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"DEPENDENCY LEGAL NEWS"

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NEW DEPENDENCY CASELAW

NOTICE—WIC 388

In re Mia M.—published 2/28/22; Second Dist., Div. Five
Docket No. B313574; 75 Cal.App.5th 792
Link to case: https://www.courts.ca.gov/opinions/documents/B313574.PDF

BECAUSE THE FAILURE TO NOTICE CARRIES SUCH GRAVE CONSEQUENCES IN THE DEPENDENCY CASE, REVERSAL IS MANDATED WHERE THE AGENCY FAILS TO MAKE REASONABLE EFFORTS TO NOTICE

The agency filed a petition against mother as to her four children, including Mia, for her failure to make an appropriate plan of care. The petition did not include allegations against any of the fathers. At the initial hearing, the court found A.M. to be Mia's alleged father and ordered a due diligence search for mother and the fathers. Maternal grandmother (MGM) and Mia reported that A.M. was Mia's real father in Oklahoma (OK), Mia had spent summers with him there, and MGM previously had contact with father through paternal grandmother Rosa (PGM)'s Facebook account which had since been deleted. The agency filed a declaration of due diligence summarizing its efforts to locate father, but never asked Mia or mother if they had contact

with PGM or with others like paternal relatives who might have father's contact information. Notably, the due diligence declaration showed a search of CA and federal databases but none in OK. Moreover, the agency reported its search for father was incomplete due to pending certified mail return receipts, but the court nonetheless found it complete. Around the six-month review hearing, the agency came in contact with father and PGM who reported they'd been in communication with mother all along, but she had never informed them of the dependency case. It was not until PGM pressed that mother admitted Mia was in foster care. Father reported he wanted Mia to be placed with PGM who had raised her from two months to two years of age and had her on months-long visits. PGM later filed a 388 petition for placement with attached copies of the child's important documents to prove the child had been in her care and DNA test results from several years back confirming father was biological. Subsequently, father filed an Ansley motion, seeking to vacate the jurisdiction and disposition orders based on lack of notice. The court denied the PGM's 388, finding it was in Mia's best interest to remain in a safe, stable placement with caregivers who wanted to adopt her and her siblings. As a central part of its rationale, the court relied on father's alleged status to deny placement with PGM. The court set father's 388 petition for hearing. Father then requested a DNA test, which the court granted. At the hearing, the court proceeded without receiving the DNA test results and denied his petition, finding it was not in Mia's best interest to be placed with father who had never shown any desire to reunify with her but sought only her placement with PGM. The court terminated parental rights and the parents appealed.

Reversed as to the denial of father's 388 petition. (1) Due Process: Alleged fathers have due process rights to notice and the opportunity to appear, to assert a position, and to attempt to elevate their paternity status. There is no violation where the agency uses reasonable diligence to notice a whereabouts unknown parent. Reasonable diligence denotes a thorough, systematic search done in good faith that includes following leads most likely to yield a parent's address. Here, the evidence was "woefully inadequate" that the agency used reasonable diligence to find father, given that the agency made no efforts to search OK-specific databases (or to search specific avenues most likely to identify father's whereabouts) but only searched California and federal databases and made scant inquiry with family who might have more leads. The social worker knew MGM had communicated with PGM through her former Facebook account but never asked if MGM had any more leads to locate father or PGM (such as common friends or more specific residence information or travel records from Mia's trips to PGM) nor inquired when their last contact was or when Mia had last visited OK – which, it turned out, had been a few months before her detention. Even though the search was incomplete, the court found notice proper and went forward with

jurisdiction/disposition. Even after acknowledging its incomplete search for father, the agency failed to make additional efforts to find him; rather, it made only cursory attempts through mother who had clearly been keeping father out of the case. (2) Improper Consideration of Best Interests: Where an agency's search efforts are unreasonably lacking and the failure to notice leads to a prejudicial delay in the parent's participation, the best interest prong of WIC 388 does not apply. A child's best interests cannot act as a failsafe and reliance on this prong rewards the agency's failures. (3) Prejudicial Error: Where the agency fails to provide the parent of statutorily required materials, including advisement of the nature of the proceeding, the parent has been denied adequate notice and the ability to assert his rights. Here, had father been properly noticed, the court would likely have viewed the recommendation for an ICPC and placement with PGM favorably. Thus, the error was prejudicial and not harmless, and the order terminating parental rights is vacated. However, at father's new jurisdiction and disposition hearing, the juvenile court should consider the facts and circumstances that have arisen since the filing of the appeal. (ML)

ICWA—WIC 224.2

In re A.C.—published 3/4/2022; Second Dist., Div. One
Docket No.: B312391; 75 Cal.App.5th 1009
Link to case: https://www.courts.ca.gov/opinions/documents/B312391.PDF

THE AGENCY'S INITIAL DUTY OF INQUIRY REQUIRES THE AGENCY TO CONSULT WITH ALL KNOWN EXTENDED FAMILY MEMBERS REGARDING POSSIBLE INDIAN HERITAGE EVEN IF THE PARENTS DENY SUCH HERITAGE

Mother was a former foster youth and denied Indian ancestry. However, the agency concluded, for unidentified reasons, that ICWA "may apply" to mother. Father also denied any Indian ancestry. The children were placed with maternal relatives, but the agency failed to interview them regarding potential Indian heritage. Based on the parents' ICWA-020 forms, where they denied any knowledge of Indian ancestry, the juvenile court found ICWA did not apply. Father timely filed appeal and alleged the agency failed to satisfy its statutory duty of initial inquiry as to the extended family members.

Reversed. California law requires at the outset of a dependency case that the agency and juvenile court inquire into whether a child is or may be an Indian child. The agency's initial duty of inquiry includes asking the child, parents, legal guardian, Indian custodians, extended family members, others who have an interest in the child, and the party reporting child abuse or neglect. Under ICWA, the term "extended family member" includes a child's

grandparent, aunt, uncle, brother, sister, brother-in-law, sister-in-law, niece, nephew, first cousin, second cousin, or stepparent. The agency failed to comply with this inquiry. When the children were placed with mother's extended family members, the agency did not ask mother's relatives about the child's potential Indian heritage. Mother was a former dependent and thus may not have known her cultural heritage. The agency also failed to inquire of possible Indian heritage with the paternal family even though such relatives were readily available to consult with. The dissent disagreed reversal was warranted as the error was harmless. There was no information that suggested the child was potentially an Indian child under ICWA. (MO)

Beneficial Parental Relationship Exception—WIC 366.26

In re D.P.—published 3/10/22; Third Dist.
Docket No.: C093132; 76 Cal.App.5th 153
Link to case: https://www.courts.ca.gov/opinions/documents/C093132.PDF

WHEN EVIDENTIARY SUPPORT FOR THE BENEFICIAL PARENTAL RELATIONSHIP EXCEPTION IS OFFERED, THE COURT MUST ANALYZE THE EXCEPTION BEYOND FINDING INADEQUATE EVIDENCE

Dy. and Ki. came under the court's jurisdiction due to domestic violence, severe physical abuse of the siblings, and the parents' drug abuse. The parents were denied reunification services. Prior to the section 366.26 hearing the parents filed petitions under section 388. The court summarily denied the parents' 388 petition finding that the request did not state new evidence or a change of circumstances and did not promote the best interest of the children. At the section 366.26 hearing the agency's report described the family as a classical dysfunctional family and as failing to show any long-term effects of the services because the parents were historically getting clean but always relapsing. The report noted the parents visited the children one time per week and that the children were bonded to their caregivers and were happy and prospering in their placement. Mother testified that the children ran to her during the visits and told her they love and miss her. She also testified that when visits ended Ki. didn't want to go and asked mom if she could go home with her. The agency argued that the children were bonded to the caregivers and saw them as the parental figure. Further, since the caregivers are relatives, the parents would continue to be in the children's lives. The agency also noted that parents had been bypassed due to a previous history and not showing they had made an effort to rectify the history. Minor's counsel argued parents had not met their burden and the children were bonded to the foster parents. The court found the parents had

not met their burden of establishing an exception applied and terminated parental rights. Mother and father appealed.

Affirmed in part, reversed in part and remanded. In the unpublished portion of the case, the Court affirmed the juvenile court's order summarily denying mother's section 388 petition to reinstate reunification services. In the published portion of the case, the Court held that the juvenile court's ruling that there was inadequate evidence to support the beneficial parental relationship exception was an abuse of discretion because the ruling did not comport with the requirements established in *In re Caden C.* In addition to uncontested evidence of regular visitation and contact, there was evidence to support that continuing the relationship would benefit the child and that termination of parental rights would be detrimental to the child. Nonetheless, the juvenile court performed no specific analysis on the beneficial parental relationship exception; it only found that the parents presented inadequate evidence to justify any exception. The case was reversed and remanded for the juvenile court to weigh the evidence presented under the applicable standard and, in its discretion, consider additional evidence. (NS)

ICWA—WIC 224.2

In re Antonio R.—published 3/16/22; Second Dist., Div. Seven
Docket No. B314389; 76 Cal.App.5th 421
Link to case: https://www.courts.ca.gov/opinions/documents/B314389.PDF

IT IS PREJUDICIAL ERROR FOR THE AGENCY TO FAIL TO CONDUCT AN INITIAL ICWA INQUIRY OF MATERNAL EXTENDED RELATIVES, WHO HAVE MEANINGUL INFORMATION TO ASSIST IN DETERMINING WHETHER THE CHILD IS AN INDIAN CHILD

The agency filed a petition for Antonio R., which included an interview by the social worker of mother, who indicated she and her family had no known Indian ancestry. The social worker also interviewed maternal grandmother about the allegations but failed to inquire about Indian ancestry with her. At the detention hearing, mother appeared and filed an ICWA-020 form confirming she had no knowledge of Indian ancestry. At the jurisdiction hearing, father appeared for the first time and also denied any Indian ancestry. Maternal grandmother, maternal aunts, and a maternal uncle were present in the courtroom for a subsequent disposition hearing. However, no ICWA inquiry was conducted with the maternal relatives during or after the hearing. Antonio R. was later placed with maternal grandparents, but the record indicates no further inquiry was made with maternal relatives as

to the family's potential Indian ancestry. At the section 366.26 hearing, the juvenile court terminated mother's parental rights. Mother appealed.

Conditionally affirmed and remanded with instructions. The juvenile court erred in finding the ICWA did not apply to Antonio R. despite the agency's insufficient inquiry. The agency and the juvenile court have an affirmative and continuing duty to inquire about ICWA applicability, including asking extended family members whether a child has potential Indian ancestry. The agency missed multiple opportunities to speak with maternal relatives. Inquiry of the parents alone is insufficient as extended family members may possess knowledge of Indian ancestry that the parents may lack. The agency's lack of inquiry was prejudicial. The approach taken in the recent cases of *In re Darian R.* (2022) 75 Cal.App.5th 502 and *In re S.S.* (2022) 75 Cal.App.5th 575, are misguided. The previous reasoning in the opinion of *In re Y.W.* (2021) 70 Cal.App.5th 542 is the more appropriate analysis because the agency's failure to conduct a proper initial inquiry is in most cases, prejudicial and reversible. In determining whether the failure to make an adequate initial inquiry is prejudicial, the proper question is "whether information in the hands of the extended family members is likely to be meaningful in determining whether the child is an Indian child, not whether the information is likely to show the child is in fact an Indian child." In most circumstances, the information in the possession of extended relatives is likely to be meaningful in determining whether the child is an Indian child — regardless of whether the information ultimately shows the child is or is not an Indian child." In addition, the burden in this case was minimal as the agency only had to reach out to relatives present in the courtroom at the dispositional hearing or speak to the current caregivers, maternal grandparents. Any concern about efficiency for the agency does not justify applying a harmless error standard to the agency's actions, especially when such a standard results in the breaking up of Indian families. (SW)

ICWA—WIC 224.2

In re K.T.—published 03/23/2022; Fourth Dist., Div. Two
Docket: E077791; 76 Cal.App.5th 732
Link to Case: https://www.courts.ca.gov/opinions/documents/E077791.PDF

THE DUTY OF FURTHER INQUIRY UNDER ICWA IS NOT DISCHARGED UNTIL THE AGENCY MAKES A MEANINGFUL EFFORT TO LOCATE AND INTERVIEW EXTENDED FAMILY

In March and April 2019, mother of child K.T. (and later, his sister, D.) and K.T.'s father (father) reported they had possible Blackfeet, Cherokee, and Choctaw ancestry. The parents gave the agency contact information for

family members who might be able to provide more detail. At separate hearings, maternal grandmother and paternal grandfather, who were present in court, provided dates and places of birth for relatives who claimed Indian ancestry. The agency never followed up with these relatives. Instead, it sent notices to various tribes, including Blackfeet and Cherokee, although the notices omitted tribal and biological information given at the prior hearings. The agency failed to notice the three federally recognized Choctaw tribes. In October 2019, at a detention hearing for mother's newborn, D, mother again reported having possible Blackfeet ancestry and identified relatives in the courtroom who claimed Cherokee heritage. The juvenile court noted that ICWA was being addressed in K.T.'s case, did not make any inquiry with these relatives, and ordered the agency to consult with its counterparts in K.T.'s case before preparing ICWA notices for D. The agency did not comply. The agency sent notice to the Blackfeet Tribe and three federally recognized Cherokee tribes, again containing incomplete information. By June 2020, the Blackfeet tribe and two of the three federally recognized Cherokee tribes responded that D. did not qualify for membership. In April 2021, the juvenile court found ICWA did not apply to K.T. or D. In September 2021, the court terminated parental rights. Parents appealed.

Conditionally reversed and remanded with instructions. The agency failed to conduct an adequate further inquiry, and the juvenile court's finding that ICWA does not apply is unsupported. "We publish our opinion not because the errors that occurred are novel but because they are too common…" Section 224.2 creates three distinct duties regarding ICWA in dependency proceedings. First, from the agency's initial contact with a minor and his family, the statute imposes an affirmative and continuing duty of inquiry to ask all involved persons whether the child may be an Indian child. (WIC 224.2, subds. (a), (b).). Second, if that initial inquiry creates a "reason to believe" the child is an Indian child, then the agency "shall make further inquiry regarding the possible Indian status of the child." (WIC 224, subd. (e).) Further inquiry requires that the agency make a "meaningful effort" to locate and interview extended family members and to contact the BIA and tribes. (*In re K.R.* (2018) 20 Cal. App. 5th 701, 709.) Third, if that further inquiry results in a reason to know the child is an Indian child, then the formal notice requirements of section 224.3 apply. Here, the claims of Indian ancestry and familial information provided by mother, father, and two relatives unquestionably provided reason to believe that minors are Indian children, thereby triggering a duty to investigate. Yet, as far as the record shows, the agency made no investigation. They did not contact the named relatives to obtain additional information about possible Indian ancestry and did not contact the BIA or identified tribes to inquire about the family. Given this record, the juvenile court should not have found that ICWA did not apply. (AMC)

ICWA—WIC 224.2

In re I.F.—published 4/6/22; Sixth Dist.
Docket No. H049207; 77 Cal.App.5th 152
Link to case: https://www.courts.ca.gov/opinions/documents/H049207.PDF

FURTHER INQUIRY WOULD NOT BE FUTILE WHERE A SPECIFIC GEOGRAPHIC AREA OF ANCESTRY IS IDENTIFIED

A WIC 300 petition was filed on behalf of I.F. At the initial hearing, the agency reported there was reason to believe I.F. was or may be an Indian child based on maternal grandfather (MGF)'s advisement that his father in Minnesota may have Native American ancestry. Mother filed an ICWA-020 Parental Notification of Indian Status form and checked the box indicating she "may have Indian ancestry" and told the court she might have ancestry on her grandfather's side but was unaware of any tribal affiliation or membership. I.F. was declared a dependent without an ICWA finding. A few months later, a petition was filed on newborn sibling, B.F., at which time mother reported again that she may have ancestry on her father's side and the agency reiterated MGF's initial statements regarding ancestry. The court dismissed B.F.'s petition without any ICWA findings. Later, a new petition was filed at which time the agency reported there was "no reason to believe" I.F. or B.F. were Indian children, failed to document MGF's initial statements regarding ancestry, and incorrectly stated the court previously found ICWA did not apply to I.F. At the initial hearing, mother again advised she had no additional information regarding ancestry but that her grandfather did. The agency asked the court to find there was no reason to believe the children were Indian children based on mother's "vague" statements and the lack of family members with additional information. The court found "no reason to believe" but also that "a little bit more investigation [was] in order." At the disposition hearing, the court found there was "reason to believe" I.F. was an Indian child; that the social worker conducted a diligent inquiry into I.F.'s possible Indian heritage, including contacting the possible tribes and the BIA; there was "no reason to know" I.F. was an Indian child; "no reason to believe or know" that B.F. was an Indian child; and that ICWA did not apply. Mother appealed, arguing the evidence of Indian ancestry triggered the duty to further inquire and investigate with which the agency failed to comply.

Reversed and remanded. WIC 224.2(e) imposes on the court and social worker a duty to make "further inquiry" regarding the possible Indian status of a child if there is "reason to believe" that an Indian child is involved in the dependency proceeding. Further inquiry requires interviews to collect

biographical data regarding the known names of the child's biological parents, grandparents, and great-grandparents, including maiden, married, and former names or aliases, as well as their current and former addresses, birth dates, places of birth and death, tribal enrollment information of other direct lineal ancestors of the child, and any other identifying information, if known; contacting the Bureau of Indian Affairs and the State Department of Social Services to assist in identifying tribes in which the child or parent may be a member; and contacting tribes and persons who may reasonably be expected to have information regarding the child's tribal membership, citizenship status, or eligibility. The standard for "reason to believe" is met whenever the court or social worker has information suggesting that either the parent or the child is a member or may be eligible for membership in an Indian tribe, the latter of which includes information that indicates, but does not establish, the existence of one or more of the grounds for a "reason to know." The duty to further inquire is not satisfied by an ongoing initial inquiry under WIC 224.2(b). The proper focus is on the adequacy and results of the agency's further inquiry, which, here, the agency conceded did not occur. An important factor that the agency overlooked was MGF's report that his ancestry was connected to Minnesota, which triggered its duty to inquire further. Further inquiry would not have been futile, as MGF identified a specific geographic area of ancestry—the state of Minnesota—where there is a finite number of federally recognized tribes that the agency could have contacted. On remand, as part of its further inquiry the agency must diligently gather the biographical information related to the maternal great-grandfather and provide that information to the Bureau of Indian Affairs and the federally recognized tribes in Minnesota. (ML)

ICWA—WIC 224.2

In re A.R.—published 3/29/22; Fourth Dist., Div. Three
Docket No.: G060677
Link to Case: https://www.courts.ca.gov/opinions/documents/G060677.PDF

FAILURE TO CONDUCT AN ICWA INQUIRY DURING DEPENDENCY PROCEEDINGS WARRANTS REVERSAL

The children were declared dependents after a serious domestic violence dispute where mother was the aggressor. Mother was not interviewed on the advice of law enforcement officials, and mother later invoked her Fifth Amendment right to remain silent. The children were placed with their paternal grandparents. Mother was not offered reunification services and a section 366.26 hearing was set. Mother's parental rights were subsequently terminated. At no point during dependency proceedings did the agency or the

juvenile court conduct an ICWA inquiry. Mother timely filed appeal and alleged the agency and juvenile court failed to comply with ICWA.

Reversed. The agency conceded an ICWA inquiry had never been conducted. The sole issue was whether the error was reversible. In dependency proceedings, the parents act as surrogates for the interests of Native American tribes when raising the issue on appeal. Thus, a parent need not make a factual showing that there is readily obtainable information that is likely to bear meaningfully on whether the child is an Indian child as was required in *In re Benjamin M.*, (2021) 70 Cal.App.5th 735. Nor is a parent required to demonstrate a "miscarriage of justice" has occurred as a consequence of the failure to inquire about Native American heritage. (*In re A.C.* (2021) 65 Cal.App.5th 1060; *In re Noreen G.* (2010) 181 Cal.App.4th 1359; *In re N.E.* (2008) 160 Cal.App.4th 766.) Requiring such standards would potentially make enforcement of the tribes' rights dependent on the quality of the parents' effort on appeal. It is the obligation of the government, not the parents in individual cases, to ensure the tribes' interests are considered and protected. Federal and state public policy require Native American heritage to be considered in every dependency case. The creation of a clear rule that requires reversal in all cases where no ICWA inquiry was conducted will prompt the agency to conduct such inquiries at the earliest opportunity to do so. (MO)