



Children's Law Center of California

“DEPENDENCY LEGAL NEWS”

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NEW DEPENDENCY CASELAW

ICWA –WIC 224.2

In re J.K.—published 9/16/2022; Second Dist., Div. 6

Docket No. B319316; 83 Cal.App.5th 498

Link to Case: <https://www.courts.ca.gov/opinions/documents/B319316.PDF>

THE FAILURE TO MAKE PROPER ICWA INQUIRIES WITH KNOWN EXTENDED FAMILY MEMBERS IS A VIOLATION OF THE DUTY OF INITIAL INQUIRY AND REQUIRES A CONDITIONAL AFFIRMANCE WITH A LIMITED REMAND.

At the initial hearing, mother and father of J.K. denied Indian ancestry. The agency asserted ICWA did not apply because the parents denied Indian ancestry. J.K.'s half-sibling, Z.V.K., was also a dependent and found not to be an Indian child. At the initial hearing for J.K., the court found that ICWA did not apply, and took judicial notice of the recent ICWA finding in Z.V.K.'s case. However, the agency's reports in Z.V.K.'s case failed to demonstrate that the agency had made ICWA-related inquiries of maternal relatives, despite Z.V.K.'s placement with maternal relatives. The agency was in

contact with various maternal and paternal relatives of J.K., yet there was no indication the agency conducted an ICWA inquiry with any extended relatives except for J.K.'s paternal grandmother, who stated that she did not have Indian ancestry. The agency's attorney failed to identify any relatives in the ICWA inquiry section of the JV-415 form. At the section 366.26 hearing, the court terminated parental rights. Mother appealed.

Conditionally affirmed and remanded with directions. Section 224.2 requires the agency to ask extended relatives whether the child may be an Indian child. The duty of inquiry begins with initial contact and continues throughout the dependency proceedings. The agency failed to comply with its initial duty of inquiry when it only conducted an ICWA-related inquiry with paternal grandmother, and failed to conduct an inquiry with other known maternal and paternal relatives. The juvenile court erred in failing to ensure that the agency had fulfilled its duty of inquiry before finding that ICWA did not apply. The agency must satisfy its duty of initial inquiry and contact the extended relatives identified by the parents, and the juvenile court must make ICWA findings based on a proper inquiry. Failing to remand would absolve the agency and the juvenile court of their duties under section 224.2. However, a conditional affirmance with a limited remand is appropriate because it provides the best path for a quick resolution to the failure to comply with section 224.2. Here, the agency has already been in contact with J.K.'s extended relatives. If the relatives deny any Indian ancestry, the agency and the juvenile court can quickly remedy the ICWA error without unduly delaying permanency for J.K. If the juvenile court finds that ICWA applies, then the judgment terminating parental rights is reversed, and the court must hold a section 366.26 hearing. In concurrence, Justice Gilbert agreed that a limited remand was appropriate given the facts, but argued that the child's best interests should remain the central concern of the courts. In dissent, Justice Yegan disagreed with the decision to remand for a proper ICWA inquiry, arguing that there was no evidence that further ICWA inquiry would uncover Indian ancestry, and that there was no showing of an actual miscarriage of justice. (SL)

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Due Process

In re R.O.—published 9/20/22; Third Dist.

Docket No. C094816; 83 Cal.App.5th 586

Link to case: <https://www.courts.ca.gov/opinions/documents/C094816.PDF>

IT IS REVERSIBLE ERROR FOR THE COURT TO PROCEED IN A PARENT'S ABSENCE AT A JURISDICTIONAL HEARING WHEN THE PARENT HAS A DUE PROCESS RIGHT TO BE PRESENT AND WAS NOT PROPERLY NOTICED OF THE CONSEQUENCES THAT COULD OCCUR IF THEY DID NOT ATTEND THE HEARING.

The agency filed a petition regarding minor R.O. due to mother's failure to protect R.O. because of ongoing drug abuse and past domestic violence issues. The court detained R.O. from mother and subsequently set a date for a contested jurisdictional hearing upon mother's request. The first contested jurisdictional hearing date was vacated after the court relieved mother's original counsel due to a conflict and appointed her new counsel. At the hearing to set new dates for the jurisdictional hearing, as was local practice in this court, the court set two new dates: (1) a "confirmation" jurisdictional date; and (2) a separate "contested" jurisdictional date. Mother appeared at the hearing to set new dates without her new court-appointed counsel. The evidence in the record indicated the juvenile court did not inform mother about the possible consequences that could occur if she did not appear at the confirmation hearing. The minute order for this hearing only stated that mother was ordered to be present at both the "confirmation" and "contested" jurisdictional hearing dates. On the day of the confirmation jurisdictional date, mother did not appear, but her new court-appointed counsel made an appearance on her behalf and confirmed that mother requested a contested jurisdictional hearing. Counsel for the agency informed a substitute judge that the normal practice in the courtroom was if a parent did not appear at the confirmation hearing, then the parent gave up their right to contest jurisdictional findings and the court would immediately proceed with a non-contested jurisdictional hearing on that day. Counsel for mother objected to the court going forward, but the juvenile court proceeded to convert the confirmation jurisdictional hearing into a non-contested jurisdictional hearing and sustained the entirety of the petition against mother. At a subsequent disposition hearing, the juvenile court adopted the agency's recommendation of removal and bypass of reunification services for mother. Mother was not present for the disposition hearing, but mother's attorney objected to the agency's recommendation. Mother appealed.

Reversed and remanded for a new jurisdictional hearing. The juvenile court's routine practice of converting confirmation jurisdictional hearings into uncontested jurisdictional hearings because a parent did not appear violates the parent's due process rights. Before a child is removed from their care, parents are entitled to adequate notice and an opportunity to be heard. As recognized in three cases, *In re Stacy T.* (1997) 52 Cal.App.4th 1415, *In re Nemis M.* (1996) 50 Cal.App.4th 1344, and *In re Wilford J.* (2005) 131 Cal.App.4th 742, legal error results when the juvenile court deprives parents of their due process rights by proceeding with jurisdictional hearings without properly noticing the parents of the consequences that would result if they did not appear. Here, mother was present at the detention hearing and initially requested a contested jurisdictional hearing that was later vacated. Notably, the juvenile court did not initially set a confirmation jurisdictional hearing and only did so after new counsel was appointed and the initial contest date was vacated. The juvenile court's "spontaneous transformation" of the confirmation hearing into an uncontested jurisdictional hearing because mother did not appear constitutes legal error given the record does not demonstrate that the court, counsel, or even a local rule advised mother that this could occur. The lack of notice, combined with mother's request to proceed with a contested jurisdictional hearing and subsequent objection, deprived mother of her right to testify and confront witnesses. This error was not harmless given that mother could have testified or proffered other evidence in her own defense. (SW)

ICWA – WIC 224.2

In re Baby Girl M.—published 09/21/2022; Second Dist., Div. Five
Docket No. B311176; 83 Cal. App. 5th 635

Link to Case: <https://www.courts.ca.gov/opinions/documents/B311176.PDF>

POSTJUDGMENT EVIDENCE CAN BE CONSIDERED IN SUPPORT OF DISMISSAL OF A DEPENDENCY APPEAL, INCLUDING AN APPEAL FROM AN ICWA FINDING, PARTICULARLY WHERE THE APPEAL IS TAKEN AT A PROCEDURAL STAGE FROM WHICH FURTHER DEPENDENCY PROCEEDINGS WILL BE HELD AND CONTINUING ICWA DUTIES APPLY.

At the jurisdiction and disposition hearings, the juvenile court sustained counts relating to domestic violence and substance abuse, removed minor from her parents' custody, and granted reunification services to father only. Father appealed the jurisdiction findings and disposition order, arguing that the agency failed to comply with its inquiry obligations under ICWA and

related California law. After father filed his opening brief, the parties submitted a stipulation to remand the matter to the juvenile court. The Court of Appeal rejected the stipulation because it did not affirm or reverse the juvenile court's order at issue. Instead, the Court of Appeal invited further briefing on specified issues, including whether the appeal was moot because the agency had undertaken the requested ICWA investigation while the appeal was pending. In response, the agency submitted a brief, conceding that it had not conducted the appropriate ICWA inquiry (i.e., interviews of father and extended relatives and contact with Cherokee tribes) at the outset of the appeal but asserted it had done so while the appeal was pending, rendering the appeal moot. Father also submitted a brief, disputing the mootness issue because evidence confirming the agency's interviews and contact with the tribes was inadequate.

Dismissed as moot. While other courts have recently held – in appeals from orders terminating parental rights – that additional ICWA-related inquiry or notice efforts by a juvenile court or agency while the case is on appeal will not moot deficiencies in an ICWA inquiry at the time the notice of appeal is filed, those cases do not apply to the procedural posture here. (*In re E.V.* (2022) 80 Cal.App.5th 691; *In re M.B.* (2022) 80 Cal.App.5th 617; but see *In re Allison B.* (2022) 79 Cal.App.5th 214 [appeal moot in light of additional ICWA investigation during pendency of the appeal].) In this case, father filed an ICWA appeal at the jurisdiction and disposition stage where further dependency proceedings will be held, continuing ICWA duties will apply, and subsequent appeals may be pursued. In other words, to resolve this appeal, the Court could only order the agency and juvenile court to fulfill their inquiry and notice obligations under ICWA and related California law. However, the agency is already doing that, and there is no effective relief that this Court can now provide. The juvenile court, not the Court of Appeal, must direct this process. (AMC)

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Beneficial Parental Relationship Exception – WIC 366.26; ICWA

In re G.H.—published 10/6/2022; Fourth Dist., Div. Three

Docket No. G061166

Link to case: <https://www.courts.ca.gov/opinions/documents/G061166.PDF>

[1] THE JUVENILE COURT PROPERLY CONSIDERED THE NATURE AND CONSISTENCY OF A PARENT’S VISITS WITH THEIR CHILD TO ASSESS THE STRENGTH OF THEIR BOND BEFORE DETERMINING THAT THE PARENT-CHILD BENEFIT EXCEPTION DID NOT APPLY; [2] THE FAILURE TO INQUIRE OF A PATERNAL GRANDMOTHER ABOUT INDIAN ANCESTRY WAS A MISCARRIAGE OF JUSTICE REQUIRING REVERSAL, GIVEN THAT THE PARENT PROVIDED A SPECIFIC METHOD OF CONTACTING THE RELATIVE.

G.H. was detained two days after his birth because both he and mother tested positive for methamphetamine. Mother, maternal great-aunt, and maternal grandmother denied Native American ancestry days before the detention. Father indicated he was a “small percent” Cherokee. At the detention hearing, the juvenile court asked the father about his Cherokee heritage, and the father indicated he didn’t have any details, and that all his maternal relatives are deceased, except his mother to whom he is estranged. Father indicated he believed his mother resided in Tampa, Florida, that he reached her through the social media site LinkedIn the year prior, and he provided her last name on the account. The juvenile court ordered the child welfare agency to investigate the ICWA issue by reaching out to the father’s mother. In a further report to the court, the social worker wrote that father was unable to provide contact information for his relatives. At the jurisdiction hearing, the court found that ICWA did not apply. The parents received 18-months of reunification services. At the section 366.26 hearing the juvenile court asked if ICWA had previously been resolved, and counsel for the child welfare agency indicated it had been resolved at the detention hearing. The juvenile court terminated parental rights. Mother and father appealed.

Reversed and remanded with instructions. The juvenile court properly assessed the evidence under the prongs of the Caden C. parent/child benefit exception. Father argued that the parent-child benefit exception applied, and mother joined the arguments, because the record showed evidence of a loving relationship between the parents and G.H. The juvenile court found the parents’ visits were “generally consistent” but not at the “level which has strengthened the bond between...parent and child,” and noted that the parents rejected some visits because they did not like the location. Father

argued that the court conflated the first and second prongs, thereby applying the wrong legal standard. However, the different prongs of the test inform each other, and whether a parent’s visitation with their child builds a relationship that is beneficial to the child hinges on the nature and quality of the visits. Further, the juvenile court’s statement that the parents maintained a parental role with the child despite not having much time with him does not support a conclusion that the court misapplied the exception. With respect to ICWA, the child welfare agency failed to conduct a proper inquiry. ICWA protects the rights of Native American tribes, and without proper inquiry and notice, those rights are trampled. Here, father asserted he had “some Cherokee” heritage and provided paternal grandmother’s name, city of residence, and the specific means (LinkedIn) by which he reached her the year prior to the juvenile court. Although the juvenile court ordered the agency to attempt to reach paternal grandmother, they failed to take any steps to do so. When ICWA requirements are effectively ignored as to the relative most likely to be able to provide relevant information, it is a miscarriage of justice. Proposed post-judgment evidence that the agency conducted an ICWA inquiry as to maternal relatives was not accepted, as it was silent as to the inquiry of the paternal grandmother. (KH)

Parentage; Due Process

In re A.H.—published 10/19/22; First Dist., Div. Two
Docket No. A163882

Link to case: <https://www.courts.ca.gov/opinions/documents/A163882.PDF>

THE FAILURE TO PROPERLY NOTICE, CONDUCT THE REQUIRED PARENTAGE INQUIRY, AND TO EXERCISE REASONABLE DUE DILIGENCE TO LOCATE AN ALLEGED PARENT IS PREJUDICIAL ERROR REQUIRING REVERSAL OF TERMINATION OF PARENTAL RIGHTS.

A.H. was detained from mother and her alleged father, J.H., was named in the petition. The agency said his whereabouts were unknown, although the petition listed an address in Sacramento. J.H. was not served with the petition. The detention report stated J.H. had been present for A.H.’s birth, was listed on her birth certificate, and had not been a part of A.H.’s life for a year. The juvenile court did not conduct a parentage inquiry, did not appoint counsel for J.H., and did not inquire about the agency’s efforts to find J.H., but it ordered the agency to continue to try and make contact with him. In the eight months between the initial hearing and the jurisdiction/disposition hearings, the agency had one telephone call with J.H., but did not apprise

him of his rights to participate in the case nor ask for his whereabouts. The agency did not notify J.H. of any interim hearings or the jurisdiction/disposition hearings, nor provide him with any reports, nor make further attempts to ascertain his whereabouts prior to the final jurisdiction/disposition hearings held in May 2020. The jurisdiction/disposition report stated the agency had made two attempts to call J.H. but did not detail any further attempts to locate him or provide him with information about the case. The report also contained new information that J.H. had a relationship with A.H., that mother said he was A.H.'s biological father, that J.H. did visit A.H. and had visited her a month before the initial hearing, and that A.H. felt happy with him and missed him. The siblings' father, B.M., applied for presumed status of A.H. The court inquired as to the status of J.H., and other counsel stated he had at some point paid child support and there could be more than one presumed father. The juvenile court made B.M. a presumed father, but did not make any determination about J.H. At the jurisdiction hearing, the agency stated that they had tried calling J.H.'s number and initiated an absent parent search. No other inquiry was made. The court sustained the allegations, removed from parents, and ordered reunification services for mother and B.M. only. The juvenile court found that notice was proper, and failed to make any appropriate parentage findings under WIC 316.2 or to order the clerk to provide notice and a parentage form to J.H. The clerk did not serve J.H. with any notice of the court's jurisdiction and disposition orders or his right to appeal. Reunification services for mother and B.M. were terminated 10 months later. The agency had a few more phone calls with J.H. but did not inform him of his rights or ask for his whereabouts. J.H. was not noticed for review hearings nor of his right to challenge the court's ruling by writ petition. A.H. still expressed a desire to see J.H. At the .26 six months later, the parental rights of mother, B.M., and J.H. were terminated. J.H. was not noticed for this hearing, was not present, and was not served with reports for the hearing. The agency had some phone contact with J.H. in the months leading to the section 366.26 hearing, but reports were unclear how this occurred and how the agency knew how to contact J.H. After terminating parental rights, the clerk mailed notice of the ruling and appellate rights. J.H. timely appealed.

Reversed and remanded. Notice is a constitutional and statutory imperative and "must be reasonably calculated to advise [a party] an action is pending and afford them an opportunity to defend." (*In re Mia M.* (2022) 75 Cal.App.5th 792, 807.) Here the court failed in its obligations to J.H. in several ways. (1) The juvenile court failed entirely to conduct an adequate parentage inquiry as required by section 316.2 and California Rules of Court, rule 5.635. The court is required to ask if a judgment of paternity exists, if mother was married at the time of conception and birth, if mother was cohabitating with someone at the time of conception and birth, if mother

received any support payments, whether any man has acknowledged paternity, whether paternity tests have occurred, and whether anyone qualifies as a presumed parent under Family Code section 7611 or any other provision. This duty is continuing in nature at every hearing until the question is resolved. (2) The court failed to ensure that J.H. received notice of the proceedings and of his right to establish parentage. Alleged fathers are entitled to notice by certified mail return receipt requested that the child is the subject of dependency proceedings that could result in termination of parental rights and must include the JV-505 form by which an alleged parent can assert parentage status. This notice is designed to provide alleged fathers with the steps to take to participate in the case and elevate their status without the assistance of an attorney. Failure to provide this violated J.H.'s right to participate and demonstrate a presumed father status. (3) Failure to provide J.H. with notice of specific hearings, such as the jurisdiction/disposition hearing and the section 366.26 hearing was also error depriving J.H. of the right to know about the specific hearings and appear at such hearings. (4) The agency's meager attempts to contact father and lack of any attempt to ascertain his address constitutes a failure to exercise reasonable due diligence to locate J.H. Reasonable due diligence "denotes a thorough, systematic investigation and an inquiry conducted in good faith." (*In re D.R.* (2019) 39 Cal.App.5th 583, 591.) The only evidence of the agency trying to contact or locate father was a few telephone calls, and in none of those calls did the agency inform father of his rights, give him notice of the proceedings, or ask him of his whereabouts. (5) These errors are prejudicial, as it is reasonably probable that J.H. would have stepped forward, obtained counsel, and asserted a basis to obtain services as a biological father. There is also evidence that he may have been able to elevate his status to presumed father, but the record is so incomplete that a determination of J.H.'s status is not obtainable without further investigation. The juvenile court had numerous opportunities to address parentage and correct these errors and failed to do so. (SH)