IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re Kenneth D., a Person Coming Under the Juvenile Court Law.	S276649
Placer County Department of Health and Human Services, Plaintiff and Respondent, v. J.T., Defendant and Appellant.	Court of Appeal No. C096051
	Placer County No. 53005180

Petitioner's Opening Brief on the Merits

After the published decision of the Court of Appeal of California, Third Appellate District, filed August 31, 2022

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2. If so, what procedures must be followed?

INTRODUCTION

When the child welfare agency (Department) and the trial court fail to comply with the inquiry, investigation and notice requirements of the Indian Child Welfare Act and related California law,[1] the appellate court may not take additional evidence to remedy that failure on appeal from an order terminating parental rights except in rare circumstances.

Appellate courts have limited authority, on a party's motion, to make independent factual findings and take additional evidence on appeal. (Code Civ. Proc., § 909;[2] Cal. Rules of Court, rule 8.252(b) & (c);[3] *Golden West Baseball Co. v. City of Anaheim* (1994) 25 Cal.App.4th 11, 41-42; Eisenberg, Cal. Prac. Guide: Civil Appeals & Writs (The Rutter Group, 2022), ¶ 5:168, p. 5-65.)

Section 909 expressly states, "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

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[1] Indian Child Welfare Act of 1978 (25 U.S.C. § 1901 et seq. (ICWA); Welf. & Inst. Code § 224 et seq.

[2] Code of Civil Procedure section 909 provides in part, "the reviewing court may make factual determinations contrary to or in addition to those made by the trial court."

[3] All statutory references are to the Code of Civil Procedure unless otherwise stated and all rule references are to the California Rules of Court.

proceedings in the trial court except where in the interests of justice a new trial is required on some or all of the issues."

Section 909 is not intended to usurp the trial court's factfinding authority. In practice, the circumstances under which appellate courts will receive new evidence are very rare. (*See In re Zeth S.* (2003) 31 Cal.4th 396, 405 (*Zeth S.*).)

In *Zeth S.* this Court disapproved the procedure where the Court of Appeal considered postjudgment evidence presented for the first time through the unsworn statements of the minor's appointed appellate counsel in a brief and relied on that evidence to reverse the juvenile court's judgment terminating parental rights. (*Zeth S., supra,* 31 Cal.4th at p. 400.) This procedure violated both generally applicable rules of appellate procedure and the express provisions of Welfare and Institutions Code section 366.26. (*Id.* at p. 413.)

The Court of Appeal in the present case considered postjudgment evidence to remedy the failure of the juvenile court to follow ICWA inquiry requirements. As will be explained, this situation is analogous to and controlled by *Zeth S.*, as the evidence was contested, contrary to the evidence presented before the trial court, and offered on a central issue in the case.

This brief will also discuss concerns that the procedure followed in this case does not afford parents due process on appeal and can result in unreliable ICWA determinations.

In answer to the Court's second question, California Rules of Court rule 8.252[4] establishes a procedure that must be followed

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[4] Rule 8.252(b) provides, "A party may move that the reviewing court make findings under [section] 909. The motion must include proposed findings."

Rule 8.252(c) provides for evidence on appeal as follows: (1) A party may move that the reviewing court take evidence. (2) An order granting the motion must: (A) State the issues on which evidence will be taken; (B) Specify whether the court, a justice, or a special master or referee will take the evidence; and (C) Give

for the reviewing court to receive and consider postjudgment evidence. First, a motion must be filed. Next, the court must state the issues, specify the judicial officer who will take the evidence, and give notice of the time and place for the hearing.

In reviewing the parental rights termination order in this case, the Court of Appeal did not follow the authorized procedure when it granted the Department's motion to augment the record with a social workers' memorandum of the Department's postjudgment inquiries to determine biological father Joshua T.'s Indian heritage and to demonstrate its earlier failure to investigate was harmless. The Court did not comply with the procedures for the reviewing court to take postjudgment evidence. Its order granting the motion did not state the issues on which evidence would be taken; it did not specify the judicial officer who would take the evidence; it did not give notice of the time and place for taking the evidence. (§ 909; rule 8.252(c).) Moreover, it did not appoint counsel for Joshua T. to address the motion at a noticed hearing. Joshua T. did not have an opportunity to dispute the Department's memorandum and present evidence in a noticed hearing with counsel. Finally, the social worker's memorandum revealed a dispute between Joshua T. and his family member about his Indian[5] heritage, which was beyond the authority of the reviewing court to resolve.

Joshua T. will request this Court to reverse the determination of the Court of Appeal.

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notice of the time and place for taking the evidence. (3) For documentary evidence, . . . The court may admit the document in evidence without a hearing."

[5] California statute defines the term "Indian" or "Indian child" as provided in section 1903 of the federal Indian Child Welfare Act (25 U.S.C. § 1901 et seq.). (Welf. & Inst. Code, § 224.1, subd. (a).)

STATEMENT OF THE CASE AND FACTS

A. Detention

This case began April 19, 2021 when the Department filed a petition alleging the child Kenneth D. came within the provisions of Welfare and Institutions Code section 300, subdivisions (b)(1) and (j), in that he suffered, or was at substantial risk of suffering, harm due to substance abuse by C.B. (Mother), who had previously had another child taken away as a result of her substance abuse. (CT 1-5.)

The petition named alleged father Timothy D., who resided with Mother and had a history of abusing controlled substances. It did not name Joshua T.[6] (CT 1-5.)

Attached to the petition was the ICWA-010(A) form stating an inquiry had been made of Timothy D. The form did not indicate whether the inquiry gave any reason to believe the child may be an Indian child. (CT 5.)

The detention report filed April 22, 2021 stated alleged father Timothy D. and Mother each reported some Indian ancestry. (CT 16-17.)

On April 22, 2021 Mother and Timothy D. attended the detention hearing. The court found Timothy D. was an alleged father. (CT 34.)

At the hearing the court asked Mother and Timothy D., "To your knowledge do you have any Native heritage that elevates you to the point where you are eligible for registration" and each answered no. The court found ICWA did not apply. (RT 4, 12; CT 35.) The court did not order any parent to complete form ICWA-020 and no such forms appear in the record.

The court ordered paternity testing for Timothy D. (RT 11.)

The court found a prima facie showing to detain Kenneth D.

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[6] The California Supreme Court caption refers to father Joshua T. as "J.T."

from Mother and Timothy D. (RT 11.)

B. Jurisdiction/Disposition

The investigator continued to inquire about Indian ancestry and on May 4, 2021 and May 5, 2021 Mother and Timothy D. confirmed no Indian ancestry. However, paternity testing concluded Timothy D. was not the biological father of Kenneth D. and the biological father remained unknown. The report indicated, "At this time, the current finding that ICWA does not apply to Kenneth remains appropriate; however, should a biological father be identified as to Kenneth, then further inquiry will be conducted pertaining to his paternal ancestry." (CT 48.)

Mother and Timothy D. each appeared with counsel at the May 26, 2021 jurisdiction / disposition hearing. Joshua T. appeared remotely in pro per. (RT 16.)

The court found Timothy D. the presumed father as he signed the voluntary declaration of paternity. (RT 20.)

The court found the petition true under subdivisions (b)(1) and (j) of Welfare and Institutions Code section 300 and adjudged Kenneth D. a dependent. (RT 20.) It found ICWA does not apply "at this point." (RT 23.)

After Mother and Timothy D. left the courtroom, the court addressed Joshua T., an alleged biological father, stating it was waiting for the results of his recent DNA test. As a biological father, the Department would decide whether to offer him services if in the child's best interests, but he would not automatically have reunification services. The court would not appoint an attorney to represent Joshua T. while waiting for the test results. (RT 26.)

The court stated if the DNA test results determined Joshua T. was the biological father of Kenneth D., it would put the matter on calendar. The court continued, "we can actually have

two fathers." Timothy D. was the "presumed father" entitled to services. The biological father could also be involved in the case once the court had the test results. (RT 27.)

C. Six-Month Review

The November 17, 2021 status review report, filed November 3, 2021, stated, "At the detention hearing on April 22, 2021, the Court found that ICWA did not apply. At this time, the Department does not have reason to know that there is Indian heritage; however, the Department will continue its inquiry." (CT 158.)

The report stated Joshua T. was found to be Kenneth D.'s biological father, following a paternity test. He had not contacted the Department so it had not informed him of the results. (CT 158.)

The November 17, 2021 addendum report, filed November 15, 2021, stated Mother had "rekindled" her relationship with Joshua T. (CT 197.)

On December 7, 2021 Mother appeared with counsel. Timothy D. appeared only through counsel. Joshua T. appeared in pro per. (RT 37.)

Joshua T. asked for a continuance to request reunification services. He had contacted a lawyer who could not attend the hearing but wanted Joshua T. to request an extension "to amend the birth certificate" and an opportunity for reunification services. (RT 40-41.) The court informed Joshua T. he would need to file a Welfare and Institutions Code section 388 petition; it denied his request to continue because he was only the "biological father." (RT 41.)

The court found ICWA does not apply. (RT 42.)

The court terminated reunification services and set a Welfare and Institutions Code section 366.26 hearing. (RT 43.) It

informed Joshua T. that his next step was to file the modification request. (RT 44.)

D. Welfare and Institutions Code section 366.26 Hearing

The March 22, 2022 Welfare and Institutions Code section 366.26 report, filed March 10, 2022 summarized its February 15, 2021 ICWA inquiries and stated, "The Department has no reason to know that the child is an Indian child and requests that based on the information the Department was able to obtain, there is no reason to know the child is ICWA eligible." (CT 231.)

The Department assessed Kenneth D. as very adoptable with no exceptions to termination of parental rights. (CT 239.)

As to Joshua T., the Department stated, "Even though Mr. [T.] is the biological father, he never followed up with the Department to inquire about his son, nor have his attorney file a 388 requesting services. He is only considered a biological father who has never had contact with his biological son nor has he cared for nor has he seen Kenneth." (CT 240.)

The report stated biological father Joshua T. had very little contact with the Department and Kenneth D. Joshua T. completed a DNA paternity test on May 25, 2021. He stated in court on May 26, 2021 he had not been allowed to be involved with Kenneth D. and was not informed when Kenneth D. was born but he wanted to be there. (CT 240; RT 26-27.)

The Department reported on July 6, 2021 the social worker left a voice mail for Joshua T. to return her call about the paternity results. Joshua T. did not attend the August 25, 2021 hearing but he appeared on November 17, 2021. Services were not offered to him. (CT 240.)

The Department also reported on December 7, 2021 Joshua T. requested a continuance to be given services. The court denied

his request and said he needed to file a Welfare and Institutions Code section 388 petition. Although Joshua T. was the biological father, he did not file a Welfare and Institutions Code section 388 requesting services and did not follow up with the Department to inquire about Kenneth D. Accordingly, the parental relationship exception did not apply to Joshua T. (CT 240.)

At the March 22, 2022 hearing, Mother appeared with counsel. Joshua T. appeared in pro per. (RT 46.)

The court asked Joshua T. how he wished to proceed, stating, "you were here on December 7th, and if you wanted to get any services etc., you were going to hire counsel and file a motion to modify." (RT 48.) Joshua T. responded, "I wasn't able to pull that form out, and my counsel is not here today. I just would like visitation." (RT 49.)

When the court asked if he objected to the termination of his parental rights, Joshua T. said "No." (RT 49.)

The court terminated parental rights and ordered Kenneth D.'s permanent plan as adoption with the foster parents / prospective adoptive parents, where he had been placed on July 23, 2021. (RT 51; CT 245.)

The court did not discuss ICWA compliance at the hearing to terminate parental rights. (RT 46-53.)

E. Notice of Appeal

On April 1, 2022 Joshua T. timely filed a notice of appeal in pro per and requested an appointed attorney on appeal. (CT 271-272.) He checked the box that he was not represented by an appointed attorney in the superior court and added the handwritten statement, "I asked several times." (CT 271.)

F. Department's Motion

On April 28, 2022, the Department filed in the juvenile

court a memorandum from the social worker of postjudgment efforts to determine Joshua T.'s Indian heritage. (Aug CT 1-3.)

On April 29, 2022 the Department filed in the Court of Appeal a Motion to Augment the appellate record (motion) with the memorandum filed in the juvenile court. The motion noted the document proposed for augmentation, the April 28, 2022 memorandum, was not on file or considered by the juvenile court at the Welfare and Institutions Code section 366.26 hearing on March 22, 2022. (Motion at p. 3, citing RT 46.)

According to the memorandum, Joshua T. stated he might have Cherokee ancestry and the social worker should contact his mother Elena T., who would have further information. (Aug CT 2.) Also, according to the memorandum, paternal grandmother stated she completed a blood DNA ancestry test which came back stating they had Native Heritage. She "assumes it is from Mexico since this is where her family resided." (Aug CT 2.) The memorandum indicates she stated "all of her family is actually from Culican Sinaloa, Mexico." (Aug CT 2.)

The Court of Appeal granted the Department's motion on May 5, 2022. Its order granting the motion did not state the issues on which evidence would be taken; it did not specify the judicial officer who would take the evidence; it did not give notice of the time and place for taking the evidence. (Rule 8.252(c).) Moreover, it did not appoint counsel for Joshua T. to address the motion at a noticed hearing. The Court of Appeal appointed counsel for Joshua T. on June 10, 2022. (See Docket (Register of Actions) case no. C096051.)

G. Opinion and Petition for Review

In its August 31, 2022, opinion affirming the parental rights termination order, the Court of Appeal found the "abject failure" of the Department and juvenile court to inquire as to

Joshua T.'s possible Indian heritage was error. (*In re Kenneth D.* (2022) 82 Cal.App.5th 1027, 1034.) But the Court concluded Joshua T. had not shown this error was prejudicial. The Court of Appeal stated it was appropriate to consider the Department's posttermination evidence "that has been made part of the official appellate record." (*Ibid.*) The Court accepted as true and determinative the Department's assumption that Joshua's mother meant the family's native heritage as being of Mexican origin. (*Kenneth D., supra*, 82 Cal.App.5th at p. 1034.)

On October 10, 2022 Joshua T. filed a petition for review, which this Court granted on November 30, 2022.

DISCUSSION

I.

WITH CERTAIN EXCEPTIONS, NOT APPLICABLE HERE, APPELLATE COURTS MAY NOT TAKE ADDITIONAL EVIDENCE TO REMEDY ICWA ERRORS ON APPEAL FROM ORDERS TERMINATING PARENTAL RIGHTS.

A. General rule

It has long been the general rule and understanding 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. [Citation.] 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. . . .."

(*Zeth S., supra,* 31 Cal.4th at p. 405, citing *Tupman v. Haberkern* (1929) 208 Cal. 256, 262-263.)

Although appellate courts are authorized to make findings of fact on appeal by section 909, that authority should be exercised sparingly. Absent exceptional circumstances, no such findings should be made. (*Zeth S., supra,* 31 Cal.4th at p. 405.) There is no blanket exception to the general rule for juvenile dependency appeals. (*Ibid.*)

> "'[C]laims of error under ICWA are not rare and will not typically present the type of exceptional circumstances warranting deviation from the general rule. . . .' [Citations.] To the contrary, routinely accepting the submission of such evidence on review 'invites the [very] deviat[ion] from settled rules on appeal' disapproved of in *Zeth S.* [Citation.]"

(*In re E.C.* (2022) 85 Cal.App.5th 123, 149, quoting *Zeth S., supra,* 31 Cal.4th at pp. 405-406.)

Thus, the trial court decides questions of fact. The

appellate court decides questions of law. This promotes the orderly settling of factual questions in the trial court with an opportunity to be heard, present evidence, and representation by counsel.

B. Procedures for taking additional evidence on appeal

1. Motion to Augment

Here the Department's procedure of a motion to augment with postjudgment evidence, creating a new record rather than completing the appellate record in the case, was inappropriate.

> "Augmentation does not function to supplement the record with materials not before the trial court. [Citations.] . . . Rather, normally 'when reviewing the correctness of a trial court's judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered.' [Citation.]."

(*In re K.M.* (2015) 242 Cal.App.4th 450, 455-456, citing *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3. (*Vons*).)

The augmentation procedure cannot be used to bring up matters *outside* the record (e.g., matters occurring during the pendency of the appeal). (*K.M., supra,* 242 Cal.App.4th at p. 456; see Eisenberg, Cal. Prac. Guide: Civil Appeals and Writs, *supra,* ¶ 5:134, p. 5-47.)

2. Request for Judicial Notice

Taking judicial notice is not a viable solution. Reviewing courts generally do not take judicial notice of evidence not presented to the trial court absent exceptional circumstances. (*Vons, supra,* 14 Cal.4th at p. 444, fn. 3.)

For example, declarations from the Department with maternal relatives and tribes to correct an ICWA error did not

present "exceptional circumstances" justifying engagement in findings of fact on review. (*E.C., supra,* 85 Cal.App.5th at p. 135.) Although occasional cases present exceptions, the inquiry is fact specific. (*Id.* at p. 148.)

Moreover, judicial notice may be taken of the existence of court documents but not the truth of factual findings made in other court rulings. (*K.M., supra,* 242 Cal.App.4th at p. 456.)

3. Code of Civil Procedure section 909

Section 909 permits appellate courts to make independent factual findings and take additional evidence on appeal. However, as stated, the statute is not intended to usurp the trial court's factfinding authority. In practice, the circumstances under which appellate courts will receive new evidence are very rare. (*Zeth S., supra,* 31 Cal.4th at p. 405.) Appellate courts will not use section 909 to substitute their own factual determinations for those of the trial court. (See *Eisenberg,* Cal. Prac. Guide: Civil Appeals and Writs, *supra,* ¶ 5:169, p. 5-65, 5-66; *Tupman v. Haberkern, supra,* 208 Cal. at p. 269.)

C. This Court's Opinions in Dependency Cases

This Court has addressed questions of taking postjudgment evidence at the appellate level in dependency cases. None of the cases authorize the taking of that evidence to show ICWA error harmless.

1. *In re Zeth S.*

This Court has stated the rule as follows:

> "In a juvenile dependency appeal from an order terminating parental rights, may the Court of Appeal 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? The general answer is no, although in the

> rare and compelling case an exception may be warranted."

(*Zeth S., supra,* 31 Cal.4th at p. 400.)

Zeth S. disapproved of the Court of Appeal receiving and considering postjudgment evidence, presented for the first time through the unsworn statements of the minor's appointed appellate counsel in a letter brief, and in further relying on that evidence to reverse the juvenile court's order and judgment terminating parental rights. (*Zeth S., supra,* 31 Cal.4th at p. 400.)

2. *In re Josiah Z.*

In *In re Josiah Z.* (2005) 36 Cal.4th 664, this Court held the Court of Appeal could consider postjudgment evidence when ruling on a motion to dismiss a dependency appeal based on the child's best interest. (*Id.* at p. 674.) Citing *Zeth S., supra,* the Department's trial counsel opposed the motion to dismiss. The Court granted review to address significant questions of first impression relating to the scope of an appellate counsel's authority in handling a child's dependency appeal. (*Id.* at p. 673.)

In *Josiah Z.*, minors' trial counsel appealed the juvenile court's denial of a request to place the children with their paternal grandparents. Minors' appellate counsel sought funds to visit the children and assess their situation and wishes to investigate a potential motion to dismiss their appeal. The Court of Appeal concluded that hearing a motion to dismiss the appeal based on appellate counsel's best interest assessment would violate the proscription against consideration of postjudgment evidence on appeal. (*Josiah Z., supra,* 36 Cal.4th at p. 676, citing *Zeth S., supra*, 31 Cal.4th at p. 413.)

This Court stated,

> 'This conclusion reads too much into our holding in *Zeth S.* 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. 626.)

This Court distinguished *Josiah Z.* from *Zeth S.* in three respects. First, the generally applicable appellate rules authorize a motion to dismiss, and appellate courts routinely consider limited postjudgment evidence in the context of such motions. Second, the 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 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, citing *Zeth S., supra*, 31 Cal.4th at pp. 409-410. Third, 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" (*Zeth S., supra,* at p. 413) – precisely the policy advanced by our ruling in *Zeth S.* (*Josiah Z., supra*, 36 Cal.4th at p. 676.)

As summarized by this Court, appellate counsel has the power to move to dismiss a dependency appeal based on a child's best interests, and a Court of Appeal has the power to consider and rule on that motion, even though it may involve consideration of postjudgment evidence. (*Josiah Z., supra*, 36 Cal.4th at p. 684.)

3. *In re D.P.*

Recently, in *In re D.P.* (2023) 14 Cal.5th 266, this Court approved the taking of evidence on appeal in another exceptional circumstance, a parent's claim that the reviewing court could

exercise its discretion and resolve an appeal rendered moot by the juvenile court's termination of jurisdiction. The Court of Appeal had dismissed a parent's appeal challenging jurisdictional findings in a dependency case on the grounds that jurisdiction had been dismissed and the appeal was moot. (*Id.* at p. 276.)

This Court granted review and held the Court of Appeal had erred in its analysis of its discretion to resolve the appeal even though the appeal was moot. The matter was remanded for further consideration of its discretion. This Court held the parent would be allowed to introduce additional evidence in support of discretionary review if appropriate, citing section 909 [appellate court may take additional evidence "for the purpose of making factual determinations or for any other purpose in the interests of justice"]. This Court also cited *In re Salvador M.* (2005) 133 Cal.App.4th 1415, 1421 [augmenting record to include additional report from county agency[7] regarding dependency petition because the report related to mootness]. (*D.P., supra,* 14 Cal.5th at p. 287.)

Salvador M. distinguished *Zeth S.* (*Salvador M., supra*, 133 Cal.App.4th at pp. 1420-1421.) The postjudgment evidence was a report by Agency filed with the juvenile court with information that the grandmother's home study had been approved. The Agency sought to augment the record on appeal to demonstrate the appeal was moot and should be dismissed, "more like *Josiah Z.* than *Zeth S.*" (*Salvador M., supra,* 133 Cal.App.4th at p. 1421.) Unlike the postjudgment evidence at issue in *Zeth S.*, the postjudgment evidence before it was not the unsworn statement of counsel. The evidence would have been admissible and relevant if known to the court, and the party's purpose in requesting the augmented record was to promote the finality of the juvenile

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[7] *Salvador M.* involves the San Diego County Health and Human Services Agency (Agency). (133 Cal.App.4th at p. 1417.)

court's judgment. (*Ibid.*)

This Court's decisions in *Zeth S.*, *Josiah Z.* and *D.P.* did not address postjudgment evidence to remedy ICWA errors in an appeal from a judgment terminating parental rights. Although *Josiah Z.* stated the rule in *Zeth S.*, that an appellate court should not admit "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), *Josiah Z.* does not support indiscriminate use of post-judgment evidence to affirm a judgment. The question in *Josiah Z.* concerned use of postjudgment evidence to support a voluntary dismissal in the child's best interest, an issue collateral to the merits of the issues raised on appeal. (*Id.* at pp. 675-677.)

Similarly, *D.P.* authorized postjudgment evidence on another collateral issue, this time in the context of whether appeal from jurisdictional finding should be heard despite the appeal having become moot. (*D.P., supra,* 14 Cal.5th at p. 287.)

This Court's other decisions indicate the pivotal point for taking postjudgment evidence is not whether the evidence supports affirmance or reversal, but whether the postjudgment evidence concerns the merits of the appeal. In *Vons, supra,* 14 Cal.4th 434, litigation between fast food restaurant franchises and suppliers stemming from several incidents of food poisoning, the trial court had granted motions to quash and the Court of Appeal affirmed. (*Id.* at p. 444.)

During the proceedings, Vons requested that this Court take judicial notice, augment the record, or make a factual determination under section 909, so the record in the proceedings would include postjudgment deposition testimony and new evidence to rebut factual claims about the franchise agreements requiring the franchisees to follow certain health standards. (*Vons, supra,* 14 Cal.4th at p. 444, fn. 3.)

This Court denied the request stating,

> "Augmentation does not function to supplement the record with materials not before the trial court. [Citations.] Reviewing courts generally do not take judicial notice of evidence not presented to the trial court. Rather, normally 'when reviewing the correctness of a trial court's judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered.' [Citation.] No exceptional circumstances exist that would justify deviating from that rule, either by taking judicial notice or exercising the power to take evidence under [section 909]. [Citations.]"

(*Vons, supra,* 14 Cal.4th at p. 444, fn. 3.)

More recently in *Granny Purps, Inc.* v. *County of Santa Cruz* (2020) 53 Cal.App. 5th 1, the trial court sustained the county's demurrer to causes of action brought by a medical marijuana dispensary. The Court of Appeal reversed. The county had requested the Court of Appeal to take judicial notice of a stipulated judgment in another actions. The Court denied the request because it was not made in the trial court and the county's arguments based on it were being raised for the first time on appeal, citing *Vons, supra,* 14 Cal.4th at p. 444, fn. 3. (*Granny Purps, Inc., supra,* 53 Cal.App.5th at p. 12.) The Court also denied the county's motion to dismiss, filed after the briefing was completed. The Court stated,

> "Resolving that issue would require significant factfinding and consideration of matters outside the record. That is inconsistent with our role as a reviewing court and something for which the trial court is much better equipped."

(*Granny Purps, Inc., supra,* 53 Cal.App.5th at p. 12.)

The decisions in *Vons* and *Granny Purps, Inc.* prohibit postjudgment evidence generally, whether favorable or unfavorable to the judgment. As applied here, in an appeal

where ICWA error has occurred, the decisions of this Court do not support taking postjudgment evidence to remedy ICWA error.

D. Opinions of the Court of Appeal in ICWA Cases

Several recent opinions of the Court of Appeal, including this case, *Kenneth D., supra,* 82 Cal.App.5th 1027, have approved receipt of postjudgment evidence to resolve claims of error under ICWA. (*In re Allison B.* (2022) 79 Cal.App.5th 214, 218-219; *In re E.L.* (2022) 82 Cal.App.5th 597.[8])

In re Dezi C. (2022) 79 Cal.App.5th 769 addressed proffers of Indian ancestry by the appealing parent as appropriate under section 909. Allowing the "record" to include any such proffers would bear on the collateral issue of prejudice rather than the substantive merits, would expedite the proceedings and promote finality of the juvenile court orders. (*Id.* at p. 799 & fn.4, review granted Sept. 21, 2022, S275578, citing *In re A.C.* (2021) 65 Cal.App.5th 1060, 1071-1073 [so holding as to parental proffers regarding prejudice].)

Other courts have declined receipt of postjudgment evidence. (*In re Ricky R.* (2022) 82 Cal.App.5th 671, 681-683; *In re G.H.* (2022) 84 Cal.App.5th 15, 32-33; *In re M.B.* (2022) 80 Cal.App.5th 617, 627-628.) (*E.C., supra,* 85 Cal.App.5th at p. 148.)

1. Opinions approving receipt of postjudgment evidence

a. *In re Allison B.*

In re Allison B., supra, 79 Cal.App.5th 214, relied upon by the Court of Appeal in the present case, allowed postjudgment evidence by providing the mother due process to address the

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[8] Petition for review granted Nov. 30, 2022, S276508, further action deferred pending consideration and disposition of a related issue in this case, *In re Kenneth D.*, S276649.

postjudgment evidence. The Court requested supplemental briefing on whether under section 909 the Court could consider the factual statements in the Department's last minute information report. (*Id. at* p. 219.) The Court held that any due process concerns were addressed by considering the mother's opposition to the notice to dismiss, her supplemental brief, and by providing her, through her counsel, the opportunity for oral argument before the Court of Appeal, which she waived. (*Id.* at p. 220.)

The Court relied upon the holdings in *K.M., supra,* 242 Cal.App.4th at p. 456, and *In re A.B.* (2008) 164 Cal.App.4th 832, both cases holding that this procedure was authorized by this Court's decision in *Josiah Z., supra,* 36 Cal.4th at p. 676. (*Allison B., supra,* 79 Cal.App.5th at p. 219.)

Allison B. addressed due process by considering the mother's opposition to the motion, her supplemental brief, and the opportunity for oral argument through counsel. (*Allison B., supra,* 79 Cal.5th at p. 220.)

b. *In re E.L.*

In re E.L., supra, 82 Cal.App.5th 597, an appeal from a judgment terminating parental rights under Probate Code section 1516.5, not Welfare and Institutions Code section 366.26, allowed postjudgment evidence when the mother was represented by counsel in the trial court and appellate counsel had an opportunity to object to the evidence. The Court held section 909 allows a reviewing court to admit evidence not adduced at trial. (*E.L., supra,* 82 Cal.App.5th at p. 600.) Mother had filled out the ICWA-020 form but it was not part of the record. At trial, Mother's counsel represented that Mother had no Indian ancestry. (*Id.* at p. 607.) The Court of Appeal admitted into evidence Mother's signed ICWA-020 form stating she is or may be a member of the Tohono

O'odham Nation, and letters from the tribe stating the children were not members of the tribe for purposes of ICWA. Included was an affidavit from guardian Aida R.'s appellate attorney that she obtained the ICWA form from Mother's trial attorney and the tribal letters from Aida R.'s trial attorney. Mother's appellate attorney objected to taking such evidence on appeal under section 909. The Court of Appeal admitted the ICWA-020 form and tribe's response pursuant to section 909 as appendices to its opinion. (*Id.* at p. 608.) The Court affirmed the orders terminating parental rights under Probate Code section 1516.5. (*Id.* at p. 600.)

E.L. was a Probate Code section 1516.5 proceeding, not Welfare and Institutions Code section 366.26, so the California dependency statutes were not at issue.[9] However, Mother's trial attorney addressed ICWA and Mother's appellate attorney filed an objection under section 909. (*E.L., supra,* 82 Cal.App.5th at pp. 607-608.)

2. Opinions declining receipt of postjudgment evidence

a. *In re Ricky R.*

In re Ricky R., supra, 82 Cal.App.5th 671 disapproved of the procedure in *Allison B., supra,* 79 Cal.App.5th at pp. 219-220, which failed to give the parent an opportunity to challenge the postjudgment evidence. (*Ricky R., supra,* 82 Cal.App.5th at p. 683.)

The Department did not dispute that it failed to discharge its duty of initial inquiry, but asked the Court to dismiss the appeal as moot on the basis of postjudgment evidence. (*Ricky R., supra,* 82 Cal.App.5th at p. 675-676.) The postjudgment evidence

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[9] California statutes define an "Indian child custody proceeding" as a hearing under the Welfare and Institutions Code, or a proceeding under the Probate Code or Family Code, involving an Indian child. (Welf. & Inst. Code §, 224.1, subd. (d)(1).)

consisted of two social worker declarations stating inquiry of maternal and paternal relatives. Paternal relatives reported great-great-grandparents born in Nayarit, Mexico, and said family was "part Indian" but could not remember which tribe. Social worker asked if it might be the Cora tribe and paternal great-grandmother thought that was correct. Social worker believed Cora was an indigenous ethnic group from the Mexican state of Nayarit. (*Id.* at pp. 680-681.)

The Court of Appeal declined to consider the declarations under any of the Department's theories – judicial notice, augmentation, or section 909. (*Ricky R., supra,* 82 Cal.App.5th at p. 683.) Moreover, the Court stated the Department's approach of presenting new ICWA evidence to the juvenile court while the order terminating parental rights was on appeal, violated Welfare and Institutions Code section 366.26, subdivision (i)(1), which expressly deprives the juvenile court of jurisdiction to modify or revoke an order terminating parental rights once it is final as to that court. (*Ricky R., supra,* 82 Cal.App.5th at p. 682.) Belated remedial ICWA efforts are in substance a collateral attack on the termination order. (*Id.* at p. 683.)

b. *In re E.C.*

E.C., supra, 85 Cal.App.5th 123, did not allow postjudgment evidence to correct the ICWA inquiry error. The Department did not dispute that it failed to document its ICWA inquiry. It offered declarations from Department paralegals from maternal relatives and tribes to correct the error pursuant to section 909. (*Id.* at p. 134.)

The Court of Appeal denied the section 909 motion to submit postjudgment evidence, stating it did not present "exceptional circumstances" justifying engagement in findings of fact on review. Even if the Court considered the evidence and treated it

as undisputed for sake of argument, it neither cured the error stemming from the Department's failure to conduct an adequate inquiry nor supplied substantial evidence to support the juvenile court's ICWA finding. At best, the declarations created a conflict between Mother's testimony and information the Department obtained. "This factual conflict must be resolved by the juvenile court in the first instance." (*E.C., supra,* 85 Cal.App.5th at p. 135.)

Consistent with *Zeth S., supra,* the Court of Appeal generally disapproved of reliance on postjudgment evidence to resolve claims of error under ICWA. (*E.C., supra*, 85 Cal.App.5th at p. 148.) Nevertheless, because there may be "occasional cases that present exceptions, we emphasize that the inquiry is fact specific." (*Id.* at p. 148, citing *E.L., supra,* 82 Cal.App.5th at p. 608 [finding circumstances warranted admission of ICWA-020 form and tribal letters to resolve ICWA claim on review].)

c. *In re G.H.*

In *G.H., supra,* 84 Cal.App.5th 15, similar to *E.C., supra,* and to this case, as to the type of evidence offered on appeal, denied the Department's motion to take postjudgment evidence. The Court of Appeal explained, in prior cases the obligations under ICWA and related state law to investigate "are not primarily for the parents' sake, but instead implement federal and state public policy protecting 'the broad interest of Native American tribes in maintaining cultural connections with children of Native American ancestry.' [Citation.]" (*G.H., supra,* 84 Cal.App.5th at p. 23.)

The Court of Appeal concluded the Department did not conduct an adequate inquiry of the paternal grandmother. Father had claimed he was a "small percent" Cherokee, but not registered as a member of the tribe. (*G.H., supra,* 84 Cal.App.5th at p. 22.)

Father had informed the court and the Department he had contacted his mother on the social media platform, LinkedIn. The Department and court knew from the colloquy at the detention hearing that Father was estranged from his mother, such that Father did not want his mother in his life. (*Id.* at p. 31.)

On appeal, the Department filed a motion asking the Court of Appeal to take additional evidence of its outreach to extended family members. The Court denied the motion stating, while section 909 permits appellate courts to take postjudgment evidence for the purpose of making independent factual determinations or "for any other purpose in the interests of justice," this authority must be used "sparingly." (*G.H., supra,* 84 Cal.App.5th at pp. 32-33, citing *Zeth S., supra*, 31 Cal.4th at p. 405.) Because nothing in the record suggested the Department or the juvenile court took advantage of the social medial platform contact method for the paternal grandmother, the Court of Appeal conditionally reversed and remanded for the Department and the juvenile court to do so. (*G.H., supra,* 84 Cal.App.5th at p. 23.)

E. Procedures in this case did not provide reliable factfinding and due process

1. Factfinding

Here the Court of Appeal granted the Department's motion to augment the record on appeal to include a Department memorandum filed April 28, 2022. (*Kenneth D., supra*, 82 Cal.App.5th at p. 1031.) The postjudgment information presented to the trial court consisted of a 3 page memorandum from the Department dated April 27, 2022. This postjudgment memorandum was not part of the normal record on appeal from the March 22, 2022 judgment terminating parental rights. The Department relied on California Rules of Court, rules 8.410 and 8.155 to support its motion to augment. (Motion.)

The Department first summarized the ICWA steps taken February 15, 2021 [sic][10], and the April 22, 2021 finding by the trial court that ICWA did not apply. (*Kenneth D., supra*, 82 Cal.App.5th at p. 1031; Aug CT 1-2.) The memorandum summarized April 21, 2022 statements by Father and his mother (biological paternal grandmother). The Department then contacted the Bureau of Indian Affairs to confirm that native heritage originating in Mexico would not be federally recognized for purposes of the ICWA. (*Id.* at pp. 1031-1032.)

Here the Court of Appeal considered the Department's posttermination evidence, an unsworn memorandum of the social worker. Addressing the facts specific to this case, here, as in *E.C., supra*, 85 Cal.App.5th at p. 150, the Department requested that the Court of Appeal rely on the contents of its declaration and treat those factual assertions as undisputed, which the Court of Appeal cannot do. This type of factfinding is precisely what must occur in the juvenile court in the first instance, where additional and possibly competing evidence may be offered; and the court, on a more fully developed record, will assess weight and credibility as appropriate, and make its factual findings. (*Ibid.*, citing *Ricky R.*, supra, 82 Cal.App.5th at pp. 681-683.)

In its opinion the Court of Appeal recognized Father's authority that posttermination remedial efforts should not be considered when making an ICWA determination. (*Kenneth D., supra*, 82 Cal.App.5th at p. 1034, citing *M.B., supra*, 80 Cal.App.5th at pp. 627-629; *In re E.V.* (2022) 80 Cal.App.5th 691, 700-701.) The Court of Appeal disagreed with Father's authority and found it was appropriate to consider the Department's posttermination evidence "that has been made part of the official

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[10] Kenneth was not born until March 2021. (CT 1.) This brief does not use his full birth date. (Cal. Style Manual (4th ed. 2000) §5:9.)

appellate record" and the finding that the minor is not an Indian child within the meaning of ICWA, relying on *Allison B.*, *supra*, 79 Cal.App.5th at pp. 218-220. (*Kenneth D.*, *supra*, 82 Cal.App.5th at p. 1035.) The Court did not cite *Ricky R.*, *supra*, 82 Cal.App.5th at pp. 682-683, which distinguished *Allison B.* and disapproved of the [agency]'s approach, presenting new ICWA evidence to the juvenile court while the order terminating parental rights was on appeal. The juvenile court should consider in the first instance whether DPSS discharged its duties under ICWA and related state law, citing *E.V.*, *supra*. To the extent the juvenile court in *Allison B.* failed to give the parent an opportunity to challenge the evidence, the reviewing court must do so. (*Ricky R.*, *supra*, 82 Cal.App.5th at p. 683.)

Ricky R. declined to consider the Department's declaration under any of the Department's theories -- judicial notice, augmentation, or section 909. (*Ricky R., supra,* 82 Cal.App.5th at p. 683.)

In *Allison B.* the appellate court considered postjudgment evidence under section 909 but declined to do the same with minute orders. (*Allison B., supra,* 79 Cal.App.5th at p. 219.) The Court of Appeal took judicial notice of minute orders. (*Id.* at p. 217.) Moreover, the Court noted that when considering postjudgment evidence it "addressed any due process concern in this context by considering Mother's opposition to the noticed motion to dismiss and her supplemental brief, and by providing her, through her counsel, the opportunity for oral argument before this court[.]" (*Id.* at p. 220.) No such due process considerations existed in this case, where the Court of Appeal granted the Department's motion to augment before it appointed counsel on appeal for Joshua T. The Court denied Joshua T. the opportunity to address or challenge the proffered evidence and the conclusions the Department requested from the Court of Appeal. Thus, the

Court in this case improperly relied on *Allison B.* when it proceeded ex parte without the basic protections of due process that *Allison B.* considered necessary.

In *In re E.L., supra*, 82 Cal.App.5th 597, another case relying on *Allison B.*, the guardian (respondent on appeal) asked the Court of Appeal to consider several documents pursuant to section 909. Those documents of ICWA inquiry were not considered by the trial court before it terminated parental rights under Probate Code section 1516.5. The Court determined the application of section 909 was appropriate based on additional evidence it took on appeal. The Court affirmed the order terminating parental rights of both parents. (*E.L. supra,* 82 Cal.App.5th at p. 600.)

M.B., supra, E.V., supra, and Ricky R., supra, have all rejected the reasoning of *Allison B.* As stated in *Ricky R.*, deficiencies in the ICWA inquiry and investigation process should be handled by the trial court in the first instance, giving the parent an opportunity to challenge the evidence. (*Ricky R., supra,* 82 Cal.App.5th at p. 683.)

> "[T]he juvenile court should consider in the first instance whether [the agency] discharged its duties under ICWA and related state law. (*E.V., supra*, 80 Cal.App.5th at p. 700; *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 703 [denying the agency's motion to take additional evidence consisting of ICWA notices, because '[m]aking the appellate court the trier of fact is not the solution'].)"

(*Ricky R., supra,* 82 Cal.App.5th at p. 682.)

Here Joshua T. did not have appointed counsel to represent him and did not have the opportunity to challenge the proffered evidence of ICWA inquiry. He had the right to dispute the evidence and the forum for disputing evidence is the trial court, not the Court of Appeal or even this Court. Augmenting the

appellate record with a memorandum filed in the juvenile court postjudgment without the opportunity of a hearing and representation by counsel does not allow the Court of Appeal to treat the factual assertions therein as undisputed. (*Ricky R., supra*, 82 Cal.App.5th at p. 681.) Moreover, the Department's memorandum was simply an unsworn statement of a social worker "to inform" the court of further ICWA inquiry. (Memorandum at p. 1.)

That is a fundamental flaw of this case, where the Court of Appeal dispensed with the an opportunity to be heard, cross-examination, rights guaranteed by due process of law, representation by counsel.

The Court of Appeal engaged in factfinding without discovery, without a hearing, witnesses, cross-examination, which is the province of the trial court, not the appellate court. When resolving a motion "would require significant factfinding and consideration of matters outside the record," the appellate court is likely to defer the issue to the trial court following remand. (*Granny Purps, Inc., supra,* 53 Cal.App. 5th at p. 12 [trial court "much better equipped"].) Factfinding involves discovery, testimony, the requirements of due process with notice and opportunity to be heard. Appellate courts are generally not equipped to handle the process. (*In re Glorianna K.* (2005) 125 Cal.App.4th 1443, 1450-1451.)

2. Due Process

In *In re Cynthia D.* (1993) 5 Cal.4th 242, this Court resolved a due process challenge to termination of parental rights under the California dependency scheme and concluded that, considered in the entire process for terminating parental rights under the dependency statutes, the procedure for terminating parental rights comports with due process because of the precise and

demanding substantive and procedural requirements the petitioning agency must have satisfied before it can propose termination of parental rights. (*Id.* at p. 256.)

The California dependency statutes endeavor to preserve the parent-child relationship and to reduce the risk of erroneous factfinding in many different ways. (*Cynthia D., supra,* 5 Cal.4th at p. 255.) Most significant to the current case, the California dependency statutes require that the court appoint counsel for a parent unable to afford one whenever a petitioning agency recommends out-of-home care (Welf. & Inst. Code, § 317, subd. (b)), and such counsel must continue to represent the parent "at all subsequent proceedings" ". . . unless relieved by the court upon the substitution of other counsel or for cause." (Welf. & Inst. Code, § 317, subd. (d).) (*Cynthia D., supra,* 5 Cal.4th at p. 255.)

Thus this Court found the dependency scheme was "more of a level playing field." The Court concluded,

> "Considered in the context of the entire process for terminating parental rights under the dependency statutes, the procedure specified in Welfare and Institutions section 366.26 for terminating parental rights comports with the due process clause of the Fourteenth Amendment because the precise and demanding substantive and procedural requirements the petitioning agency must have satisfied before it can propose termination are carefully calculated to constrain judicial discretion, diminish the risk of erroneous findings of parental inadequacy and detriment to the child, and otherwise protect the legitimate interests of the parents."

(*Cynthia D., supra,* 5 Cal.4th at p. 256.)

However, as discussed above, the Court of Appeal granted the Department's motion to augment before appointing counsel for Joshua T. in this case. Thus, he did not have counsel at a critical stage as anticipated by *Cynthia D.* When the appellate court takes postjudgment evidence ex parte to correct ICWA error it

does not provide a "level playing field." The due process issue may arise in many situations where the appellate court takes postjudgment evidence to correct an ICWA error.

Termination of parental rights terminates jurisdiction of the juvenile court and termination of the trial counsel appointment and representation. (Welf. & Inst. Code, § 366.26, subd. (i)(1).) During the juvenile court proceedings the attorneys for the parents have access to the ongoing facts of the case through social studies and other memoranda, discovery procedures, and the power of subpoena through their court representation of the parents in the juvenile court. (See, *e.g.*, Welf. & Inst. Code, §§ 358, subd. (b)(1), 366.21, subd. (c), 361.22, subd. (c)(1)).) This access to information ends after the court terminates parental rights. Unlike the attorney for the Department who continues to receive updates such as the social worker's memorandum received in the present case, the appellate attorneys do not have ready access to this information. Welfare and Institutions Code section 827, subdivision (a)(1), governs confidentiality of juvenile records. Appellate attorneys for a parent do not have access to this information except through a petition procedure (Welf. & Inst. Code, § 827, subd. (a)(3)(A)), a cumbersome process not suited for the time frame in an appeal from termination of parental rights. Only the Department has ready access to the type of postjudgment information normally offered to comply with ICWA. This is not the level playing field envisioned by this Court in *Cynthia D.*, *supra*, 5 Cal.4th at p. 255.

Therefore, deficiencies in the ICWA inquiry and investigation process should be handled by the trial court in the first instance, giving the parent representation by counsel and opportunity to challenge the evidence. (*Ricky R.*, *supra*, 82 Cal.App.5th at p. 683.)

3. Memorandum as postjudgment evidence to remedy ICWA

The memorandum stated, "the Department complied with its duties of further inquiry by interviewing father's mother who was identified by father as the individual within the family on this subject." (*Kenneth D., supra*, 82 Cal.App.5th at p. 1034.) The Department contacted father Joshua T. April 21, 2022, postjudgment, while his appeal from the March 22, 2022 orders was pending. According to the memorandum, Joshua T. stated he might have Cherokee ancestry and the social worker should contact his mother Elena T., who would have further information. (Aug CT 2.) The Court of Appeal accepted this fact as true without an evidentiary hearing. The Court also accepted as true the statement, "Father's mother unequivocally identified all native heritage as being of Mexican origin." (*Ibid.*)

According to the memorandum, paternal grandmother stated she completed a blood DNA ancestry test which came back stating they had Native Heritage. She "assumes it is from Mexico since this is where her family resided." (Aug CT 2.) The memorandum indicates she stated "all of her family is actually from Culican Sinaloa, Mexico." (Aug CT 2.) The Court accepted as true the Department's assumption that she meant native heritage as being of Mexican origin. (*Kenneth D., supra*, 82 Cal.App.5th at p. 1034.)

But Mexican ancestry, alone, does not rule out Indian ancestry. Mexican ancestry does not necessarily mean that Kenneth D. does not have Indian ancestry. It has been estimated that tens of thousands of people belonging to United States Native tribes live in the Mexican states of Baja California, Sonora, Coahuila and Chihuahua. (For Indians, US-Mexico Border is an

"Imaginary Line" (Mar. 19, 2019) The Conversation.[11]) As the Court stated in *In re Oscar H.* (2022) 84 Cal.App.5th 933,

> "The Department emphasizes that it believes the father's family is Mexican, but it does not explain why this matters."

(*Id.* at 938.)

The Department did not contact any tribe, either formally or informally. The Department stated PGM had DNA ancestry findings of some Native Heritage but assumed it was from Mexico. Father stated he believed he had Indian heritage from Oklahoma, Cherokee. Although the Department had names, date of birth and date of death of various paternal relatives, it did not send notice to the Cherokee tribes in Oklahoma. (*Kenneth D., supra*, 82 Cal.App.5th at p. 1031.) The Department was required to provide the trial court with information sent to the tribes so the trial court could make a proper determination that the Department fulfilled its duties under ICWA. It provided no notices and no responses, just a phone call to the Bureau of Indian Affairs. (*Id.* at p. 1031.)

4. Any postjudgment evidence must comply with the goals and policies of ICWA and California law

ICWA reflects a congressional determination to protect Indian children and to promote the stability and security of Indian tribes and families. As this Court stated,

> "Congress enacted ICWA in 1978 in response to 'rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the

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[11] <https://theconversation.com/for-native-anerucabs-us-nexucibirder-is-an-imaginary-line-11043>[archived at <https://perma.cc/AZ8Z-XBYV>]

> separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.'"

(*In re Isaiah W.* (2016) 1 Cal.5th 1, 7, citing *Miss. Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 32.)

ICWA notice requirements serve two purposes. First, they facilitate a determination of whether the child is an Indian child under ICWA. Second, ICWA notice ensures that an Indian tribe is aware of its right to intervene or exercise jurisdiction over a child custody proceeding involving an Indian child. (*Isaiah W., supra,* 1 Cal.5th at p. 8.)

The remedial purpose of ICWA requires that an ICWA inquiry be conducted in every case. The tribes have a compelling, legally protected interest in the inquiry itself. (*In re A.R.* (2022) 77 Cal.App.5th 197, 202.)

ICWA implements this policy by establishing minimum federal standards a state court must follow before removing an Indian child from his or her family. (*In re T.G.* (2020) 58 Cal.App.5th 275, 287; see 25 U.S.C. § 1902.)

> "ICWA allows states to provide 'a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under ICWA,' and the California Legislature has imposed on the court and child protective agencies 'an affirmative and continuing duty to inquire whether a child,' who is subject of a juvenile dependency petition, 'is or may be an Indian child.' [Citations.]"

(*In re Y.W.* (2021) 70 Cal.App.5th 542, 551; Welf. & Inst. Code, § 224.2, subd. (a).)

In 2016 new federal regulations were adopted concerning ICWA compliance. (*In re D.S.* (2020) 42 Cal.App.5th 1041, 1028, citing 81 Fed.Reg. 38864 (June 14, 2016), revising 25 C.F.R. § 23 (2019).) California subsequently made conforming amendments

to its statutes related to ICWA notice and inquiry requirements, Welfare and Institutions Code sections 224-224.6. The revised ICWA statutes became effective January 1, 2019. (*D.S., supra,* 46 Cal.App.5th at p. 1048, citing Assem. Bill No. 3176 (2017-2018 Reg.Sess.).)

California embraces ICWA and has established its own more stringent guidelines. Under the revised statutes, the duty of inquiry (Welf. & Inst. Code, § 224.2), which precedes the notice requirements (Welf. & Inst. Code, § 224.3), sets forth the "affirmative and continuing duty" of the court and county welfare department "to inquire whether the child is an Indian child." (Welf. & Inst. Code, § 224.2, subd. (a).) Welfare and Institutions Code section 224.2, subdivision (b), requires a social services agency to "inquire whether the child is an Indian child," which "includes, but is not limited to, asking the child, parents, legal guardian, Indian custodian, *extended family members, others who have an interest in the child, and the party reporting child abuse or neglect,* whether the child is, or may be, an Indian child." (Welf. & Inst. Code, § 224.2, subd. (b), italics added.)

Although commonly referred to as the "initial duty of inquiry," it "begins with the initial contact" and continues throughout the dependency proceedings. (*T.G., supra,* 58 Cal.App.5th at p. 290.)

Second, if the court or child protective agency "has reason to believe that an Indian child is involved in a proceeding, but does not have sufficient information to determine that there is reason to know that the child is an Indian child," the court and the Department "shall make further inquiry regarding the possible Indian status of the child, and shall make that inquiry as soon as practicable." (Welf. & Inst. Code, § 224.2, subd. (e).)

Third, if the further inquiry "results in a reason to know the child is an Indian child, then the formal notice requirements

of [Welf. & Inst. Code] section 224.3 apply." (*Y.W., supra*, 70 Cal.App.5th at p. 552.)

Notice "shall comply with all the following requirements." (Welf. & Inst. Code, § 224.3, subd. (a).) Those statutory requirements include the following.

Notice shall be sent by registered or certified mail with return receipt requested. (Welf. & Inst. Code, § 224.3, subd. (a)(1).) Notice to the tribe shall be to the tribal chairperson, unless the tribe has designated another agent for service. (Welf. & Inst. Code, § 224.3, subd. (a)(2).) Notice shall be sent to all tribes of which the child may be a member or citizen or eligible for membership or citizenship. (Welf. & Inst. Code, § 224.3, subd. (a)(2)(A)(i), (ii).) Notice shall include the name, birth date, and birthplace of the Indian child; the name of the Indian tribe in which the child is a member or may be eligible for membership; and all names of the child's biological parents, grandparents, great-grandparents, including maiden, married, and former names or aliases, as well as their current and former addresses, birth dates, places of birth and death, tribal enrollment information of other direct lineal ancestors of the child, and any other identifying information. (Welf. & Inst. Code, § 224.3, subd. (a)(5).)

The ICWA notice form adopted for mandatory use by the Judicial Council of California, ICWA-030, includes preprinted lines for the required identifying information. The information is required regardless of the lack of a preprinted line on the Judicial Council form asking for it. (*In re S.E.* (2013) 217 Cal.App.4th 612, 615-616.)

5. Proper procedure for the trial court this case

In this case, the proper procedure for the juvenile court to follow under ICWA and California statutes (Welf. & Inst. Code, §

224.2, 224.3, 317) would include the following:

- Appointment of counsel for Joshua T. (Welf. & Inst. Code, § 317, subd. (b),(d).)
- ICWA inquiry of Joshua T., including completion and filing of the mandatory ICWA-020 Judicial Council form. (Welf. & Inst. Code, § 224.2, subd. (a), (b).)
- ICWA inquiry of all extended family members. (*Ibid.)*
- Notice to the Cherokee Tribe of Oklahoma, identified by Joshua T. and all other tribes identified through proper inquiry. (Welf. & Inst. Code, § 224.3.)
- Notice on mandatory ICWA-030 form by registered or certified mail with return receipt requested to all identified tribes, and Secretary of the Interior's designated agent. (*Ibid.*)
- Information on the ICWA-030 form to include all names of the child's biological parents, grandparents, and great-grandparents, and the specific requirements of Welfare and Institutions Code section 224.3, subdivision (a)(5)(C), set forth above, such as birth dates, last known address, tribe, date of death.
- Proof of the notice, including copies of notices sent and all return receipts and responses received filed with the court in advance of the hearing. (Welf. & Inst. Code, § 224.3.)

The California statutes set forth a procedure for appointment of counsel for a parent at the beginning of the proceedings, followed by inquiry, due diligence and notice that results in reliable factfinding under ICWA and California law implementing ICWA. Compliance results in accurate information from the parent and extended family, proper notice to the tribe. This compliance provides the juvenile court with sufficient

evidence to make an ICWA finding after proper and adequate inquiry and due diligence, as required.

ICWA confers on tribes the right to intervene at any point in a court proceeding, including on appeal. However, a tribe's right to intervene in the proceedings is meaningless if it has not received notice of the pending action. (*Guardianship of D.W.* (2013) 221 Cal.App.4th 242, 249-251.)

ICWA and the California statutes implementing ICWA have "precise and demanding substantive and procedural requirements" that the Department must have satisfied before it can propose termination of parental rights and a finding that ICWA does not apply. (See *Cynthia D., supra,* 5 Cal.4th at p. 256.)

Any postjudgment evidence of ICWA compliance in the appellate court must satisfy the precise and demanding substantive and procedural requirements.

The Court of Appeal did not meet those requirements when it took postjudgment evidence to remedy the "abject failure" of the juvenile court. (*Kenneth D., supra,* 82 Cal.App.5th at p. 1034.) Joshua T. is Kenneth's biological father. For purposes of ICWA, the term "parent" means a biological parent. (25 U.S.C. § 1903 (9).) "Termination of parental rights" means any action resulting in the termination of the parent-child relationship. (25 U.S.C. § 1903 (1)(ii).) Under ICWA a parent has the right to court-appointed counsel in any removal, placement, or termination proceeding. (25 U.S.C. § 1912 (b).) Apart from ICWA, the dependency statutes require the court to appoint counsel for a parent and such counsel must continue to represent the parent at all subsequent proceedings. (Welf. & Inst. Code, § 317.)

Terminating parental rights without court-appointed counsel for a biological parent violates ICWA requirements under federal law and the California statutes. (Welf. & Inst. Code, §

317.) Likewise, taking additional evidence ex parte by the appellate court without court-appointed counsel for a biological parent violates ICWA requirements and California law.

II.

AN APPELLATE COURT TAKING ADDITIONAL EVIDENCE TO REMEDY THE FAILURE TO COMPLY WITH ICWA SHOULD PROCEED BY WAY OF A NOTICED MOTION; NEW EVIDENCE SHOULD BE LIMITED TO UNDISPUTED FACTS.

Any procedure this Court would adopt for an appellate court to take additional evidence to remedy an ICWA inquiry must afford parties due process and a procedure calculated to achieve reliable results. (*Cynthia D., supra,* 5 Cal.4th at p.256.)

This Court recognized one exception to the general rule that postjudgment evidence is inadmissible in a juvenile dependency appeal from an order terminating parental rights in *In re Elise K.* (1982) 33 Cal.3d 138, 139. All parties offered to stipulate that due to changed circumstances and the minor's advanced age, the minor in that case was no longer adoptable. The postjudgment evidence undermined the legal underpinnings of the juvenile court's judgment and all parties stipulated to reversal of the juvenile court's judgment. The appellate court appropriately accepted the stipulation and reversed the judgment. (*Zeth S., supra,* 31 Cal.4th at p. 414, fn. 11.)

Beyond that scenario, the nature and scope of any exception to the general rule of inadmissibility of postjudgment evidence in an appeal by a parent from an order terminating parental rights must meet the standards of *Cynthia D., supra,* 5 Cal.4th at p. 256, with due process and a procedure calculated to achieve reliable results.

The California statutes implementing ICWA set forth that

procedure, which occurs in the trial court. Thus, the appellate court may not take additional evidence to remedy a failure to comply with the ICWA, except in rare circumstances. In those circumstances, certain procedures must be followed.

The moving party must file a noticed motion pursuant to section 909. Parties need an opportunity to brief the reviewing court's authority to act under section 909. (*In re Marriage of Forrest & Eaddy* (2006) 144 Cal.App.4th 1202, 1214.) Unsworn testimony or statements are not admissible evidence. (*Zeth S., supra,* 31 Cal.4th at p. 414, fn. 11.) A section 909 motion will be denied where the evidence presented is hearsay and inadmissible. (See *Wolf v. Drew* (1928) 94 Cal.App. 449, 450 [under former Code Civ. Proc. 956a].)

Although section 909 authorizes an appellate court to make additional findings under certain circumstances, the appellate court should not supply missing findings where the facts are in conflict. (*Packer v. Silas* (1976) 57 Cal.App.3d 206.) An action which will entail an extended hearing is not a proper use of these powers. (*Smith v. Young* (1942) 50 Cal.App.2d 152, 154 [under former Code Civ. Proc. 956a], citing *Tupman v. Haberkern, supra,* 208 Cal. at p. 269.)

The moving party can submit a noticed motion to submit postjudgment evidence. Any other parties must have an opportunity to respond. If any parties raise an objection to the evidence or a potential conflict in the facts, then the motion should be denied. Evidence of a subsequent juvenile court ICWA finding, made without the parent and parent's counsel present for an evidentiary hearing, would be inappropriate. (*Glorianna K., supra,* 125 Cal.App,4th at p. 1451.)

If the Court denies the motion to submit postjudgment evidence, the Department can stipulate to a reversal in the best interests of the minor for further proceedings in the juvenile court

with a contested evidentiary hearing.

These procedures limit the acceptance of postjudgment evidence to those rare cases where the appellate court can remedy ICWA error.

Section 909 is not an escape hatch to allow the Department to correct an inadequate ICWA inquiry. If the facts proffered in the section 909 motion conflict, section 909 is not the proper vehicle to present contested facts. If the information provided through section 909 is not sufficient to remedy the ICWA error, section 909 is not the proper vehicle.

This Court must resolve that judicial notice, augmentation, section 909, cannot be used to salvage improper or incomplete ICWA inquiries, investigations and notices without a reliable procedure. Although it may be more "convenient" and "quicker" for the appellate court to resolve the dispute, that is not how the system operates. "[I]t is the province of the trial court to decide questions of fact and of the appellate court to decide questions of law." (*Zeth S., supra,* 31 Cal.4th at p. 405.)

This Court must resolve the issue by protecting the traditional roles of trial and appellate courts and the rights of tribes under ICWA. An adequate inquiry is the prerequisite to ensuring notice to an Indian tribe. Notice is a key component of the congressional goal to protect and preserve Indian tribes and Indian families because it insures the tribe will be afforded the opportunity to assert its rights under ICWA irrespective of the position of the parents or the Department. (*In re Kahlen W.* (1991) 233 Cal.App,3d 1414, 1421.) The trial court and Department failure in the ICWA inquiry precludes tribes from receiving required notice. Thus, the tribe will be deprived of its rights under ICWA, irrespective of the position of the parents or the Department. (*In re Samuel P.* (2002) 99 Cal.App.4th 1259,1267.)

> "The relevant rights under ICWA belong to Indian tribes and they have a statutory right to receive notice where an Indian child may be involved so that they may make that determination. It necessarily follows that the prejudice to those rights lies in the failure to gather and record the very information that 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.* (2022) 84 Cal.App.5th 566, 591.)

The failure to follow a reliable procedure, locate and provide notice to the applicable tribe, can make the order terminating parental rights subject to challenge at a later date by that tribe. ICWA states in pertinent part,

> ". . . [T]he Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of Sections [1911, 1912, and 1913.]"

(25 U.S.C. § 1914.)

Therefore, any postjudgment procedure requires a reliable factfinding process to achieve finality in parental rights termination cases where ICWA error has occurred.

Factfinding must occur in the juvenile court in the first instance, where additional and possibly competing evidence may be offered; and the court, on a more fully developed record, will assess weight and credibility, as appropriate, and make its factual findings.

The proper remedy for violations of ICWA inquiry requirements is reversal and remand to the trial court for a procedure that comports with due process and is reliable. At that hearing the parent, with counsel, can challenge any evidence of inquiry and information to the tribes before a determination that ICWA does or does not apply.

CONCLUSION

When the Department and the trial court fail to comply with statutorily required inquiry, investigation and notice of a child's potential ancestry, the appellate court may not take additional evidence to remedy that failure in an appeal from an order terminating parental rights except in rare cases. Any procedure must provide due process and reliable factfinding, with court-appointed counsel for the parent at all proceedings. Moreover, when it appears the proposed evidence is contested, the trial court must act as the trier of fact.

For these reasons, Joshua T. respectfully requests that this Court reverse the judgment of the Court of Appeal and remand for further proceedings.

Dated: March 15, 2023.

Respectfully submitted,

_____

Janette Freeman Cochran
Attorney for Joshua T.

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Janette Freeman Cochran
Attorney for Joshua T.

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