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 REPLY 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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INTRODUCTION

Because it is not evident whether a child is or may be an Indian child, there are federal and California legislative mandates the child welfare agency conduct an inquiry into a child's potential Indian ancestry in every dependency case, thereby protecting tribal rights. The thrust of DCFS' answer brief on the merits and its reliance on *In re Dezi C.* (2022) 79 Cal.App.5th 769, is to rewrite or ignore the relevant statutes and shift the agency's and the juvenile court's broadened burden of inquiry to the appealing parent to prove there is a "reason to believe" the child has Indian ancestry. That is not the law.

DCFS omitted any discussion of the *remedial* purpose of the Indian Child Welfare Act ("ICWA") and related California law, which is intended to protect third party rights, i.e., the tribes' independent rights. Also, neither DCFS nor the cases upon which it relies explain how the tribes' rights are protected in the juvenile proceedings when the agency doesn't bother to make inquiries about the child's potential Indian ancestry. DCFS does not discuss how the tribes' rights are protected by imposing the harmless error standard of prejudice. DCFS' position ignores those cases in which an inquiry would have resulted in a tribal connection. Instead, the *Dezi C.* standard allows the child welfare agencies to ignore the rights of the tribes. If this Court adopts the *Dezi C.* standard, agencies will be permitted to ignore federal legislation and the California inquiry statute and not even ask the parents about potential Indian ancestry. (See *In re A.R.* (2022) 77 Cal.App.5th 197, 202.)

It is DCFS who is "gaming the system" and "delaying permanence" (Answer Brief on the Merits "ABM" 12, 38-41) by betting the parent, whose parental rights are being terminated, will not file an appeal in the first place. It is also betting that, if the parent does appeal, the Court of Appeal will apply the harmless error standard and affirm the order terminating parental rights.

As explained in *In re J.C.* (2022) 77 Cal.App.5th 70, DCFS is also gaming the system because its inadequate inquiry

> virtually guarantees that the (incomplete) information it obtains will support a finding ICWA does not apply and that the juvenile court's error in failing to require the Department to comply with the law is harmless. Under the Department's theory, the less it complies with the duties to inquire under state and federal law, the more harmless is its erroneous failure to inquire.¶ That is not how it works.

(*Id.* at p. 80.)

Had the agency complied with its broad inquiry duty during the juvenile court proceedings, there would be no basis upon which to claim an ICWA inquiry issue on appeal.

DCFS mainly argues Welfare and Institutions Code section 224.2, the inquiry statute, is an ill-conceived law.[1] (ABM 11-12, 25-29.) Those arguments should be directed to the policymakers in the California legislature.

When a child welfare agency fails to make the statutorily-required inquiry concerning the child's potential Indian ancestry,

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

that error should be reversible per se. Applying a lesser standard ignores the remedial purpose of ICWA and the revised California statutes and does not protect the tribes' rights.

DISCUSSION

I. DCFS Is Precluded From Arguing a Parent Should Be Foreclosed From Raising ICWA Inquiry Issues For the First Time on Appeal Because It Did Not Seek Review of That Issue.

Throughout the answer brief DCFS complains the parents should not be allowed to raise failure to comply with ICWA for the first time on appeal, and allowing a parent to raise ICWA inquiry issues for the first time on appeal delays the child's permanency. (ABM 12-13, 28, 30, 37-38, 40-41, 44-45, 47-50, 55-56.) The issue in this case before this Supreme Court is what constitutes "reversible" error when the child welfare agency fails to make the statutorily required inquiry concerning the child's potential Indian ancestry. This Court previously decided a parent may raise failure to comply with ICWA on appeal (*In re Isaiah W.* (2016) 1 Cal.5th 1, 9, 25.)

DCFS is precluded from arguing this because it did not seek review of this issue. In its answering brief to appellant's petition for review, DCFS did not request this Court consider additional issues not raised in the petition for review. (Cal. Rules of Court, rule 8.500(a)(2).) This Court should decline to address DCFS's complaints concerning a parent's right to raise ICWA compliance issues for the first time on appeal. (*National Biweekly Admin., Inc. v. Superior Court* (2020) 9 Cal.5th 279, 334; Cal. Rules of Court, rule 8.516(b)(1).)

II. The Thrust of DCFS's Brief Is That This Court Should Rewrite the Statute, Shifting the Burden to the Parent to Make the Initial Inquiry as to Whether the Child Has Any Potential Indian Ancestry.

DCFS complains the broad duties set forth in section 224.2 are ill-conceived, mainly arguing section 224.2's broad duty of initial inquiry is causing the agency problems in the juvenile court and causing problems for the Courts of Appeal. (ABM 11-12, 25-29, 55-58, 64, 72-73, 77-78.) Ultimately, DCFS wants this Court to rewrite the statute, shifting the county welfare agency's broad burden to the appealing parent. This argument must be directed to the California legislature.

DCFS cites several cases, primarily dissents, claiming the broadened inquiry statute is ill-conceived. (ABM 25-28.) Generally, those cases complain the revised broadened statute "has generated confusion and divergent views in the appellate courts" or "practically, if not theoretically impossible to satisfy" (*In re A.C.* (2022) 86 Cal.App.5th 130, 142 (dis. opn.of Baker, J.); created "havoc, expense, and uncertainty" (*In re A.C.* (2022) 75 Cal.App.5th 1009, 1019-1020 (dis. opn. of Crandall, J); is "impossible to satisfy" and "anything but straightforward," "has no end point," is "a real problem," (*In re H.V.* (2022) 75 Cal.App.5th 433, 441 (dis. opn of Baker, J.); is "absurd at best and impossible at worst." (*In re Ezequiel G.* (2022) 81 Cal.App.5th 984, 1006.) (ABM 25-28.) These cases all take issue with the merits of the statute, an issue relegated to the Legislature. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 572; *Kesler v. Department of Motor Vehicles* (1969) 1

Cal.3d 74, 77.)

A reviewing court is tasked to determine the Legislature's intent and give effect to the law's purpose. (*In re Greg F.* (2012) 55 Cal.4th 393, 406.) When a law is unambiguous, the reviewing court must conclude the Legislature meant what it said, even if the outcome strikes the Court as unwise or disagreeable. (*In re D.B.* (2014) 58 Cal. 4th 941, 944.) This law is not even ambiguous.

Moreover, there would not be a "flood of appeals" (ABM 28), raising ICWA inquiry issues if the agency had completed an adequate inquiry of the extended family members and others during the dependency case. DCFS had plenty of time to complete an initial inquiry of extended family member is this particular case. As it pointed out, this dependency case has been ongoing since 2019; the section 366.26 hearing was not until 2022. (ABM 10.).

From a practical point of view, the lack of inquiry issue could have easily been put to rest in the juvenile court. When the social worker detains a child, he or she must inquire if there is a responsible relative who can provide care for the child. (Welf. & Inst. Code, §§ 319, subd. (f)(3) and 361.4, subd. (b)(6).) Asking a few more questions, such as: Do you know if the child has any Native American ancestry?, and, if not, Do you know anyone who might know if the child has any Native America ancestry? during the placement investigation is not an onerous, open-ended, or impossible task to complete.

DCFS' complaints about broad duties set forth in section

224.2 must be directed to the California legislature.

III. ICWA: Background

A. Congress and the California Legislature Enacted the ICWA and Related California Law 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.

Respondent ignores the *remedial* purpose of ICWA and related California law. Congress enacted the ICWA, and the California Legislature enacted these statutes, to cure abusive child welfare practices that caused large numbers of Indian children to be separated from their families and tribes. (*Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 32 [190 S.Ct. 1597, 104 L.Ed. 2d 29]; *In re Isaiah W., supra,* 1 Cal.5th pp. 7-8.) The federal and state law is intended to ensure the rights of Indian children and Indian tribes, which are separate and independent from the parent's rights. (U.S.C., §§1901, 1902; Welf. & Inst. Code, § 224.) DCFS ignores the remedial purpose underlying the ICWA and related California law as set forth in mother's brief on the merits ("BOM".) (BOM 20-31.)

The Legislature assigned the duty of inquiry to the child welfare agency. When ICWA inquiry problems continued to persist, it broadened that duty to include inquiry of a larger group of people (the child, parents, extended family members and other, such as non-related family members) who may know whether the child has potential Indian ancestry. (*In re M.M.* (2022) 81

Cal.App.5th 61, 74 (dis. Opn., Wiley J.).)

The broadened duty of inquiry protects the Indian *tribes*' interest. (*In re T.G.* (2020) 58 Cal.App.5th 275, 288, 314.) This was the first step toward making amends for a wrongs done by predecessor child welfare agencies to Indian children, Indian families and Indian tribes. (*In re Antonio R.* (2022) 76 Cal.App.5th 421, 435-436; *In re M.M.*, *supra,* 81 Cal.App.5th at pp.73; *In re Ezequiel G.*, *supra*, 81 Cal.App.5th at p. 1016, dis.opn. Lavin, J.) However, child welfare agencies continue to resist the ICWA mandates. In *In re A.R., supra*, 7 Cal.App.5th 197, the agency ignored ICWA altogether and did not even bother asking mother about any potential Indian ancestry. (*Id.* at p. 201.) As that Court pointed out, the agency's position reflected a belief that the inquiry into Indian ancestry was not important. (*Ibid.*)

"'A remedial statute is one which provides a means for the enforcement of a right or the redress of a wrong.'" (*Leader v. Cords* (2010) 182 Cal.App.4th 1588, 1598, quoting *Tintocalis v. Tintocalis* (1993) 20 Cal.App.4th 1590, 1592 ["A remedial statute "'must be liberally construed 'to effectuate its object and purpose, and to suppress the mischief at which it is directed.'"'"]. Here, the mischief is the child welfare agency's failure for *years* to comply with the inquiry statutes, and thereby not protecting the tribes' right to notice and due process. DCFS' brief avoids this pivotal point.

In re K.H. explained a remedial statute is "to be construed broadly to accomplish their purpose." (*In re K.H.* (2022) 84 Cal.App.5th 566, 602; citing *Pulliam v. HNL Automotive Inc.*

(2022) 13 Cal.5th 127, 137.) Continuing, *K.H.* noted the agency's duty of inquiry, as framed by the express terms of section 224.2, subdivision (b), is quite broad. (*Ibid.*) However, that Court held, "[W]e agree that an agency's broad duty of inquiry under section 224.2, subdivision (b), could arguably lend itself to an absurd interpretation, but we do not anticipate this particular aspect presenting an insurmountable hurdle . . . . [S]tatutes are interpreted to '"avoid a construction that would produce absurd consequences, which we presume the Legislature did not intend."' (*In re K.H., supra,* 84 Cal.App.5th at p. 603 citing, *In re Greg F., supra*, 55 Cal.4th at p. 406.) It further explained the statute does not require an "exhaustive inquiry to ensure "no stone is left unturned" as stated in *Dezi C.* (*Ibid.*) *Dezi C.* does not construe the statute broadly enough to accomplish the Legislature's goals of protecting the tribes' interest, the primary interest to be protected by the Legislation. The legislation protects the tribes' rights by requiring the agency to inquire in every case, whether there is any potential Native American ancestry. (*In re E.V.* (2022) 80 Cal.App.5th 619, 697-698.)

The statutes were revised and broadened 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.*, *supra*, 58 Cal.App.5th at p. 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.) This Court should take the remedial purpose of the statute into consideration in resolving this case. Neither DCFS, nor the cases upon which it relies, address the remedial purpose of the statute.

B. ICWA Is Intended to Ensure the Rights of Indian Children and Indian Tribes Are Protected in Dependency Proceedings.

DCFS fails to explain how the *tribes' rights* are protected when the agency fails to comply with the statutorily required inquiry concerning a child's potential ancestry, as set for in mother's brief. (OBM 40-41, 44-45.) Instead, DCFS urges this Court to rewrite the statute so that the less-stringent harmless error test applies to these deficient inquiry appeals, shifting the burden of proof on appeal to the parent, first to show the record of the juvenile court suggest there is a "reason to believe" the child may be an Indian child, and then allowing the parent to make a proffer on appeal as set forth in *Dezi C.* (ABM 31-45.) However, section 224.2 tasks the *agency* with the inquiry into a child's Native American ancestry, thereby protecting the tribes' rights.

DCFS ignores the underlying policy that ICWA protects:

> the broad interest of Native American tribes in maintaining cultural connections with children of Native American ancestry. Those tribes have no standing to intervene in a dependency case unless Native American ancestry is first uncovered and established, and thus no way of protecting their tribal interests unless child welfare agencies comply with ICWA and then notify the appropriate tribe when the inquiry reveals Native American ancestry.

(*In re A.R.*, *supra,* 77 Cal. App. 5th at pp. 201-202.)

Continuing, *A.R.* explained:

> That is why the law requires that an ICWA inquiry be conducted in every case. The tribes have a compelling, legally protected interest in the inquiry itself. It is only by ensuring that the issue of Native American ancestry is addressed in every case that we can ensure the collective interests of the Native American tribes will be protected. Thus, the failure to conduct the inquiry in each case constitutes a miscarriage of justice.

(*Id.* at p. 202.)

This Court should take the tribes' interest and the protection of tribal rights when it considers what constitutes "reversible" error when the child welfare agency fails to make the statutorily required inquiry concerning the child's potential Indian ancestry.

IV. The Seven Standards For Determining Prejudice.

Although there are at least seven standards for determining prejudice, DCFS only discusses the harmless error standard set forth in *Dezi C.*, the rule set forth in *Ezequiel G., supra,* 81 Cal.App.5th 984 to the extent that rule supports the *Dezi C.* standard, and the dissent in *In re J.K.* (2022) 83 Cal.App.5th 498. (ABM 26, 28.)

A. *Dezi C.*'s "Reason to Believe" Standard Is Not the Appropriate Standard In Situations Where the Agency Has Failed to Make the Statutorily Required Initial Inquiry.

DCFS fails to address mother's contention the *Dezi C.* 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.) (OBM 36-37.) As explained in *In re I.F.* (2022) 77

Cal.App.5th152, 163, a "reason to believe" exists when there is information from anyone interviewed during the initial inquiry provides information that might "imply," "hint," "intimate" and "insinuate" that a child is an Indian child. *Dezi C.*'s "reason to believe" rule requires a parent to point to such information *in the record*, but there will *be* not be anything in the record because the agency has not completed it required inquiry.

B. Dezi C's Standard Does Not Protect the Rights of the Tribe. It Relieves the Agency of Its Initial Duty of Inquiry.

1. The Reasoning in the Dissent in *J.K.* Is Flawed.

DCFS relies on the dissent in *In re J.K.*, *supra,* 83 Cal.App.5th 498, as support of its assertion the harmless error standard set forth in *Dezi C.* should be adopted by this Court. (ABM 35-40.) In his dissent, Justice Yegan does not discuss the remedial purpose of the inquiry requirements nor does he discuss the purpose of the ICWA and related California law is to protect the tribes' rights. Instead, the dissent focuses on the "administration of justice" problem, i.e., the Constitutional requirement of reversal only when the error is prejudicial and a different result will be obtained upon reversal. (*In re J.K.*, *supra,* 83 Cal.App.5th at p. 512, dis. opn., Yegan, J.) Continuing, the dissent notes there is no California Supreme Court case which has held that ICWA error is "structural error." (*Id.* at p. 513, dis. opn., Yegan, J.) The dissent also notes the caption in a dependency case does not mention an Indian tribe, and the tribe is not a party nor a "real party in interest." (*Ibid,* dis. opn., Yegan

J..) The dissent also notes the dispute in dependency cases is between the child's parents and the State of California and the court's job is to secure the safety and well-being of the child. (*Id.* at p. 514, dis. opn., Yegan, J.)

In the instant case, this Court will decide what constitutes reversible error when the child welfare agency fails to make the statutorily required inquiry concerning the child's potential Indian ancestry. This may be the case Justice Yegan notes did not exist previously. As for whether the Legislature has not declare ICWA error is always prejudicial, matters of the standard of prejudice are for the judicial branch to determine, not the Legislature. Whether or not a tribe is a "real party in interest" is a question for the judicial branch. As for the point about the child having to wait because of the delay caused by remand, the agency caused the delay, not the reviewing court. Also, as for the dissent's concern the results will not necessarily result in the child being placed with Indian family, no one will know the outcome before an inquiry is completed. Moreover, placement is not the only result. The tribe may intervene (25 U.S.C.§ 1911(c); Cal.Rules of Court, rule 5.482(d)) and decide not to seek to alter placement. (Cal. Rules of Court, rule 5.534(i)(2).) Additionally, different procedural options and burdens of proof apply when an Indian child is involved. (Welf. & Inst. Code § 366.26, subd. (c)(2)(B).) Placement is not the only goal.

For these several reasons, the dissent in *J.K.* is flawed and should not inform this Court's conclusion.

2. The Holdings In *In re Ezequiel G. Is Flawed.*

DCFS cites *In re Ezequiel G., supra,* 81 Cal.App. 5th 894, to the extent that case supports the *Dezi C.* rule. (ABM 18, 22-23, 25-26, 39, 48, 50-52, 54, 59, 72.) *Ezequiel G.* is flawed and does not support the application of the *Dezi C.* rule.

As the Justice Lavin points out in his dissent, the majority analysis of the statute was misguided and declined to follow the language of the statute. (*In re Ezequiel G., supra,* 81 Cal.App. 5th at p. 1020, dis. opn., Lavin J.) The statute does not require the agency to "track down" all the family members defined in 25 U.S.C. §1903(2).) Additionally, the dissent explained, the majority incorrectly held the "purpose of the initial inquiry was to enable the court or child protective agencies to determine at the outset of a dependency proceeding whether the child has a trial affiliation (Maj. opn., at pp. 1009-1010.)" (*Id.* at p. 1020, dis. opn., Lavin, J.) That determination is made by the tribe after the agency and court have complied with their inquiry and notice duties. (*Id.,* dis. opn., Lavin, J.) "[T]he initial inquiry is intended only to yield information about the child's possible Indian ancestry that may trigger the duties to conduct a further inquiry or to provide formal notice to tribes. (*Id.* at pp. 1020-1021, dis. opn., Lavin J.)

Because the basis for the opinion in *Ezequiel G.* is based on a flawed premise, it does not support DCFS's assertion the *Dezi C.* rule should be applied in this case.

3. DCFS' Reliance on Dezi C.'s Reasoning Is Flawed and Should Be Rejected By This Court.

DCFS urges this Court to adopt the standard set forth in *Dezi C.*, dismissing the other reversible error standards. (ABM 11-12, 31-56.) Relying on *Dezi C.,* DCFS advocates for a "reason to believe" standard, for the same reasons the *Dezi C.* court rejected the "automatic reversal rule." (ABM 32-36.) DCFS repeats the *Dezi C.* claim that the automatic reversal rule cases are based on three faulty rationales. (ABM 45.) First, DCFS claims those cases are concerned about a potential collateral attack on an order terminating parental right at some time in the future. (ABM 45.) Second, DCFS claims the "automatic reversal rule" is faulty because it is based on the premise "reversal is the only means of ensuring an agency's violation of its statutory ICWA duties will not be rewarded." (ABM 45-46.) Third, DCFS asserts, those automatic reversal cases would require the courts to conclude the parent's denial of Indian ancestry can *never* be trusted. (ABM 47.) DCFS is wrong.

The "automatic reversal rule" is not based on faulty rationales. (ABM 45-54.) First, when the agency's initial inquiry is deficient, the sooner it is required to complete a reasonable inquiry into potential Indian ancestry, the less the risk of a collateral attack. Secondly, the agencies have continued to violate or ignore the inquiry statute. The rule set forth in *Dezi C.* provides no incentive for the agency to comply with inquiry requirements. Respondent puts forth no explanation as to what

the penalty would be to agency when it fails to make the required statutorily inquiry, only arguing the *Dezi C.* states the agency's will not be rewarded. (ABM 46.)

Third, concerning the parents' denial of Indian ancestry, again, the opposite is the case: the question is whether the parent's denial of Indian ancestry must *always* be accurate. "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." (*In re M.M., supra*, 81 Cal.App.5th at p. 74, dis. opn., Wiley J.) Additionally, "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." (See, *In re Ezequiel G., supra,* 81 Cal.App.5th at p. 1021, dis. opn., Lavin, J.)

Moreover, *Dezi C.* does not use the word "never." The opinion declined to adopt a rule that obligates the court to view with "a jaundiced eye" whatever the parents report about their heritage. (*In re Dezi C., supra*, at p. 784.) DCFS claims *Dezi C.* reconciles the competing policy of the rights of the tribe and the rights of dependent children to avoid unnecessary delays in their placement by limiting remand unless the appellate record provides a reason to believe the child is an Indian child. (ABM 37-38.) Again, *Dezi C.* impermissibly rewrites the statute, shifting the burden to the parents, and allows the agency to avoid

the duty of inquiry all together.

DCFS' argues the *Dezi C.* rule will prevent the "thirteenth-hour delay tactic." (ABM 39.) It is DCFS that causes any delay by not fulfilling its duty of inquiry in the juvenile court. It is DCFS who is "gaming the system" (ABM 39-41.) by betting the parent will not file an appeal. It is also betting that, if the parent does appeal, the Court of Appeal will apply the harmless error standard of prejudice and affirms the order terminating parental rights. Had the agency completed the inquiry during the juvenile court proceedings, there would not be an appeal.

DCFS asserts *Dezi C.* will resolve the issue of a parent's failure to object to the ICWA findings in the juvenile. (ABM 41.) However, when a parent files a notice of appeal after the termination of parental rights hearing, and the only issue raised in initial inquiry failure, the parent is protecting the *tribes*' rights. It is the agency's fault the issue was not identified earlier because the agency has the duty of inquiry, not the parent. Moreover, it is the agency's and the juvenile court's duty to establish ICWA compliance. (*In re Antonio R., supra*, 76 Cal.App.5th at p. 429.)

DCFS cites *In re James F.* (2008) 42 Cal.4th 901, 918, arguing the courts should not employ the reversal per se standard as an incentive to promote compliance with statutory requirements. (ABM 46.) In *James F.* the issue was whether the juvenile court's error in the procedure used to appoint a guardian ad litem for the parent required automatic reversal of an order terminating parental rights, or was the error subject to harmless

error review. (*Id*. at p. 905.) This Court disagreed with the Court of Appeal's ruling the error was structural because it would give the juvenile court an added incentive to make every effort to follow the required procedure and decrease the frequency of errors. The issue here is requiring the agency to fulfill its duty under the inquiry statutes in order to protect the rights of the third party tribes. *James F.* does not involving third party rights so its inapplicable. Cases are not authority for propositions not discussed. (*Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 374; *City of Palo Alto v. Pub. Emp't Relations Bd.* (2016) 5 Cal. App. 5th 1271, 1292.)

DCFS claims *Dezi C.* resolves the problem of lack of information by switching the burden to the parent. (ABM 41-42.) However, there would not be a lack of information in the record had the agency made an adequate initial inquiry. And again, shifting the burden to the parent is contrary to the law. (Welf. & Inst. Code, § 224.2.)

DCFS also repeats *Dezi C.*'s claim that applying the automatic reversal standard will cause undesirable consequences such as unnecessary delay, successive appeals, and elevating the statutory provisions over the California Constitution. (ARB 47-55.) This misses the point. There would be no unnecessary delay if the agency had performed its duty of inquiry while the dependency case is in the juvenile court. DCFS adopts *Dezi C.*'s contention that the reversal per se rule may lead to the likelihood of successive appeal. There will not be any successive appeal if the agency completes it duty of inquiry on remand.

DCFS disagrees with mother's contention the agency's inquiry error is structural error. (ABM 64-67.) DCFS misinterprets *Weaver v. Massachusetts* (2017) 582 U.S. __ [137 S.Ct. 1899, 198 L.Ed.2nd 240], contending the "other interest" that opinion discussed was not a third parties' interest, but other interests of the defendant. (ABM 43-44, 66-67.) Respondent puts forth no explanation as why the rationale in *Weaver* must pertain to a party, not a third party. (ABM 66.) DCFS contends mother's argument inquiry error will result in fundamental unfairness because the tribe will be deprived of its rights under ICWA (OBM 45), is conclusory and does not justify finding that error is structural. (ABM 67.) Mother's argument is not conclusory; it is self-evident that the tribe will be deprived of its rights under ICWA if it never learns of the dependency case.

DCFS contends the *Dezi C.* test resolves the issue of an underdeveloped record. (AMB 31, 67-73.) Again, *Dezi C.* rewrites the statute switching burden to appellant's counsel to develop a record. Furthermore, *Dezi C.*'s requirement that a parent must object to the ICWA findings in the juvenile court is contrary to this Court's opinion in *In re Isaiah W., supra,* 1 Cal.5th at p. 9. As for DCFS' argument the facts in *A.R.* (2021) 11 Cal.5th 234 are distinct from ICWA inquiry appeals, DCFS is wrong for the reason set forth in mother's opening brief. (BOM 45.)

DCFS also relies on the dissent in *In re A.C.* (2022) 86 Cal.App.5th 130, which indicated the statute required a social worker to ask ICWA related questions of every family member they "can find" makes the statute arbitrary. (*Id.* at p. 141 (dis.

opn. of Baker, J.).) (ABM 53.) The statutory scheme already requires the agency to inquire the relatives about placement (Welf. & Inst. Code, §§ 319, 361.4, subd. (b)(6)) so the extended family members already should be known to the agency. The statute does not require the agency to "find" unknown relatives and others who have an interest in the child, merely to make reasonable inquiries. The operative concept is those people who are reasonably available to help the agency with its investigation into whether the child has any potential Indian ancestry should be asked. (*In re Benjamin M.* (2022) 70 Cal.App.5th 735, 744.)

As the majority in *In re J.K., supra*, 83 Cal.App.5th 498, explained:

> It has been suggested the duty of initial inquiry set forth in section 224.2 may be difficult to satisfy. But the wisdom or workability of the statute is none of our concern. (Citations.) In any event, in interpreting statutes "[t]he court will apply common sense to the language at hand and interpret the statute to make it workable and reasonable. (Citation.) County welfare department employees conducting the initial inquiry compelled by section 224.2 need not undergo overly voluminous record searches, attend family reunions, conduct stakeouts, or search Ancestry.com. Nor are they required to interview young children or other extended family members who would not be expected to have any information regarding the child's Indian status. They merely need to make reasonable and diligent efforts to conduct the required inquiry and report those efforts and the results thereof to the court.

Id. at p. 508, fn.7.)

For the reasons set forth above, the reasoning in *Dezi C.* is flawed.

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V. 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.

Citing *Dezi C.,* DCFS contends that an outcome-focused test is the only proper analysis in the failure to inquire cases. (ABM 32-36.) Mother adequately addressed this issue in her brief. (OBM 41-46.)

An adequate inquiry at the beginning of the case is the only meaningful way to safeguard the tribes' statutory rights under the ICWA and California law. An inadequate inquiry prejudices not the rights of the parent, but the tribe and the tribes' 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.

VI. 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.

DCFS contends mother's due process argument cannot be raised in this Supreme Court. (ARB 62-63.) Respondent is wrong. This issue is already before this Court; this is an additional *rationale*, not a new *issue*. Moreover, this rationale is included in appellant's opening brief on the merits; DCFS has ample opportunity to discus it. Additionally, reviewing courts may

consider legal theories, especially Constitutional ones, raised initially on appeal. (*People v. Partida* (2005) 37 Cal.4th 428, 435-436; *Sea & Sage Audubon Society, Inc. v. Planning Commission* (1983) 34 Cal.3d 412, 417; *Bank of New York Mellon v. Citibank N.A.* (2017) 8 Cal.App.5th 935, 942-943.)

VII. 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.

DCFS asserts *Dezi C.* does not "require" appellate counsel to conduct an investigation into the child potential Indian ancestry. (ABM 73.) Mother disagrees. If the agency does not inquire about potentially Indian ancestry, there will not be any evidence in the record to show there is a "reason to believe" the child potential has Indian ancestry. In order for counsel to competently represent an appellant, there would be a de facto requirement appellate counsel must conduct this investigation in order to supplement the record to demonstrate prejudice.

Respondent argues *In re Zeth S.* (2003) 31 Cal.4th 396 allows appellate courts to receive post-judgment evidence on appeal. (ABM 74-75.) What respondent ignores is that *Zeth S.* held that "in rare and compelling cases;" there may be an exception to allow evidence that was not before the juvenile court. (*In re Zeth S., supra,* 31 Cal.4th at p. 400.) There are hundreds of these ICWA appeals in which the issue is deficient inquiry. These cases are hardly rare.

VIII. Whether the Legislature Requires the Agency to Designate an Indian Tribe When It Files a Dependency Action Is Not Relevant to the Issues Presented Here.

DCFS finds fault with the agency's statutory duty of inquiry because the Legislature did not designate the Indian tribe as parties or "real parties in interest" to the dependency proceedings, citing the dissent *In re J.K., supra,* 83 Cal.App.5th at p. 513, (dis. opn. of Yegan, J.). (ARB 56.) What the Legislature did mandate was the tribes had a right to notice and to intervene after the agency's inquiry provide information the child had potential Indian ancestry. The agency protects the tribes' rights by inquiring into potential Indian ancestry of the child and then providing notice to the tribes, if the facts indicate potential ancestry. The rights of Indian tribes in American law are *sui generis,* i.e., an independent legal classification. (See *Yellen v. Confederate Tribes of Chehalis Reservation* (2021) __ U.S. __ [141 S.Ct. 2434, 210 L.Ed. 2d 517, 2021 U.S. LEXIS 3400.].)

Respondent cites several cases applying the automatic reversal rule that do not protect the rights of a non-party. (ABM 57-58.) Those cases are not ICWA cases. Additionally, all of those cases concern errors in the courtroom. (See *Gideon v. Wainwright* (1963) 372 U.S. 335 [83 S.Ct. 792, 9 L.Ed. 2d. 799] [defendant deprived of right to counsel]; *In re Jasmine G.* (2005) 127 Cal.App.4th 1109, 1116 [in a dependency case mother was not provided notice of hearing to terminate parental rights]; *In re Josiah S.* (2002) 102 Cal.App.4th 403, 417-418 [mother improperly denied a contested hearing].) In dependency cases the

tribes' rights are not dependent on what happens in the courtroom. These cases are distinguishable.

IX. Alternatively, This Court Should Adopt the Holding in the *Benjamin M.,* as Elaborated in *K.H.*

DCFS rejects the standards set forth *In re Benjamin M., supra,* 70 Cal.App.5th 735, and *In re K.H., supra,* 84 Cal.App.5th 566. (ABM 70, 75-77.) Both of those standards are based on the agency's inactions in the juvenile proceedings. DCFS relies on *Dezi C.* rejection of *Benjamin M.*'s "readily obtainable information" rule because that rule is not "outcome focus[ed]" and appears to be "so flexible and malleable." (ABM 75.) DCFS' argument are flawed.

A. The Benjamin M. Case Is Not Based on Faulty Reasoning.

DCFS rejects the *Benjamin M.* rule because it does not focus on whether the information is likely to affect the juvenile court's ICWA findings so it lacks the "outcome" focus. (ABM 76.) DCFS' analysis is flawed. If there has not been an inquiry, then the "outcome" of an inquiry is unknown.

The rule set forth in *Benjamin M.* does not switch the burden to the parent to claim the child has Indian ancestry. Instead, the rule is based the appellate record, and the burden remains with the agency. (*In re Benjamin M., supra,* 70 Cal.App.5th at p. 744.) *Benjamin M.* explained the agency is charged with obtaining information in order for the tribes' right to determine if the child is an Indian child is meaningful. (*Id.* at p. 745.) If the agency failed to obtain information about the

child's potential Indian ancestry, and that information was readily available and potentially meaningful; the case must be reversed and remanded to protect the tribes' right. (*Ibid.*)

B. *In re K.H.* Is Not Based on Faulty Reasoning.

Similarly, DCFS rejects the *K.H.* rule because that Court rejected the "likelihood of success" test set forth in *Watson*. (ABM 70, 77.)

K.H. explained that, given the remedial purpose underlying ICWA and related California law intended to protect tribal third party rights, initial inquiry error is prejudicial. (*In re K.H., supra,* 84 Cal.App.5th at p. 588.) *K.H.* focused on the agency's and court's failure to gather information sufficient to ensure a reliable finding that ICWA does not apply. (*Id.* at p. 591.) It did not switch the burden to the parent to prove the child potentially had Indian ancestry. *K.H.* adopted an "injury focused test." (*Id.* at p. 608.) It explained some of the other standards "shield[ed] state agencies and courts from the consequences of delinquency in complying with ICWA's basic mandates at the first step, at the expense of tribal rights and in perpetuation of the evils Congress and the Legislature identified and intended to remedy. (*In re K.H., supra,* 84 Cal.App.5th at p. 610.) Essentially, *K.H.* applied the substantial evidence rule to examine the ICWA finding made in the juvenile court. If there was no substantial evidence, reversal is required. (*In re K.H., supra,* 84 Cal.App.5th at 590.)

Both the standards set forth in *In re Benjamin M.* and *In re*

K.H. protects the tribes' rights and comply with the remedial purpose of ICWA.

CONCLUSION

For these reasons and those in the opening brief on the merits, 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: February 6, 2023

/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 6,926 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: February 6, 2023 /s/ Karen J. Dodd

Karen J. Dodd, Attorney for Appellant

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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 jdodd@appellate-law.com and my business address is 17621 Irvine Blvd., Ste. 200, Tustin, CA 92780. On February 6, 2023, 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 Reply 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 6th day of February, 2023, at Tustin, California.

/s/ Karen J. Dodd
Karen J. Dodd

STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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