Supreme Court No. S275578

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

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

APPELLANT 'S OPENING BRIEF ON THE MERITS

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

Hon. Robin R. Kesler, Judge Pro Tempore

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1. What constitutes "reversible" error when the child welfare agency fails to make the statutorily required inquiry concerning the child's potential Indian ancestry?

INTRODUCTION

When a child welfare agency fails to make the statutorily-required inquiry concerning the child's potential Indian ancestry, that error should be reversible per se. Welfare and Institutions Code, section 224.2, subdivision (b),[1] requires that, when the agency takes a child into temporary custody, it must ask the child, parents, legal guardian, Indian custodian, *extended family members*, others who have an interest in the child, and the reporting party whether the child is or may be an Indian child. This case presents the question of the proper prejudice analysis when the court and social services agency fail to carry out their duty of inquiry.

Applying a lesser standard ignores the remedial purpose of the Indian Child Welfare Act ("ICWA") (25 U.S.C. § 1901 et seq.) and the revised California statutes, essentially insulating "failure to inquire" error from review. A lesser standard also is inappropriate because the inquiry is the prerequisite to ensuring notice to an Indian tribe guaranteed by the Due Process Clause of the Fourteenth Amendment. "Failure to inquire" is structural error, i.e., error in the process itself, not an error occurring during the hearing. Per se reversal is required.

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

STATEMENT OF THE CASE

A. The Juvenile Court Granted Los Angeles County Department of Children and Family Services' ("DCFS") Application Authorizing Removal; DCFS Filed Petitions, and the Children Were Detained.

1. Petition and Detention Report.

On December 17, 2019, DCFS filed section 300 petitions, alleging the children came within section 300, subdivisions (a) and (b)(1), because their parents, Angelica A. and Luis C., had a history of domestic violence in the presence of the children; Luis failed to protect the children by allowing Angelica to reside in the home; and the parents had a history of substance abuse and currently were users of methamphetamine. (1CT 10, 13-15,19, 22-24.)

Attached to the petitions were the ICWA-010(a) forms indicating an inquiry had been made. (1CT 16, 25.) The "1. f." box was checked: "[t]he child has no known Indian ancestry." (*Ibid.*) The forms did not indicate to whom the worker had spoken or the date of this inquiry.

The detention report filed on December 17, 2019, noted: "The Indian Child Welfare Act does not apply. Mother and father denied Indian ancestry." (1CT 29.)

2. Detention Hearing.

On December 18, 2019, the parents attended the detention hearing; also present were a paternal aunt and paternal cousin. (1RT 6.) The court found Luis to be a presumed father. (1CT 120, 125; 1RT 2-3.)

At the detention hearing, the parents filed ICWA 020

forms. (1CT 114-116, 120, 125.) The court stated, "And I have your ICWA-020 forms indicating no American Indian heritage. (1RT 3.) [¶] Is that accurate? You have no American Indian heritage?" (Ibid.) Mother responded, "Yes, I don't. (*Ibid.*) The court asked father, who responded, "No." (*Ibid.*) The court stated: "This court finds this is not an I.C.W.A. case." (*Ibid.*) The minute order for the December 18, 2019, hearing noted:

> The Court does not have a reason to know that this is an Indian Child, as defined under the ICWA, and does not order notice to any tribe or BIA. Parents are to keep the Department, their Attorney and the Court aware of any new information relating to possible ICWA status. ICWA-020, the Parental Notification of Indian Status is signed and filed.

(1CT 120, 125.)

Without providing an explanation, the court ordered the parents provide DCFS with the name, address, and any other identifying information for maternal and paternal relatives. (1RT 4.) Mother's counsel requested mother's father, Pablo A., be assessed as mother's visitation monitor. (*Ibid.*) Father's counsel requested father's sister, Susie C., and his cousin, Berenize, be assessed as visitation monitors. (*Ibid.*) Mother's counsel requested the court authorize visits for the maternal grandparents. (1RT 5.) The court ordered DCFS to assess the maternal and paternal relatives as soon as possible. (*Ibid.*)

The court found a prima facie case for the detaining the children existed. (1RT 5-6; 1CT 121, 126.) It ordered DCFS to provide reunification services and monitored visits. (*Ibid.*)

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B. At the February 19, 2020, Jurisdiction/ Disposition Hearing, the Court Found the Allegations True, Adjudged the Children Dependents, and Ordered Family Reunification Services.

The jurisdiction/disposition report filed February 4, 2020, indicated

> on 1/18/19, "the Court ordered it does not have a reason to know that this in an Indian Child, as defined under ICWA, and does not order notice to any tribe or the BIA. ¶ On 1/29/20, mother reported that she does not have any Native American heritage.

(1CT 139.)

On February 19, 2020, the parents were not present at the jurisdiction hearing, but were represented by counsel. (2RT 1.) The maternal grandparents were present. (*Ibid.*) The court struck the subdivision (a) allegation (2RT 4; 1CT 192, 196), but found the subdivision (b)(1) allegations true and adjudged the children dependents. (2RT 5, 7; 1CT 191-192, 195-196.) It ordered DCFS assess the maternal grandparents for visits and/or overnight visits. (2RT 6, 9.) It ordered family reunification services for the parents. (2RT 7-8; 1CT 131-132.)

C. At the Six-Month Review Hearing, the Court Terminated the Parents' Reunification Services.

Neither parent was present at the August 26, 2020, six-month review hearing. (3RT 1.) The court terminated reunification services. (3RT 5.)

The August 7, 2020, status review report, the December 2, 2020, section 366.26 report; the February 10, 2021, Status Review Report; and the June 28, 2021, Interim Review Report filed on June 28, 2012; reported: "On 12/18/2019, the Court found that

the Indian Child Welfare Act does not apply regarding children Dezi [.] and Joshua [.]" (2CT 380, 529, 3CT 670, 4CT 900.)

D. On January 18, 2022, the Court Terminated Parental Rights.

After several continuances (2CT 573, 3CT 788, 4CT 914, 1010) on January 18, 2022, the court held a section 366.26 selection and implementation hearing. (5RT 1.) Mother was present via webex. (5RT 2.) The court found, by clear and convincing evidence, the children were adoptable, terminating the parents' parental rights, finding the "(C)(1)(b)(1)" exception did not apply. (5RT 5-7.) ICWA was not mentioned. (5RT 1-7.)

E. Mother Timely Filed a Notice of Appeal.

On January 18, 2022, mother's counsel timely filed a notice of appeal. (4CT 1096-1097.)

F. Opinion and Petitions For Rehearing and Review.

On June 14, 2022, the Court of Appeal filed its published opinion. Appellant timely petitioned for rehearing on June 27, 2022. The Court of Appeal denied rehearing on June 28, 2022, but modified the opinion. On July 19, 2022, appellant timely filed a petition for review, which this Court granted on September 21, 2022.

STATEMENT OF FACTS

A. Circumstances Surrounding DCFS' Decision This Family Needed Court Intervention.

1. The Family.

Mother, father, Dezi C. (born 2016) and Joshua C. (born 2018) resided together in Los Angeles, in the same apartment

with the paternal grandparents, Teresa and Luis, Sr. (1CT 28, 36.) The maternal grandparents, Yara A. and Pablo A., did not reside together, but lived locally. (1CT 32, 147; 1RT 4.). Also, mother has two brothers. (1CT 34.) Luis has one sister, Susie C., and a cousin, Berenize C. (1RT 4.)

2. The November 6, 2019, Referral.

On November 6, 2019, mother and father were involved in a physical altercation outside their apartment building. (1CT 30.) The paternal grandmother reported the parents argued; mother was violent and aggressive and behaved erratically by talking to herself and drinking alcohol daily. (1CT 31, 32.) She also reported mother had been arrested recently for physically attacking the maternal grandmother. (*Ibid.*) The parents agreed to drug test; mother's results were positive for amphetamine/ methamphetamine. (1CT 37.) Father had been unable to test due to lack of identification. (*Ibid.*)

B. Additional Facts Concerning Adjudging the Children Dependents. (December 18, 2019-February 18, 2020.)

The children continued to reside with the paternal grandparents. (1CT 137.) The parents were homeless, residing in their car. (1CT 138.) Both parents had a criminal history. (1CT 141, 2CT 382-385.) Mother admitted the parents had a history of domestic violence. (1CT 143.) Mother began using methamphetamine when she 19 years old. (*Ibid.*) She began using daily after Joshua was born. (1CT 144.) DCFS recommended a full drug and alcohol program with testing and after care. (1CT 151.)

C. Parents' Participation in Case Plan. (February 19, 2020-August 26, 2020.)

The children remained placed with the paternal grandparents. (1CT 199; 2CT 378.) Mother and father remained homeless, living in their car. (1CT 199; 2CT 386.) The parents failed to participate in their case plan components, and testing positive for methamphetamine. (1CT 199; 2CT 391.) Mother remained in contact with her children, mostly by virtual visits due to the pandemic. (1CT 386.) Her mother, Yara A., supervised the weekly visits. (2CT 397, 533, 3CT 676, 4CT 976.)

D. Termination of Parental Rights. (August 27, 2020-January 18, 2022).

Dezi appeared to be on track developmentally. (2CT 531.) Joshua showed signs of fine motor delays and speech delays. (2CT 532.) By July 13, 2021, he was doing very well in therapy and would soon be done with services. (4CT 903.) Neither child required mental health services. (2CT 531-532, 3CT 674-675.) The paternal grandparents were willing to adopt the children. (2CT 533, 534, 3CT 675, 778, 782, 4CT 904, 975, 1006.)

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DISCUSSION

I. ICWA: Background and Error in This Case.

A. Introduction.

The agency, DCFS, and the juvenile court failed to comply with their broad duties of inquiry under the ICWA. DCFS and the juvenile court had an affirmative and continuing duty to inquire whether the minor was an Indian child. DCFS' initial inquiry, required under section 224.2, was inadequate as it failed to ask mother's and father's extended family members about possible Indian ancestry. Because the inquiry was inadequate, there is no substantial evidence to support the juvenile court's finding and order ICWA did not apply.

B. Background.

1. Congress Enacted the ICWA to Cure the Abusive Child Welfare Practices That Caused Large Numbers of Indian Children to be Separated From Their Families and Tribes Through Adoption and Foster Care Placement. ICWA Is Intended to Ensure the Rights of Indian Children and Indian Tribes Are Protected in Dependency Proceedings.

Congress enacted the ICWA in 1978 to cure "abusive child welfare practices that resulted in separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." (*Mississippi Choctaw Indian Band v. Holyfield* (1989) 490 U.S. 30, 32, [109 S.Ct. 1597, 104 L.Ed.2nd 29].) ICWA's purpose is "to protect the best interests of Indian children and to promote the

stability and security of Indian tribes and families . . . . (25 U.S.C. § 1902; *see In re Isaiah W.* (2016) 1 Cal.5th 1, 7-8.) "The ICWA presumes it is in the best interests of the child to retain tribal ties and cultural heritage and in the interest of the tribe to preserve its future generations, a most important resource." (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 469; *In re H.G.* (2015) 234 Cal.App.4th 906, 908-909.)

25 U.S.C., section 1911 provides a tribe may intervene in state court dependency proceedings. (25 U.S.C. § 1911(c).) Notice to the tribe provides it the opportunity to exercise its right to intervene. (*In re Junious M.* (1983) 144 Cal.App.3d 786, 790-791.) "ICWA's notice requirements serve two purposes. First, they facilitate a determination of whether the child is an Indian child under ICWA." (*In re Isaiah W.*, *supra*, 1 Cal.5th at p. 8.) Second, "ICWA notice ensures that an Indian tribe is aware of its right to intervene in or, where appropriate, exercise jurisdiction over a child custody proceeding involving and Indian child. (*Ibid.*, citing 25 U.S.C. § 1911(c).)

2. For 25 Years, California Courts and County Agencies Failed to Consistently Comply with the ICWA Mandates. In 2006, the Legislature Codified ICWA's Requirement by Amending and Adding Sections to the Welfare and Institutions Code Aimed at Alleviating the Problem.

In the 25 years following the passage of the ICWA, California courts and county agencies inconsistently applied various Rules of Court, case law and BIA Guidelines in

dependency cases. (See *In re K.H.* (2022) 84 Cal.App.5th 566, 595.) Hoping to alleviate the problem and increase compliance with ICWA, the Legislature enacted Senate Bill 678, in 2006, affirming the ICWA's purpose and amending and adding sections to the Welfare and Institutions Code relating to Indian children, which became operative January 1, 2007. (Sen. Bill No. 678 (2005-2006 Reg. Sess.) This legislation affirmed the court and the child welfare department have "an affirmative and continuing duty" to inquire about a child's Indian status when a section 300 petition is filed. (Former Welf. & Inst. Code, § 224.3, subd. (a); *In re M.R* (2017) 7 Cal.App.5th 886, 904.)

The legislation required the agency to interview extended family members and gather information about lineal ancestors if circumstances indicated the child may be an Indian child. (Former Welf. & Inst. Code, § 224.3, subd. (c).) If, while the dependency case was ongoing, information came to light suggesting a child may be an Indian child, the court and agency were required to undertake a meaningful investigation regarding Indian heritage, and, if appropriate, provide notice to the tribes. (*In re I.B.* (2015) 239 Cal.App.4th 367, 377; *In re Michael V.* (2016) 3 Cal.App.5th 225, 235-236.)

Under the former statute, both *In re K.R.* (2018) 20 Cal.App.5th 701, and *In re N.G.* (2018) 27 Cal.App.5th 474, found failure to question extended family members was prejudicial and required reversal. In *In re K.R.*, the record was silent as to the agency's investigative efforts in fulfilling its duty to inquire when it had received information that the dependent child might be an

Indian child. (*In re K.R.*, *supra,* 20 Cal.App.5th at p. 706.) The agency asserted that, because the record was silent as to its investigative efforts, mother's contentions that it should have done more was unsupported by the record and speculative. (*Id.* at p. 708.) The agency argued it had no obligation to document its efforts to contact extended family, and, therefore, mother was unable to meet her burden on appeal, i.e., demonstrate error based on the record. (*Ibid.*)

The *K.R.* court disagreed, explaining ICWA compliance presented a unique situation. (*In re K.R.*, *supra,* 20 Cal.App.5th at p. 708.) The agency cannot omit from its reports any discussion of efforts to locate and interview family members who might have pertinent information and then claim that the sufficiency of its efforts cannot be challenged on appeal because the record is silent. (*Id.,* at p. 709.) Continuing, the court noted the juvenile court cannot assume that, because some information was obtained and relayed to the relevant tribes, the agency necessarily complied fully with its obligations. (*Ibid.*) The court reversed and remanded the matter for the limited purpose of compliance with the directives of ICWA and the California statutes. (*Ibid.*)

Similarly, in *In re N.G.*, *supra,* 27 Cal.App.5th 474, the court rejected the agency's assertion further inquiry was not required because there was not enough information to suggest the minor's paternal lineal ancestors were members of a Cherokee tribe, even though father told the agency he had some paternal cousins who were registered with the Cherokee tribe. (*Id.,* at p.

482.) The court explained the appellate record "plainly suggested *N.G.* may be eligible for membership in a federally recognized Cherokee tribe." (*Ibid.*) The agency failed to fully investigate the paternal lineal ancestry because it failed to interview all persons who reasonably could have been expected to have identifying information concerning the minor's paternal lineal ancestors. (*Ibid.*)

Continuing, *N.G.,* explained the record failed to show that the agency asked mother whether the minor may have maternal Indian ancestry or ever asked her to complete an ICWA-010 form, even though the agency was in contact with mother and maternal relatives during the proceedings. (*In re N.G.*, *supra,* 27 Cal.App.5th at p. 482.) The court repeated its holding from *In re K.R., supra,* that the agency cannot omit from its reports any discussion of efforts to locate and interview family members who might have pertinent information and then claim that the sufficiency of its efforts cannot be challenged on appeal because the record is silent. (*In re N.G., supra,* 27 Cal.App.5th at p. 484.) Additionally, the court noted the juvenile court cannot assume that, because some information was obtained and relayed to the relevant tribes, the agency necessarily complied fully with its obligations. (*Ibid.*)

Lastly, noting that, usually, a parent has the burden of demonstrating prejudice, *N.G.* held the absence of an appellate record affirmatively showing the court's and the agency's efforts to comply with the ICWA's inquiry will not, as a general rule, allow the court to conclude that substantial evidence supported

the court's findings that proper ICWA notices were given, or that ICWA did not apply. (*In re N.G., supra,* 27 Cal.App.5th at p. 484.) Instead, as a general rule, where the record does not show what, if any, efforts the agency made to discharge its duty of inquiry, appellant's claims of ICWA error are prejudicial and reversible. (*Ibid.*)

3. The 2006 Legislation Did Not Resolve California's Compliance Problems. A Task Force Was Formed to Find Solutions.

Even though there had been incremental progress after the implementation of the 2006 legislation, systemic compliance problems persisted, and a task force was formed in 2015 to address those issues and frame solutions. (*In re M.M.* (2022) 81 Cal.App.5th 61, 74, Wiley J., dissenting.) As the California ICWA Compliance Task Force ("Task Force") pointed out in its 2017 report to the Attorney General,

> [a] common mistake by agencies, county counsels, court-appointed attorneys and the courts themselves is to conflate the issues of: (a) whether ICWA applies [i.e., whether ICWA's substantive provisions apply] and (b) whether notice is required under the ICWA [i.e., whether ICWA's and related state law's procedural provisions apply].

(Cal. ICWA Compliance Task Force, Rep. to Cal. Atty. Gen.'s Bur. of Children's Justice (2017) p. 32 ("Report").)

As Justice Wiley noted in his dissent in *In re M.M.*, *supra*, 81 Cal.App.5th at p. 74, the Report explained "there are a variety of reasons why relying on the parents does not necessarily protect the child's best interests, or the rights of the tribe. Parents may simply not have that information, or may possess only vague or

ambiguous information." (Report, *supra*, at p. 28, .)

The Task Force urged the Legislature to address the problems caused when child protective agencies neglect to interview extended relatives once a child's parents deny knowledge of Indian ancestry, warning

> [w]hen parents are the sole target of the initial inquiry, it should be understood that there are a variety of reasons why relying on the parents does not necessarily protect the child's best interests, or the rights of the tribe. Parents may simply not have that information, or may possess only vague or ambiguous information. [¶] The parents or Indian custodian may be fearful to self-identify, and social workers are ill-equipped to overcome that by explaining the rights a parent or Indian custodian has under the law. Parents may even wish to avoid the tribe's participation or assumption of jurisdiction.

(Report, supra, at p. 28, fn. omitted; see also, *In re Ezequiel G.* (2022) 81 Cal.App.5th 984, 1021, Lavin, J. dissenting.)

The Report notes (former) section 224.3,[2] had been interpreted to limit the inquiry made solely of the parents, and to the extent that it had been so interpreted it should be amended, citing (former) section 224.3, subdivision (b) requiring the agency to ask members of the child's extended family to provide information about the child's possible Indian status. (See, Report, *supra,* at p. 27.)

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[2] The Legislature did revise this statute in 2018. (Assem. Bill No. 3176 (2017-2018 Reg. Sess.)

4. In 2016 New Federal Regulations Were Implemented to Clarify the Federal Standards Governing the Implementation of ICWA.

In 2016, while the California Task Force was completing its investigation, new federal regulations were adopted concerning ICWA compliance. (*In re D.S.* (2020) 46 Cal.App.5th 1041, 1048, citing 81 Fed.Reg. 38864 (June 14, 2016), revising 25 C.F.R. § 23 (2019).)

According to the Department of Interior, as set forth in 81 FR 38778, the purpose of the Bureau of Indian Affairs new regulations was to clarity the minimum federal standards governing implementation of the ICWA and to promote the uniform application of the federal law designed to protect Indian children, their parents and Indian tribes because implementation and interpretation of the ICWA had been inconsistent across the States. (25 C.F.R. §§ 23.101-23.144.) The new regulations:

1. clarified there are no exceptions;
2. refined the various definitions;
3. made clear the steps involved in conducting a thorough inquiry at the beginning of child-custody proceedings as to the whether the child is an "Indian child" and subject to the act;
4. required prompt notice to the tribes to facilitate compliance with the statutory requirements, i.e., without notice of the proceedings, the tribes will not be able to exercised the rights guaranteed by the ICWA; and
5. clarified the rules concerning transferring the proceedings to the tribal court, the placement preferences, and information, record keeping and other rights.

(See 81 FR 38788, pp. 9-10, 84-85; 25 C.F.R., § 23.)

Although the BIA *Guidelines for Implementing the Indian Child Welfare Act*, may not be binding on the States, but only entitled to great weight (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1422 n.3.); these Regulations *are* binding. (*In re E.H.* (2018) 26 Cal.App.5th 1058, 1073.) The 2016 Federal Regulations clarified the federal standards implementing ICWA in the States.

5. In 2018 California Passed Remedial Legislation Imposing a More Expansive Duty of Inquiry, Requiring the Agency to Ask Extended Family Members, Not Just the Parents, Concerning Whether the Child May Be an Indian Child.

In 2018 the California Legislature passed remedial legislation imposing a more expansive duty of inquiry on the agencies. (*In re K.H., supra*, 84 Cal.App.5th at p. 588; Assem. Bill No. 3176 (2017-2018 Reg. Sess.)) Those amendments addressed the Task Force's express concerns that California law failed to ensure child protective agencies were contacting extended relatives while conducting ICWA inquiries. (See Report, *supra*, at p. 27, fn. 80 ["It is reported that the parents are frequently the only persons asked [about ICWA], and unfortunately the courts have at times affirmed this approach."].)

> Specifically, the Legislature made substantive changes to the inquiry requirements and moved them to section 224.2, while moving the notice requirements to section 224.3. (Assem. Bill No. 3176 (2017–2018 Reg. Sess.).) The amendments added, among other provisions, section 224.2, subdivision (b), which now describes the duty of initial inquiry and requires, as part of that inquiry, child protective agencies to interview parents and extended family members. (§ 224.2, subd. (b).) The amendments also

> lowered the threshold for triggering the duty of further inquiry from a "reason to know" that an Indian child is involved in a dependency proceeding to a "reason to believe" that an Indian child is involved. (Compare § 224.2, subd. (e) with former § 224.3, subd. (c).)

(*In re Ezequiel G., supra,* 81 Cal.App.5th at p. 1023, J. Lavin, dissenting.)

The Majority in *Ezequiel G.* disagreed that the Task Force Report was a catalyst for the 2018 amendments to section 224 because the Report was prepared for the Governor, not the Legislature. (*In re Ezequiel G., supra,* 81 Cal.App.5th at pp.1011-1012.) However, the majority did agree the Report may have been part of the impetus for Assembly Bill 3175, but there did not appear to be any evidence suggesting the Report was before the Legislature. (*Ibid.*)

The amendments also have been described as "conforming amendments to its statutes, addressing the 2016 federal regulations and revised portions of the Welfare and Institutions Code related to ICWA notice and inquiry requirements." (*In re D.S.*, *supra*, 42 Cal.App.5th at p. 1048.) Specifically, sections 224 to 224.6 were amended, and parts were repealed, added, and renumbered. The revised California ICWA statutes became effective on January 1, 2019. (*In re D.S., supra,* 46 Cal.App.5th at p. 1048, citing Assem. Bill No. 3176 (2017-2018 Reg. Sess.).) The new statutes broadened and specified the steps an agency and the juvenile court must take to determine a child's possible status as an Indian child. (*Id.* at pp. 1048-1049.)

The most recent amendments did not limit the duty to interview extended relatives only to circumstances in which the

court or the child protective agency had "reason to know" an Indian child might be involved in a dependency proceeding. Nor did the amendments include any language relieving the agencies from having to interview extended relatives if a child's parents deny knowledge of Indian ancestry or tribal membership. (See Welf. & Inst. Code, § 224.2.)

The duty of inquiry applies in *every* dependency case. (*In re A.R.* (2022) 77 Cal.App.5th 197, 207.) Under the revised statute, it begins with initial contact by the agency. (Welf. & Inst. Code, § 224.2, subd. (a).) The duty continues throughout the dependency proceedings. (*In re J.C.* (2022) 77 Cal.App.5th 70, 77.) Specifically, California law requires the juvenile court to inquire at the first appearance in court of each party, by asking each participant present whether the participant knows or has reason to know that the child is an Indian child. (Welf. & Inst. Code, § 224.2, subd. (c).) More importantly, when the agency takes a child into temporary custody, it must ask "the child, parents, legal guardian, Indian custodian, extended family members, other who have an interest in the child," and the reporting party whether child is or may be an Indian child. (Welf. & Inst. Code, § 224.2, subd. (b).) Extended family members include adults who are the child's stepparent, grandparents, siblings, brothers- or sisters-in-law, aunts, uncles, nieces, nephews, and first or second cousins. (Welf. & Inst. Code, § 224.1, subd. (c); 25 U.S.C. § 1903(2).)

After asking parents and extended family members about potential Indian ancestry, that information may trigger a duty of further inquiry if that information suggests there is a "reason to

believe" the parent or child is a member or may be eligible for membership in an Indian tribe. (Welf. & Inst. Code, § 224.2, subd. (e)(1).) During the agency's "further inquiry," the agency conducts more extensive interviews with the parents and extended family members, gathering the information necessary for an ICWA notice. (Welf. & Inst. Code, § 224.2, subd. (e)(2).) The duty to provide notice to the tribe arises only if the agency or the court "knows or has reason to know" that an Indian child is involved. (Welf. & Inst. Code, § 224.3, subd. (a); 25 U.S.C. § 1912(a).)

Currently, California Rules of Court, rule 5.842 (a)(5) requires the agency document its investigation.

> The petitioner must on an ongoing basis include in its filings a detailed description of all inquiries, and further inquiries it has undertaken, and all information received pertaining to the child's Indian status, as well as evidence of how and when this information was provided to the relevant tribes. Whenever new information is received, that information must be expeditiously provided to the tribes.

(Cal. Rules of Court, rule 5.481(a)(5).)

The burden of coming forth with information to determine whether an Indian child may be involved does not rest entirely – or even primarily – on the child's family, but rather on the juvenile court and the agency. (*In re Michael V., supra*, 3 Cal.App.5th at p. 233.) The social worker has a duty to seek out the information. (*In re Breanna S.* (2017) 8 Cal.App.5th 636, 652; overruled in part by *In re Caden C.* (2021) 11 Cal.5th 614, 637 [this Supreme Court rejected the *Breanna S.'* court's ruling the parental-benefit exception can only apply when a parent has

made sufficient progress in addressing problems that led to dependency.].)

The statutes were revised because notice to Indian tribes is central to effectuating ICWA's purpose, enabling a tribe to determine whether the child involved in dependency proceedings is an Indian child and, if so, whether to intervene in or exercise jurisdiction over the matter. (*In re T.G.* (2020) 58 Cal.App.5th 275, 288.) To advance a tribe's interest in receiving notice and its ability to intervene in appropriate cases, the Legislature imposed duties on the court and the agencies to investigate potential tribal relations. (*Id.* at p. 314.)

6. The Error In This Case.

Here, DCFS and the juvenile court failed to comply with their broad duties of inquiry under ICWA. The agency and court never asked the parents' extended family members about potential Indian ancestry. (1RT 4-6, 2RT1, 1CT 28, 32, 34, 147.) Although the court made no express ICWA findings at the final hearing, that order necessarily was premised on an implied current finding by the juvenile court that ICWA did not apply. (*In re Benjamin M.* (2021) 70 Cal.App.5th 735, 740.) That implied finding is unsupported by substantial evidence. Compliance with the ICWA was defective, requiring reversal.

II. The Seven Standards For Determining Prejudice.

The various Districts of the Court of Appeal employ at least seven standards for determining prejudice as a result of the agency's and the juvenile court's failure to comply with the broad duty of inquiry.

A. One Line of Cases Holds the Error Does Not Warrant Reversal Unless a Miscarriage of Justice Is Demonstrated to Have Occurred as a Consequence of the Failure to Inquire, and the Appellant Must Affirmatively Demonstrate Prejudice.

One line of cases applies a harmless error standard, requiring a parent to demonstrate prejudice, i.e., requiring the parent show on appeal that he or she would, in good faith, have claimed some kind of Indian ancestry. In *In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1439, a case published before the Legislature revised section 224.2, subdivision (a)-(c), the Fourth District, Division Two required the affirmative showing of prejudice.

Fifteen years later, after the Legislature revised section 224.2, subdivisions (a)-(c), in *In re A.C.* (2021) 65 Cal.App.5th 1060, 1069, the Fourth District, Division Two, again held an affirmative showing was required.

Similarly, in *In re A.C.* (2022) 75 Cal.App.5th 1009 [Second District, Division One], the dissent advocated for a harmless error standard, requiring the appealing party to affirmatively show prejudice, and expecting more of a parent's trial counsel in raising ICWA issues in the juvenile court. (*Id.* at p. 1021-1022 (dis. opn. of Crandall, J.).)

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B. Still Another Line of Cases Looks to Whether Substantial Evidence Supports the ICWA Findings and Orders.

A second line of cases applies the substantial evidence test. In *In re Josiah T.,* the Second District, Division Eight, reviewed DCFS' failure to complete its initial and further duties to investigate ICWA by contacting extended family members. (*In re Josiah T.* (2021) 71 Cal.App.5th 388, 401.) The Court explained the agency has a duty to "document it[s inquiry] and to provide clear information to the court" so that the court may rule on the question of whether the ICWA applies, citing *In re L.S.* (2014) 230 Cal.App.4th 1183, 1198. (*In re Josiah T., supra,* 71 Cal.App.5th at p. 406.)

Continuing, the Court explained the juvenile court may *not* find that ICWA does not apply when the absence of evidence that the child is an Indian child results from an agency's inquiry that is not proper, adequate or demonstrative of due diligence. (*In re Josiah T., supra,* 71 Cal.App.5th at p. 408.)

> In order for the court to make a determination whether the notice requirements of the ICWA have been satisfied, it must have sufficient facts, as established by the Agency, about the claims of the parents, the extent of the inquiry, the result of the inquiry, the notice provided any tribes and the responses of the tribes to the notices give. Without these facts, the juvenile court is unable to find, explicitly or implicitly, whether the ICWA applies. [Citation.] Because DCFS's inquiry and reporting deficiencies, the juvenile court's lack of information it needed to make those determinations, and even worse, it would have to engage in detective work to uncover the facts that it did not have the information necessary to make an informed ruling.

(*Id.* at p. 408.)

Josiah T. did not require a parent show prejudice by making an affirmative showing of Indian ancestry. Instead, it conditionally reversed the orders terminating parental rights and remanded with directions the juvenile court permit the agency to demonstrate it did in fact satisfy its affirmative duty to investigate. The court ordered that, if agency shows its investigation fulfilled its duty to investigate, the juvenile court should reinstate the section 366.26 orders. (*In re Josiah T., supra,* 71 Cal.App.5th at p. 408.)

More recently, in *In re H.V.* (2022) 75 Cal.App.5th 433 [Second District, Division Five], the dissent suggested that, under the deferential standard of review, the juvenile court's ICWA finding should not be disturbed because there was substantial evidence supporting that determination based on mother's denial of Indian heritage. (*Id.* at p. 441, (dis. opn. of Baker, J.).)

C. Another Line of Cases Holds Prejudice Is Determined on a Case-By-Case Basis, Looking to Whether the Record Reflects That There Are Known Relatives Identified By the Agency, Who Appear to Have Been Able to Shed Light on the Issue of Native American Heritage.

A third line of cases articulates a different approach. In *In re Benjamin M., supra,* 70 Cal.App.5th 735, a panel of the Fourth District, Division Two, explained this issue of failing to inquire was analogous to the state having a duty to disclose certain evidence but failing to check if it has that material, citing *Brady v. Maryland* (1963) 373 U.S. 83, 87 [83 S.Ct. 1194, 10 L.Ed. 2nd 215].) Continuing, *Benjamin M.* explained:

> Here, instead of mere duty to disclose, the agency has a duty to gather information by conducting an initial inquiry, where the other party–here the parent "acting as a surrogate for the tribe" [Citation]–has no similar obligation. At any point, the agency could still gather the required information and make it known. Until the agency does so, however, we cannot know what information an initial inquiry, properly conducted, might reveal.

(*In re Benjamin M., supra,* 70 Cal.App.5th at pp.742-743.)

Benjamin M. held the court must reverse where the record demonstrates that the agency (1) has failed in its duty of initial inquiry, and (2) where the record indicates there was readily obtainable information that was likely to bear meaningfully upon whether the child is an Indian child. (*In re Benjamin M., supra*, 70 Cal.App.5th at p. 744.)

D. Dezi C. Created a New Test, Holding the Error Does Not Warrant Reversal Unless a Miscarriage of Justice Is Demonstrated in the Appellate Record and Any Further Proffer the Appealing Parent Makes on Appeal.

In this case, *In re Dezi C.* (2022) 79 Cal.App.5th759, the Second District, Division Two, adopted still another test. That Court held an agency's failure to discharge its statutory duty of initial inquiry is harmless unless the record contains information suggesting a reason to believe that the children at issue may be Indian children, in which case further inquiry may lead to a different ICWA finding by the juvenile court. (*Id.* at p. 779.) Continuing, it held that, for these purposes, the record means not only the record of proceedings before the juvenile court but also any further proffer the appealing parent makes on appeal." (*Id.* at p. 774.)

This fourth standard is flawed because it looked to the "reason to believe" question before the initial inquiry had been completed. (*In re Dezi C., supra,* 79 Cal.App.5th at pp. 775, 778-779, 780-782.) Instead, section 224.2, subdivision (e), comes into play *after* the initial broad inquiry has been completed, and there is not sufficient evidence to determine there is a "reason to know" the child is and Indian child. (Welf. & Inst. Code, § 224.2, subd. (e).) The issue is the agency's failure to complete its broad initial inquiry by not initially inquiring of the extended family members.

E. The Second District, Division Three in *In re Ezequiel G.,* Held the Court Reviews ICWA Findings Under a Hybrid Substantial Evidence/ Abuse of Discretion Standard, and a Showing of Prejudice Is Required.

In *In re Ezequiel G.*, *supra,* 81 Cal.App.5th 984, a divided panel of the Second District, Division Three, determined it would review a juvenile court's ICWA finding under a hybrid substantial evidence/abuse of discretion standard. The court reviewed for substantial evidence whether there is a reason to know a child is an Indian child, and for abuse of discretion a juvenile court's finding that an agency exercised due diligence and conducted a proper and adequate ICWA inquiry. (*Id.* at pp. 1004-1005.) Continuing, the Court determined inquiry of the extended family was "absurd at best, impossible at worst" because the parents might refuse to provide, or provide partial contact information to the agency for extended family members, or the dependent's family could be so large contacting every person identified would not be practical or useful. (*Id.* at p. 1006.)

Also, the Court held that, in the context of an appeal from an order terminating parental rights, the abuse of discretion standard must also consider whether an objection was made below to the adequacy of an ICWA inquiry. (*Id.* at p. 1013.) That Court also required an affirmative showing of prejudice. (*Id.* at p. 1014.) The dissent, however, adopted the view of the majority of recent cases, finding the failure to inquire of available relatives error, which was neither waived nor harmless, explaining the purpose of the revision was to correct the problem created by social service agency in failing to interview extended family members once the parents deny Indian heritage. (*Id.* at pp. 1021-1022, Lavin, J. dissenting.)

F. In *In re K.H.* the Fifth District Held That, *If* Substantial Evidence Does Not Support the ICWA Finding, Then the Juvenile Court Abuses Its Discretion in Finding ICWA Does Not Apply. The *Watson* "Likelihood of Success" Test Does Not Apply.

More recently, *In re K.H., supra,* 84 Cal.App.5th 566, the Fifth Appellate District took another approach, expanding on *Benjamin M.* In *K.H.*, the parents denied Indian ancestry, and the agency failed to inquire any further in violation of section 224.2, subdivision (b). (*Id.* at p. 588.) *K.H.* held the juvenile court's ICWA finding is reviewed for substantial evidence, but a determination that the agency's inquiry was proper should be viewed under a hybrid substantial evidence and abuse of discretion standard. (*Id.* at p. 489.)

Continuing, the Court explained the juvenile court's ability

to exercise discretion and determine whether the agency's inquiry was proper is based on an adequate record developed by the agency. (*In re K.H., supra,* 84 Cal.App.5th at p. 489.) If the agency's inquiry is patently insufficient, then the juvenile court's find that ICWA does not apply is unsupported by substantial evidence, and the juvenile court's conclusion to the contrary constitutes a clear abuse of discretion. (*Ibid.*)

Additionally, *K.H.* explained ICWA is a remedial statute designed to protect the rights of a stakeholder other than the parent or the child. (*In re K.H., supra,* 84 Cal.App.5th at p. 589.) "The relevant rights under ICWA belong to Indian tribes and they have a statutory right to received 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 the juvenile court needs to ensure accuracy in determining whether further inquiry or notice is required, and whether ICWA does or does not apply." (*Id.* at p. 591.) "[A]n obviously deficient record" compels reversal. (*Id.* at p. 618.)

This essentially amounts to "reversal per se" whenever there is an inadequate inquiry. *K.H.* was followed by a second Fifth District case, *In re E.C.* (2022) 85 Cal.App.5th 123.

G. The Final View Is the Agency's and the Juvenile Court's Failure to Ask the Extended Family About Potential Indian Ancestry Warrants Reversal in Every Case, Requiring Reversal Per Se.

Finally, a line of cases holds the agency's and the juvenile

court's failure to satisfy the duty of inquiry is presumed prejudicial, requiring reversal. These cases include *In re K.R., supra,* 20 Cal.App.5th at 709 [Fourth District, Division Two] and *In re N.G., supra*, 27 Cal.App.5th at p. 484 [Fourth District, Division Two]. Both of those case were published prior to the Legislature's revision of section 224.2, in enacting Assembly Bill 3176.

The next tranche of cases enunciating this view was decided based on Legislature's expansion of the duties of ICWA inquiry enacted by Assembly Bill 3176, revising section 224.2, subdivisions (a)-(c): *In re T.G., supra,* 58 Cal.App.5th at pp. 288-289 [Second District, Division Seven]; review denied March 24, 2021]; *In re Y.W.* (2021) 70 Cal.App.5th 542, 556 [Second District, Division Seven]; *In re H.V., supra,* 75 Cal.App.5th 433, 438, fn. 4 [Second District, Division Five]; *In re Antonio R.* (2022) 76 Cal.App.5th 421, 435 [Second District, Division Seven]; *In re J.C.*, *supra*, 77 Cal.App.5th 70, 80 [Second District, Division Seven]; and *In re A.R., supra,* 77 Cal.App.5th at p. 207 [Fourth District, Division Three]; and *In re E.V.* (2022) 80 Cal.App.5th 691, 698 [Fourth District, Division Three].)

A.R. held conceded error by the agency "warrants reversal in every case because the duty to inquire was mandatory and unconditional." (*In re A.R., supra,* 77 Cal.App.5th at p. 205.)

> Stated plainly, it is the obligation of the government, not the parents in individual cases, to ensure the tribes' interest are considered and protected. [¶] The duty to inquire in every case is the key to that protection. Without it, the tribes effectively have no mechanism for ascertaining

> wether they have an interest in the care and well-bing of any specific child. To ignore the obligation to conduct an ICWA inquiry in individual cases would undermine ICWA policy in general.

(*In re A.R., supra,* 7 Cal.App.5th at p. 207.)

As set forth below, this Court should adopt this standard.

III. When the Agency and Juvenile Court Fail to Comply With Their Duties Under ICWA by Not Asking the Extended Family Members About Indian Ancestry, the Error Should Be Presumed Prejudicial. This Court Should Apply a Reversal Per Se Standard.

A. Introduction.

An adequate inquiry is the prerequisite to ensuring notice to an Indian Tribe. Applying the harmless error standard when the agency does not follow the ICWA's inquiry requirements ignores the remedial purpose of the revised statutes, and essentially insulates "failure to inquire" error from review. Moreover, because of the independent right of any Indian tribe to notice, a failure to inquire should not be viewed as simple California statutory error since a failure to inquire – which could have resulted in a tribal connection – prevents the tribe from receiving notice.

B. An Adequate Inquiry Is Prerequisite for Ensuring Notice Guaranteed by the Due Process Clause of the Fourteenth Amendment, to an Indian Tribe. An Error Should Not Be Viewed as a Mere Violation of State Statutory Law. Per Se Reversal Is Required Because a Failure to Inquire Denies a Tribe Its Right to Notice, Thereby Denying the Tribe Due Process of Law.

Among the procedural safeguards imposed by the ICWA is

the provision of notice to various parties. (*In re A.W.* (2019) 38 Cal.App.5th 655, 662.) One of the primary purposes of giving notice to the tribe is to enable the tribe to determine whether the child involved in the proceedings in an Indian child. (*In re Desiree F., supra*, 83 Cal.App.4th at p. 470.) An inadequate inquiry should not be viewed as a mere violation of state statutory law, but a violation of a tribe's right to notice, guaranteed by the Due Process Clause of the Fourteenth Amendment.

"[D]ue process requires 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. (*Mullane v. Central Hanover Tr. Co.* (1950) 339 U.S. 306, 314 [70 S.Ct. 652, 657, 94 L.Ed 865].)" (*In re Melinda J.* (1991) 234 Cal.App.3d 1413, 1418.) "[T]he essence of procedural due process is that the individual be given adequate notice and a meaningful opportunity to be heard . . . ." (*Lackner v. St. Joseph Convalescent Hospital, Inc.* (1980) 106 Cal.App.3d 542, 557; see also *In re Crystal J.* (1993) 12 Cal.App.4th 407, 412.)

Notice is a key component of the congressional goal to protect and preserve Indian tribes and Indian families because it ensures the tribe will be afforded the opportunity to assert its rights under ICWA irrespective of the position of the parents, Indian custodians or state agencies. (*In re Kahlen W., supra*, 233 Cal.App.3d at p. 1421.)

The agency's failure in its duty of initial inquiry precludes tribes from receiving required notice and, therefore, is structural

error, i.e., error in the process itself, not error occurring during the hearing. Per se reversal is required. (*Judith P. v. Superior Court* (2002) 102 Cal.App.4th 535, 556-557; citing *Arizona v. Fulminante* (1991) 499 U.S. 279, 310 [111 S.Ct. 1246, 113 L.Ed.2d 302].)

This Supreme Court recently declined to foreclose the application of structural error principles in the dependency context. (*In re Christopher L.* (2022) 12 Cal.5th 1063, 1075.) In *Christopher L.*, the issue was whether it was structural error when the juvenile court failed to appoint counsel for father for the combined jurisdiction and disposition hearing and also failed to comply with Penal Code section 2625. (*In re Christopher L., supra,* 12 Cal.5th at p. 1072.)

First, this Court explained "[w]hen the error is one of state law only, it generally does not warrant reversal unless there is reasonable probability, that in the absence of the error, a result more favorable to the appeal party would have been reached," citing *People v. Watson* (1956) 46 Cal.2d 818, 835. (*In re Christopher L., supra,* 12 Cal.5th at p. 1073.) Continuing, this Court explained not all errors are amenable to harmless error analysis, noting that "under the California constitutional harmless-error provision some errors similarly are not susceptible to the 'ordinary' or 'generally applicable' harmless-error analysis … and may require reversal of the judgment notwithstanding the strength of the evidence contained in the record in a particular case."(*In re Christopher L., supra,* 12 Cal.5th at p. 1074, citing *People v. Cahill* (1993) 5 Cal.4th 478, 493. .)

This Court looked to the "three broad rationale" categories for treating an error as structural error identified in *Weaver v. Massachusetts* (2017) 582 U.S. _ [137 S.Ct. 1899, 198 L.Ed.2nd 240], for the framework for the reversal per se analysis.(*In re Christopher L., supra,* 12 Cal.5th at p. 1077.) Citing *Weaver*, this Court explained:

> First, an error has been deemed structural in some instances if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest. This is true of the defendant's right to conduct his own defense, which, when exercised, 'usually increases the likelihood of a trial outcome unfavorable to the defendant.' [Citation.] … [¶] Second, an error has been deemed structural if the effects of the error are simply too hard to measure. For example, when a defendant is denied the right to select his or her own attorney, the precise 'effect of the violation cannot be ascertained.' [Citation.] Because the government will, as a result, find it almost impossible to show that the error was 'harmless beyond a reasonable doubt,' [citation], the efficiency costs of letting the government try to make the showing are unjustified. [¶] Third, an error has been deemed structural if the error always results in fundamental unfairness. For example, if an indigent defendant is denied an attorney or if the judge fails to give a reasonable-doubt instruction, the resulting trial is always a fundamentally unfair one. [Citations.] It therefore would be futile for the government to try to show harmlessness", citing *Weaver v. Massachusetts, supra*, *Id.* at p. __ [137 S.Ct. at p. 1908.] "These categories are not rigid. In a particular case, more than one of these rationales may be part of the explanation for why an error is deemed to be structural." (*Ibid*.)

(*In re Christopher L., supra,* 12 Cal.5th at p. 1077.)

Here, the error is structural because the "right at issue is not designed to protect" the parents, but instead protects another

interest, the interest of the tribe and its right to notice. Additionally, the error is too hard to measure because the accuracy of determining whether further inquiry or notice is required is impossible to determine because of a failure to gather and record the very information the juvenile court needs to ensure the accuracy of a finding whether ICWA does nor does not apply. Lastly, the error will result in fundamental unfairness because the tribe will be deprived of its rights under ICWA, irrespective of the position of the parents or state agencies. The notice requirements serve the interests of the Indian tribes, irrespective of the positions of the parents, and cannot be waived by the parents. (*In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1267.)

Reversal per se is required.

C. When the Child Welfare Agency Fails to Make the Statutorily Required Inquiry Concerning the Child's Potential Indian Ancestry, That Error Is Not Amenable to an Assessment Under *Watson*'s "Likelihood of Success" Test.

The *K.H.* court explained that, generally, prejudice is measured by asking whether "it is reasonably probable that a result more favorable to the appealing party would have been reached absence the error, citing *People v. Watson, supra,* 46 Cal.2nd 818, 836. (*In re K.H., supra,* 84 Cal.App.5th at p. 590.) However, *K.H.* explained not every error under state law is amenable to the "likelihood of success test" or the "outcome-focused" test set forth in *Watson*. (*Ibid.*) Citing this Court's opinion in *In re A.R.* (2021) 11 Cal.5th 234, *K.H.* held "in some

instances, the relevant injury is not related to a specific substantive outcome on the merits and placing the measure for prejudice on such an outcome falls short of meaningfully safeguarding the rights at issue. (*In re K.H., supra,* 84 Cal.App.5th at p. 590.)

K.H. explained ICWA is a remedial statute designed to protect the rights of a stakeholder other than the parent or the child. (*In re K.H., supra,* 84 Cal.App.5th at p. 589.) The relevant rights under ICWA belong to the tribe, which has the statutory right to receive notice where an Indian child may be involved so that they may make that determination. (*Id.* at p. 591.) "[T]he prejudice to those right lies in the failure to gather and record the very information the juvenile court needs in determining whether further inquiry or notice is required, and whether ICWA does or does not apply." (*Ibid.*)

Similar to this Court's holding in *A.R., K.H.* adopted an "injury-focused test for prejudice," noting that an inadequate inquiry is prejudicial because prejudice "'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 nor does not apply.'" (*In re K.H., supra,* 84 Cal.App.5th at p. 591.)

As the Fourth District, Division Three in its "*A.R.*" case held,

> Adopting "a rule requiring reversal in all cases where ICWA requirements have been ignored is consistent with the recognition that parents are effectively acting as 'surrogate[s]' for the interests of Native American tribes

> when raising this issue on appeal. . . . '[A]ppellate review of procedures and ruling that are preserved for review irrespective of any action or inaction on the part of the parent should not be derailed simply because the parent is unable to produce an adequate record.' [Citation.] [¶] Any other rule would potentially make enforcement of the tribes' rights independent on the quality of the parents' efforts on appeal. That would be inconsistent with the statutory schemes which place the responsibility squarely on the courts and child welfare agencies. Stated plainly, it is the obligation of government, not the parents in individual cases, to ensure the rtibes interest are considered and protected.

(*In re A.R., supra,* 77 Cal.App.5th at p. 207.)

An adequate inquiry at the beginning of the case is the only meaningful way to safeguard the tribe's statutory rights under the ICWA and California law. An inadequate inquiry prejudices not the rights of the parent, but the tribe and the tribe's determination whether the child is or may be an Indian child. Reversal per se is the only effective safeguard of the rights ICWA was designed to protect.

IV. The Dezi C. Requirement That a Parent Must Prove on Appeal There Would Have Been a More Favorable Outcome Absent the Error, Frustrates ICWA and California Law.

Dezi C. held "an agency's failure to conduct a proper initial inquiry into a child's Indian ancestry is harmless unless the record contains information suggesting a reason to believe that the child may be an Indian child within the meaning of ICWA. (*In re Dezi C., supra,* 79 Cal.App.5th at p. 779.) Continuing, *Dezi C.* held the "record" includes both the record of the proceedings in the juvenile court and any proffer the appealing parent make on

appeal. (*Ibid.*)

This Court should reject this rule. By requiring appellate counsel to investigate a parent's potential Indian ancestry, it reassigns the agency's duty of inquiry to appellate counsel. This not only violates the Legislature's mandate, but it also conflicts with this Supreme Court's opinion in *In re Zeth S.* (2003) 31 Cal.4th 396, mandating that post-judgment evidence is only proper if it supports the underlying judgment. (*Id.* at p. 413.)

Recently, in *In re Kenneth D.* (2022) 82 Cal.App.5th 1027, reviewed granted November 30, 2022, S276649, the Third District Court of Appeal found it was appropriate for the Court of Appeal to consider the agency's posttermination evidence that had been made part of the official appellate record and the finding that the minor was not an Indian child within the meaning of ICWA. (*Id.* at p. 1034.) This Court granted review on the issue of whether an appellate court may take additional evidence to remedy the failure of the agency and the trial court to comply with the inquiry, investigation, and notice requirement of ICWA, and if so, what procedure must be followed?

In *In re Y.M.* (2022) 82 Cal.App.5th 901, the Fourth District, Division One criticized this rule allowing the Court of Appeal to consider matters not contained in the juvenile court record. (*Id.* at p. 913.) *Y.M.* explained that, although authorized to make findings of fact, appellate courts should do so sparingly, citing *In re Zeth S., supra,* 31 Cal.4th at p. 405. (*In re Y.M., supra,* 82 Cal.App.5th at p. 913; see also *In re Benjamin M., supra,* 70 Cal.App.5th at pp 743-744; *In re K.H., supra,* 84

Cal.App.5th at pp. 612-613.) Continuing, *Y.M.* explained ICWA error claims are not rare and therefore, are not exceptional circumstances. (*In re Y.M., supra*, 82 Cal.App.5th at p. 913.) *Y.M.* noted this approach "not only embraces finality at the expense of the tribe's interest in ascertaining accurate determinations of the Indian status of children," but it also requires "a parent to make an affirmative representation of Indian ancestry where the [agency's] failure to conduct an adequate inquiry deprived the parent of the very knowledge need to make a claim." (*Id.* at p. 914.) This rule also "does too little to incentivize the agency to conduct proper inquiries because prejudicially deficient investigations will go uncorrected if a parent is unwilling or unable to make a meaningful proffer on appeal." (*Id.* at pp. 914-915.)

Justice Menetrez explained this conflict. Appointed appellate counsel "ordinarily do not, need not, and are not paid to conduct an investigation of facts outside the record." (*In re A.C.*, *supra,* 65 Cal.App. at p. 1078, (dis. opn. of Menetrez, J.)

Additionally, appellate counsel generally is under time constraints in Welfare and Institutions Code section 366.36 appeals. (Cal. Rules of Court, rule 8.412(b); rule 8.412(c); rule 8.416 (e); and rule 8.416(f).) There are "no-extension/short time frame" requirements in which to file a brief. Appointed appellate counsel has neither the time nor the resources to complete an investigation and file a brief raising ICWA issues or file a timely no-issue brief after a review by the appellate project. The appointed appellate counsel programs in dependency appeal are

limited by "guidelines" and are highly systemized. (See 2022 Continuing Education of the Bar, California Juvenile Dependency Practice (2022), §§ 10.15 et seq., the Appellate Projects, pp. 975-978.)

Requiring appointed appellate counsel to investigate potential Indian ancestry reassigns the duty of inquiry, will not incentivize the agency to comply with its statutory mandate, is not cost-effective.

V. Alternatively, This Court Should Adopt the Holding in the *Benjamin M.* As Elaborated by *K.H.*

Alternatively, if this Court does not adopt a per se reversal standard, it should adopt the holding in *Benjamin M.* as elaborated by *K.H.* Those cases focused on the adequacy of the agency's investigation, and if an adequate inquiry had been conducted, what the inquiry might have revealed. Additionally, both cases rejected the harmless error standard.

Again *In re Benjamin M., supra*, 70 Cal.App.5th 735, the Court explained it "must reverse where the record demonstrates that the agency has not only failed in its duty of inquiry, but where the record indicates that there was readily obtainable information that was likely to bear meaningfully upon whether the child was an Indian child." (*Id.* at p. 744.) Continuing, *Benjamin M.* held:

> Here, instead of mere duty to disclose, the agency has a duty to gather information by conducting an initial inquiry, where the other party–here the parent "acting as a surrogate for the tribe" (Citation)–has no similar obligation. At any point, the agency could still gather the required information and make it known. Until the agency does so,

> however, we cannot know what information an initial inquiry, properly conducted, might reveal.

(*In re Benjamin M., supra*, 70 Cal.App.5th at pp. 742-743.)

More importantly, *Benjamin M.* rejected the "likelihood of success" test set forth in *Watson*, explaining the harmless error standard focused on the result, not the failure of the inquiry. (*In re Benjamin M.*, *supra,* 70 Cal.App.5th at p. 744.) *Benjamin M.* explained the right at issue is the Indian tribe's right to a determination of a child's Indian status. (*Id.* at p. 743.)

Similarly, *K.H.* also rejected the "likelihood of success" test set forth in *Watson.* (*In re K.H., supra,* 84 Cal.App.5th at 590.) Instead, it found the error prejudicial because neither the agency or the court gathered information sufficient to ensure a reliable finding that ICWA does not apply. (*Id.* at p. 591.) Where the agency's inquiry is insufficient, "the relevant injury under the ICWA is not tied to whether the appealing parent can demonstrate to the juvenile court or a reviewing court a likelihood of success on the merits of whether a child is an Indian child." (*Id.* at p.591.) Continuing, *K.H.* explained:

> The relevant rights 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., supra,* 84 Cal.App.5th at p. 591.)

A formulation of this test would require reversal in every case in which either (1) known, available relatives were not asked

about possible Indian ancestry or (2) the parents were not asked if there were any such relatives who could be asked. Reversal would not be required in rare instances in which the record affirmatively demonstrates no possible American Indian heritage, such as where both parents recent immigrants from Europe or some other country which no possible American Indian connection. However, if the agency or juvenile court does not "rule out" possible Indian heritage by making these inquiries, the appellate record is inadequate to demonstrate ICWA compliance, compelling reversal.

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. A lesser standard is inappropriate because the inquiry is the prerequisite to ensuring notice to an Indian tribe guaranteed by the Due Process Clause of the Fourteenth Amendment.

Respectfully submitted

Dated: December 14, 2022

/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 10,674 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: December 14, 2022 /s/ Karen J. Dodd

Karen J. Dodd, Attorney for Appellant

PROOF OF SERVICE

I am, and was at the time of the service of this declaration, over the age of 18 years and am not a party to this cause. My electronic service address is kdodd@appellate-law.com and my business address is 17621 Irvine Blvd., Ste. 200, Tustin, CA 92780. On December 14, 2022, I served the persons and/or entities listed below by the method checked. For those marked "Served Electronically," I transmitted a PDF version of the **Appellant's Opening Brief on the Merits** by TrueFiling Electronic service or by e-mail to the e-mail service address(es) provided below. For those marked "Served by Mail," I enclosed a copy of the document identified above in an envelope or envelopes, addressed as provided below, and placed the envelope(s) for collection and mailing on the date and at the place show below, following the my office's ordinary business practices. I am readily familiar with this business practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in sealed envelope(s) with postage fully prepaid.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 14th day of December, 2022, at Tustin, California.

/s/ Karen J. Dodd
Karen J. Dodd

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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

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

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Date

/s/John Dodd

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Dodd, Karen (146661)

Last Name, First Name (PNum)

John L. Dodd & Associates

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