Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically RECEIVED on 4/6/2023 5:55:00 PM

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 4/6/2023 by Robert Toy, Deputy Clerk

Supreme Court No. S275578

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

In re DEZI C., et al., Persons Coming Under the Juvenile Court Law.	)	2nd Civ. No. B317935
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Petitioner and Respondent, v. ANGELICA A., Defendant and Appellant.	)	Los Angeles County Superior Court Case No. 19CCJP08030A-B

APPELLANT'S OPPOSITION TO REQUEST TO TAKE ADDITIONAL EVIDENCE

On Appeal from an Order of the Juvenile Court
State of California, County of Los Angeles

Hon. Robin R. Kesler, Judge Pro Tempore

*Karen J. Dodd, Esq. #146661
John L. Dodd, Esq. #126729
17621 Irvine Blvd., Ste 200, Tustin, CA 92780
tel (714) 731-5572 fax (714) 242-9065

kdodd@appellate-law.com
jdodd@appellate-law.com

Attorneys for Appellant mother, Angelica A.
Appointed by the Supreme Court

TABLE OF CONTENTS

TABLE OF AUTHORITIES

California Supreme Court Cases

California Appellate Cases

California Statutes

INTRODUCTION

The motion filed by respondent Los Angeles County Department of Children and Family Services ("DCFS") is not only ill-conceived, it also demonstrates DCFS' primary argument is that it does not want to comply with the ICWA because it believes compliance with the procedural mandates to be a waste of time. As with most of the arguments in its respondent's briefs, it should take this argument to the Legislature, not this Supreme Court.

Substantively, the motion should be denied because it relies on double hearsay and is irrelevant to the issues before this Court.

DISCUSSION

I. Code of Civil Procedure Section 909 Does Not Permit Consideration of this "Evidence."

Code of Civil Procedure section 909 provides:

> 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 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.

It is a cardinal principle of appellate review that "an appeal reviews the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration." (*In Re James V.* (1979) 90 Cal.App.3d 300, 304). This rule reflects an "essential distinction between the trial and the appellate court ... that it is the province of the trial court to decide questions of fact and of the appellate court to decide questions of law...." (*Tupman v. Haberkern* (1929) 208 Cal. 256, 262-263) The rule promotes the orderly settling of factual questions and disputes in the trial court, provides a meaningful record for review, and serves to avoid prolonged delays on appeal. "Although appellate courts are authorized to make findings of fact on appeal by Code of Civil Procedure section 909 and the California Rules of Court, the authority should be exercised sparingly. (*De Angeles v. Roos Bros., Inc.* (1966) 244 Cal.App. 2d 434, 443)

This case is not appropriate for additional evidence, certainly not the type proffered. As explained in *In re E.C.* (2022) 85 Cal.App.5th 123, courts are split on whether or not taking additional evidence is appropriate in ICWA notice cases. (*Id.* at p. 148-149.) The issue is presently pending before this Court in *In re Kenneth D.* (2022) 82 Cal.App.5th 1027, review granted November 38, 2022, S276649, a citation notably absent from DCFS' motion.

In re Zeth S. (2003) 31 Cal.4th 396, generally precludes consideration of additional evidence in these cases: "*absent*

exceptional circumstances, no such findings should be made." (*Id.* at p. 405, original emphasis.) ICWA error is common, not an exceptional circumstance. (*In re Y.M.* (2022) 82 Cal.App.5th 901, 913-914.) *E.C.* reiterated: "Consistent with *Zeth S.* and as stated in [*In re*] *K.H.* [(2022) 84 Cal.App.5th 566], we generally disapprove of reliance on postjudgment evidence to resolve claims of error under ICWA." (*In re E.C., supra,* 85 Cal.App.5th at p. 148.) *Zeth S.* only permitted additional evidence "'to expedite just and final resolution for the benefit of the children involved.'" (*Id.* at p. 150.) Here, the "additional evidence" consists of, essentially, a policy argument divorced from the facts of this instant case. It will have no impact whatsoever on the outcome of this particular case, requiring the motion be denied.

Moreover, appellant disputes the implied assertion that – in not one single ICWA-inquiry reversal in the history of California jurisprudence – was additional information discovered. Section 909 is improper if the facts are disputed. (*Butt v. State of California* (1992) 4 Cal.4th 668, 697, fn. 23.)

This Court should deny the motion.

II. DCFS' Proffered "Evidence" Is Hearsay Without an Exception.

This Court also should deny the motion because it is entirely inadmissible hearsay. (Evid. Code § 1200, subd. (b).) "'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1220, subd. (a).) "Hearsay is not admissible unless it meets the

requirements of one of the exceptions set forth in Evidence Code sections 1220 to 1390." (*People v. Selivanov* (2016) 5 Cal.App.5th 726, 774.)

The following assertions are hearsay:

> "The Department's records revealed 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 ICWA applied was zero." (p. 9, ¶ 2.)
>
> "The data of the 34 counties that responded revealed 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 ICWA applied was zero." (pp. 9-10.)

The asserted truth of the contents of records and what counsel was told about them is entirely hearsay. The assertion relies on records, expressly concerning the first paragraph, and impliedly concerning the second, i.e., "data." Evidence Code section 1271 sets for the "business records" exception:

> Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:
> (a) The writing was made in the regular course of a business;
> (b) The writing was made at or near the time of the act, condition, or event;
> (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and
> (d) The sources of information and method and time of

preparation were such as to indicate its trustworthiness.

Not only are these elements unsatisfied, DCFS does not even claim they are. Counsel apparently is referring to "data" compiled after the fact, not contemporaneous writings.

> In order to establish the proper foundation for the admission of a business record, an appropriate witness must be called to lay that foundation [Citation]. The underlying purpose of section 1271 is to eliminate the necessity of calling all witnesses who were involved in a transaction or event. [Citation]. Generally, the witness who attempts to lay the foundation is a custodian, but any witness with the requisite firsthand knowledge of the business's recordkeeping procedures may qualify. The proponent of the admission of the documents has the burden of establishing the requirements for admission and the trustworthiness of the information.

(*People v. Khaled* (2010) 186 Cal.App.4th Supp. 1, 8.)

> "The key to establishing the admissibility of a document made in the regular course of business is proof that the person who wrote the information or provided it had knowledge of the facts from personal observation." [Citation.]) The witness called to present this proof "need not have been present at every transaction to establish the business records exception; he or she need only be familiar with the procedures followed."

(*People v. Selivanov, supra,* 5 Cal.App.5th at p. 775.)

Without evidence as to how the documents were prepared, the business records exception was unsatisfied. (*Taggard v. Super Seer Corp.* (1995) 33 Cal.App.4th 1697, 1706.) Moreover, Watson could not provide substantial evidence the documents were trustworthy, a separate requirement. (*Ibid.*; see also *Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366, 1376-1377.)

Watson claimed to have spoken with "supervisors" and persons from other counties. Not only did he not have personal knowledge of the records, there is no indication the persons to whom he spoke did either. Testimony not based on personal knowledge is inadmissible. (Evid. Code, § 702, subd. (a).) Without proper foundation, exceptions to the hearsay rule do not apply. (*Osborne v. Todd Farm Service* (2016) 247 Cal.App.4th 43, 53.)

Additionally, because the "evidence" relies on court records, even if those hundreds of records were actually authenticated and attached to the motion, this Court only could consider their existence; it cannot accept, as true, any hearsay statements contained in the records. (*In Re Vicks* (2013) 56 Cal.4th 274, 314; *Copenbarger v. Morris Cerullo World Evangelism Inc.* (2018) 29 Cal.App.5th 1, 14-15.)

Because the "evidence" is entirely hearsay, this Court must deny the motion.

III. Consideration of this "Evidence" Denies Appellant Due Process of Law Because It Is Not Subject to Cross-Examination.

Consideration of the proffered evidence also denies appellant due process of law because the "evidence" is not subject to cross-examination. (*In re Lesly G.* (2008) 162 Cal.App.4th 904, 914-915.) Who are these "supervisors?" (p. 9, ¶ 2.) How many files did they review? No one knows. What does the declarant mean by "data" in any event? Although the declarant lists representatives from various counties with whom he "spoke" (pp.

10-11), there not only is no declaration under penalty of perjury from those individuals, but no hint concerning what records they purportedly reviewed. Before this Court can consider this "evidence," each of those individuals must be subject to cross-examination.

If DCFS is relying on these assertions for their truth, mother should have the right to cross-examine Mr. Watson (who now is a witness), the "supervisors," and all the personnel from other counties whose representations he relied upon. (*In re Ricky R.* (2022) 82 Cal.App.5th 671, 682.) Because – other than staying these proceedings to allow for multiple depositions – there is no mechanism to permit that in this Supreme Court, the evidence must be excluded (*People v. Sanchez* (2016) 63 Cal.4th 665, 685) and the motion denied.

IV. The Proffered Evidence Is Irrelevant.

Moreover, the information is logically irrelevant. (Evid. Code, § 350.) What was the result in the *other* 23 counties? Unless there had been not one single instance over the last 10 years in which Native American heritage was ascertained on remand, it is irrelevant what happened in the referenced counties.

//

CONCLUSION

If DCFS and allied county counsels around the state believe ICWA inquiry is a waste of time, they need to take their complaint to the Legislature, rather than filing frivolous motions in this Supreme Court. This motion should be denied.

Respectfully submitted

Dated: April 6, 2023 /s/ Karen J. Dodd

/s/ John L. Dodd

Karen J. Dodd, Esq., & John L. Dodd, Esq.

Counsel for Appellant and Petitioner, A.A.

CERTIFICATE OF WORD COUNT

I, Karen J. Dodd, counsel for appellant, certify that the foregoing brief complies with California Rules of Court and contains 1,791 words, including footnotes, but excluding table and signature lines, according the word count of the computer program used to prepare this brief. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: April 6, 2023 /s/ Karen J. Dodd

Karen J. Dodd, Attorney for Appellant

PROOF OF SERVICE

I am, and was at the time of the service of this declaration, over the age of 18 years and am not a party to this cause. My electronic service address is jdodd@appellate-law.com and my business address is 17621 Irvine Blvd., Ste. 200, Tustin, CA 92780. On April 6, 2023, I served the persons and/or entities listed below by the method checked. For those marked "Served Electronically," I transmitted a PDF version of the Appellant's Opposition to Motion to Take Additional Evidence on Appeal by TrueFiling Electronic service or by e-mail to the e-mail service address(es) provided below. For those marked "Served by Mail," I enclosed a copy of the document identified above in an envelope or envelopes, addressed as provided below, and placed the envelope(s) for collection and mailing on the date and at the place show below, following the my office's ordinary business practices. I am readily familiar with this business practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in sealed envelope(s) with postage fully prepaid.

Served Electronically:

1. Office of the County Counsel (appellate@counsel.lacounty.gov)
2. Stephen Watson, Esq. (swatson@counsel.lacounty.gov)
3. CAPLA (capdocs@lacap.com)
4. Marjan Daftary (minors)(daftarym@clccal.org)
5. Layla Toma, Esq (mother's trial counsel) (tomal@ladlinc.org)
6. Jessie Bridgeman, Esq. (bridgemanj@ladlinc.org)
7. Hon. Robin Kelser (JuvJoAppeals@lacourt.org)
8. Sean Burleigh, Esq. (Saburleigh@gmail.com)
9. California Indian Legal Services (tedmiston@calindian.org; dalter@calindian.org)
10. Christopher Blake; CADC (christopherblake@sbcglobal.net)
11. Kimberly Cluff; Calif. Tribal Families Coalition (kimberly.cluff@caltribalfamilies.org)
12. Jennifer Henning (jhenning@counties.org)
13. Eliza Molk (Eliza.Molk@sdcounty.ca.gov)
13. Second District, Div. Two (Truefiling)

By Mail:
14. A.A. (address omitted)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 6th day of April, 2023, at Tustin, California.

/s/ Karen J. Dodd
Karen J. Dodd

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 4/6/2023 by Robert Toy, Deputy Clerk

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**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **kdodd@appellate-law.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	S275578_RAB_AA
OPPOSITION	S275578_OPP_AA

Service Recipients:

Person Served	Email Address	Type	Date / Time
John Dodd John L. Dodd and Associates, Prof. Corp. 126729	jdodd@appellate-law.com	e-Serve	4/6/2023 5:55:00 PM
Karen Dodd Attorney at Law 146661	kdodd@appellate-law.com	e-Serve	4/6/2023 5:55:00 PM
Kimberly Cluff California Tribal Families Coalition 196139	kimberly.cluff@caltribalfamilies.org	e-Serve	4/6/2023 5:55:00 PM
Jessie Bridgeman Los Angeles Dependency Lawyers	bridgemanj@ladlinc.org	e-Serve	4/6/2023 5:55:00 PM
Dorothy Alther California Indian Legal Services	tedmiston@calindian.org	e-Serve	4/6/2023 5:55:00 PM
Marjan Daftary Children's Law Center	daftarym@clccal.org	e-Serve	4/6/2023 5:55:00 PM
Eliza Molk County Counsel Juv Div 312351	Eliza.Molk@sdcounty.ca.gov	e-Serve	4/6/2023 5:55:00 PM
Stephen Watson Office of County Counsel, Appeals Division 272423	swatson@counsel.lacounty.gov	e-Serve	4/6/2023 5:55:00 PM
Sean Burleigh Attorney at Law 305449	saburleigh@gmail.com	e-Serve	4/6/2023 5:55:00 PM
Dorothy Alther Attorney at Law	dalther@callindian.org	e-Serve	4/6/2023 5:55:00 PM
Layla Toma	tomal@ladlinc.org	e-	4/6/2023

		Serve	5:55:00 PM
Calif Indian Legal Service	dalter@calinidian.org	e-Serve	4/6/2023 5:55:00 PM
Chris Blake 53174	christopherblake@sbcglobal.net	e-Serve	4/6/2023 5:55:00 PM
jennifer henning 193915	jhenning@counties.org	e-Serve	4/6/2023 5:55:00 PM
Hon. Robin Kelser	juvjoappeals@lacourt.org	e-Serve	4/6/2023 5:55:00 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

4/6/2023

Date

/s/John Dodd

Signature

Dodd, Karen (146661)

Last Name, First Name (PNum)

John L. Dodd & Associates

Law Firm