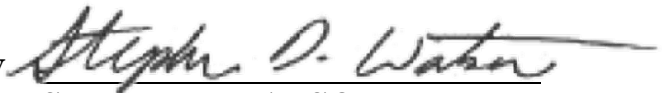
By 
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Declaration Of Service

STATE OF CALIFORNIA, County of Los Angeles:

GENNY GOMEZ states: I am employed in the County of Los Angeles, State of California, over the age of eighteen years and not a party to the within action. My business address is 648 Kenneth Hahn Hall of Administration, 500 West Temple Street, Los Angeles, California 90012.

On April 5, 2023, I served the attached **RESPONDENT LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES' ANSWER TO AMICUS BRIEFS IN SUPPORT OF APPELLANT FILED BY THE CALIFORNIA APPELLATE DEFENSE COUNSEL AND THE CALIFORNIA INDIAN LEGAL SERVICES AND CALIFORNIA TRIBAL FAMILIES COALITION IN THE MATTER OF DEZI C., SUPREME COURT NO. S275578, 2d JUVENILE NO. B317935, LASC NO. 19CCJP08030,** to the persons and/or representative of the court as addressed below.

BY ELECTRONIC SERVICE. I served via TrueFiling, and no error was reported, a copy of the document(s) identified above:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on April 5, 2023, at Los Angeles, California.

GENNY GOMEZ

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **IN RE DEZI C.**
Case Number: **S275578**
Lower Court Case Number: **B317935**

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4/5/2023

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