S275578

IN THE
SUPREME COURT OF CALIFORNIA

In re Dezi C., et al.,
Persons Coming Under the Juvenile Court Law.

THE LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

A.A.,

Defendant and Appellant.

After a Decision by the Court of Appeal
Second Appellate District, Division Two, Case No. B317935
Los Angeles Superior Court Case No. 19CCJP08030A-B

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

OFFICE OF THE COUNTY COUNSEL
DAWYN R. HARRISON
Acting County Counsel
KIM NEMOY
Assistant County Counsel
STEPHEN WATSON, SBN 272423
Senior Deputy County Counsel
648 Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, California 90012
Telephone: (323) 580-8547 Facsimile: (213) 633-1915
Email: swatson@counsel.lacounty.gov
Attorneys for Respondent
THE LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES

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Issue Presented

In juvenile dependency matters, where parents repeatedly deny – including by written attestation – having any American Indian heritage, what standard of prejudice should apply when the child-welfare agency neglects to question extended family members about whether the child has American Indian ancestry as required by heightened state law requirements of the Indian Child Welfare Act (ICWA)?

Introduction

Appellant, A.A. (mother), petitions this Court to review *In re Dezi C.* (2022) 79 Cal.App.5th 769 (*Dezi C.*) so that it may resolve a split of authority regarding how to assess prejudice when a child-welfare agency has not conducted an adequate

initial inquiry into a dependent child's American Indian ancestry in compliance with section 224.2 of the Welfare and Institutions Code.[1]

In *Dezi C.*, Division Two of the Second District Court of Appeal articulated a new standard for assessing prejudice when parents deny having Native American heritage, but the child-welfare agency neglects to ask extended family members about whether the child is Indian. The new prejudice standard differs from three other standards of prejudice applied by California's appellate courts when assessing whether noncompliance with the technical requirements of section 224.2 is harmless. The *Dezi C.* Court expressly rejected the other three standards of prejudice utilized by appellate courts in various districts, including Divisions One, Five, and Seven of the Second District.

In her Petition for Review, mother argues (1) the conflicting standards for prejudice is "an archetypal issue meriting review;"

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise designated.

Although the question on review relates to the Indian Child Welfare Act, 25 United States Code section 1901 et seq., the provision at issue is not federal law, but rather a heightened state law requirement enumerated in section 224.2, which states, in relevant part: "If a child is placed into the temporary custody of a county welfare department . . . the county welfare department . . . has a duty to inquire whether that child is an Indian child. Inquiry 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 and where the child, the parents, or Indian custodian is domiciled." (§ 224.2, subd. (b).)

(2) the *Dezi C.* standard conflicts with the standard used by the majority of appellate courts; and (3) the *Dezi C.* standard is incorrect because it approves the use of a "proffer" for appellate counsel to introduce additional evidence on appeal.

Respondent, the Los Angeles County Department of Children and Family Services (Department), does not agree that the *Dezi C.* standard is incorrect or conflicts with the majority approach. However, the Department does agree that the conflicting standards for prejudice applied by the various appellate courts and different divisions within the Second District is an archetypal issue meriting review and that resolution of this split of authority is necessary. Accordingly, the Department urges this Court to grant review in order to settle this recurring issue of law.

Background

For the purpose of this Answer, the Department adopts the statement of facts in the *Dezi C.* opinion. (Petition for Review, Appendix A.)

Discussion

I. The Petition Presents A Legal Ground For Review Pursuant To Rule 8.500(b).[2]

Rule 8.500(b) provides the grounds for review:

> (1) When necessary to secure uniformity of decision or to settle an important question of law;
>
> (2) When the Court of Appeal lacked jurisdiction;

[2] Rules references are to the California Rules of Court.

(3) When the Court of Appeal decision lacked the concurrence of sufficient qualified justices; or

(4) For the purpose of transferring the matter to the Court of Appeal for such proceedings as the Supreme Court may order.

A. Review Is Necessary To Secure Uniformity Of Decision And Settle An Important Question Of Law.

1. There Is A Split Of Authority Requiring Resolution.

As mother notes, the *Dezi C.* opinion explains that Courts of Appeal have applied three different standards for assessing whether defective initial ICWA inquiry is harmless. (Appendix, p. 44.) The *Dezi C.* Court proposed a fourth standard – the "reason to believe rule" – and rejected the other standards. (Appendix, pp. 46-52.) Although *Dezi C.* does not describe a fifth standard, mother contends there is a fifth approach that determines whether substantial evidence supports a finding the ICWA does not apply despite initial inquiry error.[3] (Petition, pp. 32-33.)

As mother also notes, the different standards employed by the Courts of Appeal have resulted in numerous conflicting published opinions. (Petition, pp. 21-36.) Some opinions contain dissents (*In re H.V.* (2022) 75 Cal.App.5th 433, 440-441 [dis. opn. of Baker, J., criticizing *In re Y.W.* (2021) 70 Cal.App.5th 542]);

[3] A variation of this approach was published by Division Three of the Second District Court of Appeal on July 29, 2022. (*In re Ezequiel G.* (2022) Cal.App.LEXIS 671.)

In re A.C. (2022) 75 Cal.App.5th 1009, 1018-1022 [dis. opn. of Crandall, J., agreeing with the *In re H.V.* dissent]), and one opinion criticized one of the dissents (*In re Antonio R.* (2022) 76 Cal.App. 5th 421, 436, criticizing the *In re H.V.* dissent).

The *Dezi C.* standard should be utilized to resolve the split in authority because it simultaneously respects the California Constitution's test for harmless error, the rights of Indian tribes and children, and the needs of dependent children for permanency and stability, while discouraging gamesmanship and delay. (Appendix, pp. 47-52.)

2. The Split Of Authority Persists Post-*Dezi C.*

Seven opinions pertaining to ICWA inquiry error have been published since *Dezi* C., some of which have been critical, some complimentary, and each recognizing the conflicting standards applied throughout the state.

In *In re Q.M.* (2022) 79 Cal.App.5th 1068, Division Three of the Second District noted there is a "split among the Courts of Appeal" in assessing whether ICWA inquiry error is harmless, cited eight cases with different approaches, and stated it "need not resolve this issue here" because the duty of inquiry had been satisfied. (*Id*. at pp. 1080-1081.)

In *In re E.V.* (2022) 80 Cal.App.5th 691, Division Three of the Fourth District utilized the "reversal per se" approach, criticized three other approaches for assessing prejudice, and stated that "this particular problem keeps surfacing in appeals with alarming frequency." (*Id*. at pp. 696-701.)

In *In re M.M.* (2022) Cal.App.LEXIS 602, Division Eight of the Second District declined to follow the "reversal per se" approach, noted there were four different standards appellate courts were using to assess ICWA inquiry error, and affirmed after finding the error was not prejudicial under three standards. (*Id*. at pp. 12-15.) The dissent stated, "I would find prejudice." (*Id*. at p. 20 [dis. opn. of Wiley, J.].)

In *In re Rylei S.* (2022) Cal.App.LEXIS 627, Division Seven of the Second District employed the "reversal per se" approach and criticized *Dezi C.* as "ignor[ing] th[e] real-world consequence of the historic mistreatment of our country's native population[.]" (*Id*. at p. 19, fn. 10.)

In *In re G.A.* (2022) Cal.App.LEXIS 630, the Third District Court of Appeal followed *Dezi C.*, stating, "We agree with our colleagues that . . . the 'reason to believe' rule effectuates the rights of the tribes in those instances in which those rights are most likely at risk, which are precisely the cases in which the tribe's potential rights do justify placing the children in a further period of limbo." (*Id*. at p. 11.)

In *In re J.W.* (2022) Cal.App.LEXIS 631, Division Eight of the Second District used two tests for prejudice regarding ICWA inquiry error, one of which was the *Dezi C.* test, and found no prejudice under either test. (*Id*. at pp. 10-11.) The dissent stated, "This problem looks persistent." (*Id*. at p. 13 [dis. opn. of Wiley, J.]).

In *In re Ezequiel G.*, *supra*, Cal.App.LEXIS 671, Division Three of the Second District criticized the "reversal per se"

standard, agreed with *In re Dezi C.*'s analysis regarding prejudice, and adopted a "hybrid substantial evidence/abuse of discretion standard." (*Id.* at pp. 2-3, 7-8, 27-45.) There is a lengthy dissent, which concludes: "California appellate courts have developed at least four different approaches to evaluating whether error at the inquiry stage is prejudicial. [Citation.] This confusion benefits no one. Because the issues raised in this appeal are of substantial importance to dependent children, the children's families, and Indian tribes, I urge the Supreme Court to review this decision and expedite briefing and preference in setting the date of oral argument. [Citation.]" (*Id.* at pp. 45-64.)

3. This Court Should Resolve The Split Of Authority.

The split of authority among California's appellate courts has resulted in a lack of uniformity of decision and an unsettled important question of law. Grounds for review in this Court include when it is "necessary to secure uniformity of decision or to settle an important question of law." (Rule 8.500(b)(1).) Because there is no uniformity of decision on this issue, mother's Petition for Review should be granted and the question of law settled.

II. Requiring Appellate Counsel To Make A Proffer On Appeal Is Not An Issue Meriting Review.

Mother also contends *Dezi C.* merits review because its approval of the use of a proffer under Code of Civil Procedure

section 909[4] for appellate counsel to introduce ICWA evidence on appeal conflicts with this Court's "mandate" in *In re Zeth S.* (2003) 31 Cal.4th 396 (*Zeth S.*) that post-judgment evidence is only proper if it supports the underlying judgment. (Petition, pp. 35-36.) But *Zeth S.* contained no such "mandate."

Zeth S. set forth "the 'general' rule that [an appellate court] cannot 'receive and consider postjudgment evidence that was never before the juvenile court . . . and rely on such evidence outside the record on appeal to reverse the judgment.' (*In re Zeth S.[, supra,]* 31 Cal.4th [at p.] 399.)" (*In re A.C.* (2021) 65 Cal.App.5th 1060, 1071.) But in *In re Josiah Z.* (2005) 36 Cal.4th 664, the Court cautioned against reading *Zeth S.* too narrowly (*id.* at p. 676), noted that "appellate courts routinely consider limited postjudgment evidence" (*ibid.*), and "clarified that in *Zeth S.*, it held 'an appellate court should not consider postjudgment evidence *going to the merits of an appeal* and introduced for the purposes of attacking the trial court's judgment.' [Citation]" (*In re A.B.* (2008) 164 Cal.App.4th 832, 841, italics in original).

Because "[t]he ICWA inquiry issue is distinct from the substantive merits of the court's ruling" (*In re A.B., supra,* 164 Cal.App.4th at p. 841), proffers on appeal regarding the ICWA would "bear on the collateral issue of prejudice rather than the

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[4] "Code of Civil Procedure section 909, unlike a motion for judicial notice, permits an appellate court to take additional evidence and make independent factual findings on appeal." (*In re M.B.* (2022) 80 Cal.App.5th 617, 627.)

substantive merits" and are appropriate "because they expedite the proceedings and promote finality of the juvenile court's orders. [Citations]" (*Dezi C.*, *supra*, 79 Cal.App.5th 769, 779, fn. 4).

Thus, requiring a proffer by appellate counsel regarding the ICWA is authorized by statute, does not conflict with *Zeth S.* because it does not attack or seek to reverse the substantive merits of the juvenile court's findings or orders, and is appropriate in dependency proceedings because it promotes finality of the juvenile court's orders. (*In re Allison B.* (2022) 79 Cal.App.5th 214, 218–220 [considering extra-record evidence is proper when determining whether insufficient ICWA inquiry had been cured]; *In re A.C., supra*, 65 Cal.App.5th at pp. 1071-1073 [same]; *In re A.B., supra,* 164 Cal.App.4th at pp. 841-844 [same].) As such, review of this issue is not necessary to secure uniformity of decision or settle an important question of law. Accordingly, review should be limited to deciding the correct standard for prejudice regarding ICWA inquiry errors.

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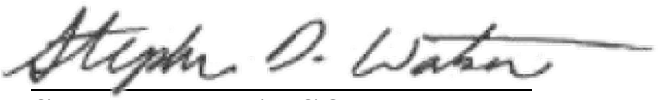
Conclusion

California's appellate courts are divided on the standard of prejudice for inquiry errors concerning the ICWA and are publishing conflicting opinions with increasing regularity. Therefore, this Court should review *Dezi C.* to resolve the split in authority.

DATED: August 4, 2022

Respectfully submitted,

DAWYN R. HARRISON
Acting County Counsel

By 
STEPHEN WATSON
Senior Deputy County Counsel

Attorneys for Respondent

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DATED: August 4, 2022

Respectfully submitted,

DAWYN R. HARRISON
Acting County Counsel

By 
STEPHEN WATSON
Senior Deputy County Counsel

Attorneys for Respondent

Declaration Of Service

STATE OF CALIFORNIA, County of Los Angeles:

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

On August 4, 2022, I served the attached **ANSWER TO PETITION FOR REVIEW BY THE LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES IN THE MATTER OF DEZI C., SUPREME COURT NO. S275578, 2d JUVENILE NO. B317935, LASC NO. 19CCJP08030A-B,** to the persons and/or representative of the court as addressed below.

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

Karen J. Dodd, Esq.
kdodd@appellate-law.com
(Counsel for Appellant Mother)

California Appellate Project
capdocs@lacap.com

Marjan Daftary, Esq.
Children's Law Center 3
daftarym@clcla.org
appeals3@clcla.org
(Trial Counsel for Minors)

Jessie Bridgeman, Esq.
LADL 2
bridgemanj@ladlinc.org
dca2@ladlinc.org
(Trial Counsel for Father)

Honorable Robin R. Kesler
Dept. 403
c/o Clerk of the Superior Court
Edelman Children's Court
JuvJoAppeals@lacourt.org

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 4, 2022, at Los Angeles, California.

Genny M. Gomez

GENNY GOMEZ

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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

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Stephen Watson Office of County Counsel 272423	swatson@counsel.lacounty.gov	e-Serve	8/4/2022 10:08:33 AM
Jessie Bridgeman	dca2@ladlinc.org	e-Serve	8/4/2022 10:08:33 AM
Marjan Daftary 298957	appeals3@clcla.org	e-Serve	8/4/2022 10:08:33 AM
Honorable Robin R. Kesler Dept. 403 c/o Clerk of the Superior Court Edelman Childrens Court	JuvJoAppeals@lacourt.org	e-Serve	8/4/2022 10:08:33 AM
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8/4/2022

Date

/s/Genny Gomez

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Watson, Stephen (272423)

Last Name, First Name (PNum)

Los Angeles County Counsel Appellate group

Law Firm