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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

# Petitioner's Reply 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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Petitioner J.T. (Father) replies to Respondent's Answer Brief on the Merits (RB) of Placer County Department of Health and Human Services (Department). This brief addresses only those items needing reply as all other facts and arguments have been fully discussed in Petitioner Father's Opening Brief on the Merits, filed March 15, 2023 (FOB).

## Introduction

If the appellate court takes additional evidence to remedy the failure of the child welfare agency and trial court to comply with the inquiry, investigation and notice requirements of the Indian Child Welfare Act (ICWA)[1] and related California law (Welf. & Inst. Code § 224.2 et seq.), it must follow procedures that comport with due process.

The thrust of the Department's answer brief on the merits is that an evidentiary hearing would be a "futile act." However, its authority does not support that premise. Any postjudgment proceedings to remedy ICWA compliance must afford parents due process.

## Discussion

### I.

### Compliance with due process requirements to remedy ICWA errors does not constitute a "futile act."

#### A. Overview

The Department relies on *Ohio v. Roberts* (1980) 448 U.S. 45 (RB 9), which considered the relationship between the Sixth Amendment's Confrontation Clause and the hearsay rule with its many exceptions. (*Id.* at p. 62.) The case considered the

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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.

constitutional propriety of the introduction in evidence of a witness not produced at the defendant's subsequent state criminal trial. (*Id.* at p. 58.) The evidence of record in *Ohio v. Roberts* demonstrated the prosecutor issued a subpoena to the witness at her parents' home on five separate occasions over a period of several months. In addition, the parents had not been able to locate her for over a year. (*Id.* at p. 75.) The Court concluded that the prosecution had carried its burden of demonstrating that the witness who had testified at the preliminary hearing was constitutionally unavailable for purposes of the trial. Within this context, the Court stated, "The law does not require the doing of a futile act." (*Id.* at p. 74.)

The United States Supreme Court disapproved of the Roberts test in *Crawford v. Washington* (2004) 541 U.S. 36, 62 stating, where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation. Associate Justice Antonin Scalia, writing for the majority, concluded the Confrontation Clause was directed at keeping "ex parte" examinations out of the evidentiary record.

Although this is not a criminal case, due process still applies. Reversal and remand for an evidentiary hearing is not "an exercise in futility." (RB 5.) Rather, it is the correct procedure for reliable fact finding and due process.

Any procedures in the appellate court must provide reliable fact finding and due process. Without those safeguards, conditional reversal and remand for ICWA inquiry is required.

A hearing on remand with reliable fact finding and due process is not a "futile act." A conditional reversal and remand will create a result which complies with the basic protections of due process. An ex parte hearing, which occurred here, did not provide due process protection to all parties. As this Court

stated, the procedure for terminating parental rights specified in Welfare and Institutions Code section 366.26 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 . . . are carefully calculated to constrain judicial discretion, diminish the risk of erroneous findings . . ., and otherwise protect the legitimate interests of the parents."
>
> (*In re Cynthia D.* (1993) 5 Cal.4th 242, 256.)

B. Code of Civil Procedure section 909

The Department cites Code of Civil Procedure section 909 but overlooks the procedural requirements for a section 909[2] hearing. (RB 13.)

California Rules of Court, rule 8.252(b) requires a motion for the reviewing court to take evidence and make proposed findings. If the appellate court grants the motion, it must specify the issues on which evidence will be taken; the judicial officer who will take the evidence; and give notice of the time and place for taking the evidence. (Rule 8.252(c).)

Here the proceedings occurred ex parte without the right of confrontation and cross-examination, essential and fundamental requirements for a fair trial which is this country's constitutional goal, as stated in *Ohio v. Roberts, supra.*

Moreover, the declarations from the Department, accepted by the Court of Appeal, did not constitute "conclusive evidence" as the Department claims. (RB 10.) Father did not have an opportunity to be heard and contest the Department's hearsay

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

declarations.

The unsworn statement of the Department stated Father said he "might have Cherokee ancestry out of Oklahoma" and the social worker should contact his mother, who would have further information. (Aug CT 2.) Paternal grandmother stated Father's information was not accurate and all of their family came from Mexico. She completed a blood DNA ancestry test which stated they had Native Heritage and she "assume[d]" the Native Heritage is from Mexico. (Aug CT 2.)

This further inquiry did not "conclusively establish" that the child did not have any Native American heritage. (RB 10.)

C. Tribes as real parties in interest

Moreover, the tribes are the real parties in interest under ICWA. The 2018 California amendment imposed a duty the federal Act does not. The 2018 amendment was tribal in origin and purpose. (*In re S.S.* (2023) 90 Cal.App.5th 694, 699.)

Respondent argues reversal and remand to the trial court for a hearing would be an "exercise in futility," with wasted resources, delayed permanency for the children, specifically contrary to the goals and purposes of ICWA. (RB 14-15.)

However, recent appellate opinions have addressed the time involved in a conditional reversal and remand for proper ICWA inquiry.

> "This work should be slight and swift. The slightness of the effort, however, does not imply the effort is unimportant. To the contrary the effort is *vital* to tribes striving to locate children to sustain tribal cultures. We reverse and remand for the Department to conduct this vital work that would take so little effort."
>
> (*S.S., supra,* 90 Cal.App.5th at p. 698, original italics.)

The Second Appellate District reasoned as follows:

> "1. Legislative history shows tribes are the real parties in interest, and tribes have explained why asking only parents is not enough.
>
> 2. The 2018 amendment's requirement of communicating with extended family members is not some costly new mandate; rather, it usually piggybacks economically on the Department's preexisting duty and current practice of investigating extended family members.
>
> 3. The added effort here would have been slight which accords with legislative intent; the 2018 amendment should not cause a workload increase for county caseworkers.
>
> 4. Courts properly interpret the concept of prejudice under the 2018 amendment in light of its legislative purpose of redressing a long and troubling history we should not forget.
>
> 5. Tribes suffer prejudice when the Department had contact information for extended paternal family members but did nothing with it, thus denying tribes the benefit of the 2018 statutory promise."

(*S.S., supra,* 90 Cal.App.5th at p. 699.)

Thus, the error is not harmless. Respondent speculates that reversal and remand would not produce a different result. (RB 17.) However, without reliable fact-finding and due process, that projected result does not go beyond mere speculation.

The evidence was not "conclusive." (RB 17.) As Respondent argues, both parents in this case provided information that gave rise to a reason to believe the child may have Native American ancestry. However, the Department then determined that neither parent met the threshold requirements for membership, which is a question for the tribe, not the Department.

Respondent Department claims Father still has an

available remedy. (RB 18.) However, Welfare and Institutions Code section 366.26, subdivision (i)(1) provides,

> "Any order of the court permanently terminating parental rights under this section shall be conclusive and binding upon the child, upon the parent or parents. . . . After making the order, the juvenile court shall have no power to set aside, change, or modify it, . . . but nothing in this section shall be construed to limit the right to appeal the order."

Father has proceeded with the remedy provided by statute, an appeal of the Welfare and Institutions Code section 366.26 order.

Department relies on *In re G.A.* (2022) 81 Cal.App.5th 355[3] as "similar to this case." (RB 19.) There the juvenile court failed to inquire of extended family members and made no ICWA orders or findings. The Court of Appeal concluded the error was harmless but remanded for entry of ICWA findings. (*Id.* at p. 360.) *G.A.* did not involve postjudgment proceedings to remedy ICWA error. In *G.A.* the mother never claimed Indian ancestry. She admitted the father's birth in Mexico made it "unlikely" he could trace his ancestry to a federally recognized tribe. (*Id.* at p. 365.)

By contrast, here Father claimed Cherokee heritage from Oklahoma and the court rejected his claim in ex parte postjudgment proceedings.

D. *In re Zeth S.* and *In re Josiah Z.*

The Department argues Father incorrectly cites *In re Zeth S.* (2003) 31 Cal.4th 396 as standing for the position that "post-

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[3] Petition for review granted Oct. 12, 2022, S287506, further actions deferred pending consideration and disposition of a related issues in *In re Dezi C.,* S275578.

judgment evidence is impermissible in a dependency case and cannot be considered." (RB 11.) That does not correctly state Father's position: "[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; FOB 19.) The appellate court authority to make findings on appeal by section 909 should be exercised sparingly. Absent exceptional circumstances, no such findings should be made. (*Ibid.*)

Claims of error under ICWA are not rare and do not present exceptional circumstances warranting deviation from settled rules on appeal. (*In re E.C.* (2022) 85 Cal.App.5th 123, 149, quoting *Zeth S., supra*, 31 Cal.4th at pp. 405-406; FOB 19.)

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

*In re Josiah Z.* (2005) 36 Cal.4th 664 distinguished *Zeth S.* stating the appellate rules authorize a motion to dismiss, and appellate courts routinely consider limited postjudgment evidence in the context of such motions. A motion to abandon and dismiss an appeal differs from the broader issues resolved by the trial court. The beneficial consequence of a motion to dismiss, where granted, expedites the proceedings. (*Josiah Z., supra*, 36 Cal.4th at p. 676.)

As summarized in Father's opening brief, in an appeal where ICWA error has occurred, the decisions of this Court do not support taking postjudgment evidence to remedy ICWA error. (FOB 19-27.)

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

and procedural requirements. (*Cynthia D., supra,* 5 Cal.4th at p. 256.) The Court of Appeal did not meet those requirements when it took postjudgment evidence to remedy the "abject failure" of the juvenile court. (*In re Kenneth D.* (2022) 82 Cal.App.5th 1027, 1034.)

A hearing that satisfies due process is not a "futile act" to remedy a trial court's "abject failure" to comply with ICWA. These facts require reversal and remand.

## Conclusion

The proper procedure for the juvenile court to follow under ICWA and California statutes is set forth in Father's opening brief on the merits. (FOB 44.) Father respectfully requests that this Court reverse the judgment of the Court of Appeal and remand for further proceedings.

Dated: June 15, 2023.

Respectfully submitted,

__________________________

Janette Freeman Cochran
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