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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

SUPPLEMENTAL BRIEF
(rule 8.530(d)(1))

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

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INTRODUCTION

Appellant hereby supplies the following additional authorities to be discussed at oral argument which were filed after the reply brief on the merits. (Cal. Rules of Court, rule 8.520(d)(1).)

DISCUSSION

I. Case Law Developing Since the Briefing Rejects *Dezi C.*, Applying Either a Per Se Reversal Standard or Adopting *Benjamin M.*

A. Cases Applying Per Se Reversal Standard.

In re S.S. (2023) 90 Cal.App.5th 695 (Second Dist., Div. Eight):

> At the behest of tribes seeking redress for a long and troubled history, the Legislature enacted a statute to help them identify children who could sustain tribal cultures. But an agency skipped the low-cost measures the statute required. That neglect shuts tribes out: they cannot learn about cases where their interests can be vitally at stake. The agency's disregard defeats the statute's promise, and this broken promise is a miscarriage of justice. It prejudices tribes.

(*Id.* at p. 696.)

> The Department's failure prejudices tribes. The Department had contact information for three extended paternal family members but did nothing with it, thus denying tribes the benefit of the statutory promise. It would be a miscarriage of justice to deny tribes the benefit of this legislation.

(*In re S.S., supra*, 90 Cal.App.5th at pp. 710-711.)

> The protection of the tribal interest is at the core of ICWA and our state counterpart, which recognize that a tribe has an interest in the child that is distinct from, but

> on a parity with, the interest of the parents. This relationship between Indian tribes and Indian children is one many non-Indians find difficult to understand and that non-Indian courts are slow to recognize. [Citation.]
>
> The relevant rights belong to Indian tribes. They have a statutory right to receive notice where an Indian child may be involved so that they authoritatively may determine for themselves that child's status. "It necessarily follows that the prejudice to those rights lies in the failure to gather and record the very information the juvenile court needs to ensure accuracy in determining whether further inquiry or notice is required, and whether ICWA does or does not apply." (*In re K.H., supra*, 84 Cal.App.5th at p. 591.)
>
> The question of membership is determined by the tribes, not by courts or child protective agencies. [Citations.]
>
> In sum, the Department's violation of the 2018 amendment is prejudicial.

(*In re S.S.*, *supra,* 90 Cal.App.5th at pp. 711-712.)

Haaland v. Brackeen (2023) __ U.S. __ [143 S.Ct. 1609, 216 L.Ed.2d 254], Gorsuch, J. concurring at pp. 1641-1647, explained in depth the historical background of the ICWA, noting specifically, "The touchstone of the statute is notice." (*Id.* at p. 1646.)

H.A. v. Superior Court (May 3, 2024 C099704) 2024 Cal.App.LEXIS 294 (Third Dist.). A parent may not have been fully aware of Native American heritage (*Id.* at pp. *8-*9) so ICWA error was presumed prejudicial:

> In light of the issue's pendency before our Supreme Court in *In re Dezi C., supra*, 79 Cal.App.5th 769 review granted, the record in this case, the remedial purpose

> underlying the ICWA and related California law intended to protect third party rights, as well as the fact that it was the Agency's and the juvenile court's duty to fully develop the ICWA information (*In re Antonio R.* (2022) 76 Cal.App.5th 421, 431 [291 Cal. Rptr. 3d 520]; *In re Elizabeth M.* (2018) 19 Cal.App.5th 768, 785 [228 Cal. Rptr. 3d 213]), we apply the analytical framework set forth by our Supreme Court in *In re A.R.* for assessing harm and conclude the error is prejudicial (*In re A.R.* (2021) 11 Cal.5th 234, 252–254 [276 Cal. Rptr. 3d 761, 483 P.3d 881] [declining to apply an outcome-focused "likelihood-of-success condition," and explaining that "[f]or a parent whose attorney has incompetently failed to file a timely appeal, the relevant injury is not denial of any specific substantive appellate victory; it is the opportunity to appeal at all"]).

(Id. at pp. *9-10; see also *In re C.L.* (2023) 96 Cal.App.5th 377, 391 (Third Dist.).)

In re Jerry R. (2023) 95 Cal.App.5th 388 (Fifth District), reaffirmed *In re K.H.* (2022) 84 Cal.App.5th 566 and *In re E.C.* (2022) 85 Cal.App.5th 123, holding review for harmlessness is inappropriate, primarily because the burden of establishing ICWA compliance does not fall to the parents, and the prejudice stems from the failure to gather the information necessary to provide tribes with notice. (*Id.* at pp. 430-431.)

B. Cases Applying *Benjamin M.*.

In re Samantha F. (2024) 99 Cal.App.5th 1062 (Fourth Dist., Div. Two). This involved reversal applying *Benjamin M.* because "the department did not extend its ICWA inquiry to any relatives other than mother and father, even though various paternal relatives had attended hearings and acted as caregivers for Samantha during the 31 proceedings. Those family members

were readily available and will have information about whether Samantha is an Indian child." (*Id.* at p. 1083; see also *In re L.B.* (2023) 98 Cal.App.5th 512, 516 (First Dist., Div. Four)

In re V.C. (2023) 95 Cal.App.5th 251, 261-262 (First Dist., Div. Two), adopted *Benjamin M.* and rejected *Dezi C.*, explaining:

> We weigh in on the issue, and begin by noting that we join with the many other courts that have declined to apply the presumptive affirmance rule, which has been rightly criticized. (See *In re K.H.* (2022) 84 Cal.App.5th 566, 612–614 [300 Cal. Rptr. 3d 499], citing *In re Y.M.* (2022) 82 Cal.App.5th 901, 913–915 [299 Cal. Rptr. 3d 118]; *Dezi C., supra*, 79 Cal.App.5th at pp. 777–778, review granted; *Benjamin M., supra*, 70 Cal.App.5th at pp. 743–744.) As explained in *In re K.H.*, a presumptive affirmance rule requiring a parent to demonstrate evidence in the record or make an offer on appeal regarding possible Indian heritage would routinize consideration of new evidence on appeal, which is generally disfavored. It would also shift the burden of investigation onto parents in dependency proceedings and, moreover, disregard the interests of the Native American tribes, because prejudicially deficient inquiries will go uncorrected if an appealing parent is unwilling or unable to make a meaningful proffer on appeal. (See *In re K.H., supra*, 84 Cal.App.5th at pp. 612–614 [and cases cited].)
>
> We also decline to adopt the "reason to believe" approach in *Dezi C.* In deeming an agency's failure to conduct a proper inquiry into a dependent's Indian ancestry to be harmless unless the "record contains information suggesting a reason to believe that the child may be an 'Indian child' within the meaning of ICWA" (*Dezi C., supra*, 79 Cal.App.5th at p. 779, review granted), the rule in *Dezi C.* shifts the duty of developing information on Indian ancestry from the agency to the parents. (See *Benjamin M., supra*, 70 Cal.App.5th at p. 743 ["Requiring a parent to prove that the missing information would have

> demonstrated 'reason to believe' would effectively impose a duty on that parent to search for evidence that the Legislature has imposed on only the agency"].)

CONCLUSION

When a child welfare agency fails to make the statutorily-required inquiry concerning the child's potential Indian ancestry, that error is structural, requiring reversal per se. (AOB 44-45.) Moreover, because the *tribe* has the right to notice, deprivation of that notice requires per se reversal as a miscarriage of justice, consistent with the longstanding rule that lack of notice compels reversal. (AOB 42-43.) Finally, because a lack of required inquiry results in a lack of substantial evidence supporting the trial court's "no ICWA" finding, per se reversal is required under the rule that lack of substantial evidence generally compels reversal without regard to prejudice. (AOB 38-39, 46-47.)

Respectfully submitted

Dated: May 23, 2024

/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 1,272 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: May 23, 2024 /s/ Karen J. Dodd

Karen J. Dodd, Attorney for Appellant

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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. Christopher Blake, Esq. (christopherblake@sbcglobal.net)
10. CSAC (SDCCJD.Appeals@sdcounty.ca.gov)
11. Jennifer B. Henning, Esq. (jhenning@counties.org)
12. Dorothy Alther, Esq. (dalther@calindian.org)
13. Kimberly Cluff, Esq. (kimberly.cluff@caltribalfamilies.org)
14. Second District, Div.Two (Truefiling)
//

By Mail:
15. 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 23rd day of May, 2024, at Tustin, California.

/s/ John L. Dodd
John L. Dodd

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Kimberly Cluff California Tribal Families Coalition 196139	kimberly.cluff@caltribalfamilies.org	e-Serve	5/23/2024 3:50:08 PM
Jessie Bridgeman Los Angeles Dependency Lawyers	bridgemanj@ladlinc.org	e-Serve	5/23/2024 3:50:08 PM
Dorothy Alther California Indian Legal Services	tedmiston@calindian.org	e-Serve	5/23/2024 3:50:08 PM
Marjan Daftary Children's Law Center	daftarym@clccal.org	e-Serve	5/23/2024 3:50:08 PM
Eliza Molk Office of the County Counsel 312351	Eliza.Molk@sdcounty.ca.gov	e-Serve	5/23/2024 3:50:08 PM
Stephen Watson Office of The County Counsel 272423	swatson@counsel.lacounty.gov	e-Serve	5/23/2024 3:50:08 PM
Sean Burleigh Burleigh Legal Consulting 305449	saburleigh@gmail.com	e-Serve	5/23/2024 3:50:08 PM
Dorothy Alther Attorney at Law	dalther@callindian.org	e-Serve	5/23/2024 3:50:08 PM
California Appellate Project	capdocs@lacap.com	e-Serve	5/23/2024 3:50:08 PM

Layla Toma	tomal@ladlinc.org	e-Serve	5/23/2024 3:50:08 PM
Hon. Robin Kessler	juvjoappeals@lacourt.org	e-Serve	5/23/2024 3:50:08 PM
Christopher Blake 53174	christopherblake@sbcglobal.net	e-Serve	5/23/2024 3:50:08 PM
CSAC	SDCCJD.Appeals@sdcounty.ca.gov	e-Serve	5/23/2024 3:50:08 PM
jennifer henning 193915	jhenning@counties.org	e-Serve	5/23/2024 3:50:08 PM

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Dodd, John (126729)

Last Name, First Name (PNum)

John L. Dodd & Associates, Prof. Corp

Law Firm