Children's Law Center of California

"DEPENDENCY LEGAL NEWS"

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NEW DEPENDENCY CASELAW

ICWA—WIC 224.2

In re K.H.—published 10/21/22; Fifth Dist.
Docket No. F084002
Link to case: https://www.courts.ca.gov/opinions/documents/F084002.PDF

WHERE THE AGENCY AND COURT FAILED TO GATHER INFORMATION REGARDING INDIAN HERITAGE IN THE FIRST INSTANCE, THE ERROR IS PREJUDICIAL AND THE ONLY REMEDY IS TO REMAND FOR AN ADEQUATE INQUIRY SUFFICIENT TO MEANINGFULLY SAFEGUARD THE TRIBAL RIGHTS AT STAKE

K.H. was removed from his parents upon his birth for his parents' drug abuse. At the initial hearing, A.C. ("mother") submitted a Parental Notification of Indian Status (ICWA-020) form denying she was or may be eligible for membership in a federally recognized tribe and testified to the same. M.H. ("father") submitted an ICWA-020 form indicating he was or may be eligible for membership but wrote "unknown" for the name and location of the tribe. Father testified he was unsure of whether he had Indian ancestry

because he did not know much about his family's heritage but did not believe anyone had mentioned Indian ancestry and had no family members who had lived on a reservation or were eligible for tribal membership, were enrolled in a tribe, or received tribal benefits. The juvenile court advised the parents that if they obtained any other information as to tribal membership, they should advise the social workers and the court so a further inquiry could be done and found ICWA did not apply. The court eventually took jurisdiction over K.H. and declared him a dependent. By this time, the agency had located for possible placement a total of 15 relatives, including the maternal and paternal grandparents who were in good communication with the parents. None of these relatives were interviewed regarding Indian ancestry. At the six-month status review, the agency's social study reflected the court's prior finding that ICWA did not apply and indicated no new information had been received. At the 366.26 hearing, the social study reflected no new information regarding ICWA. The court terminated parental rights and father appealed based solely on a violation of ICWA.

Reversed. The court and agency both have an affirmative and continuing duty to inquire that begins upon their initial contact with the family. The agency has the additional duty to inquire with the child, parents, legal guardian, Indian custodian, extended family members, those who have an interest in the child, and the party reporting the abuse or neglect, whether the child is, or may be an Indian child and where the child, parents, or Indian custodian is domiciled. (WIC 224.2(b).) The California Rules of Court additionally require the agency to document all its inquiries and the information received pertaining to the child's Indian status as well as how and when the information was provided to the tribes. Whenever new information is received, it must be expeditiously provided to the tribes. (Rule 5.481(a)(5).) (I) Standard of Review: Generally, the *Ezequiel G*. hybrid of substantial evidence (as to the factual finding that there is "no reason to know whether the child is an Indian child,") and abuse of discretion (as to the more discretionary finding of the adequacy and sufficiency of the agency's inquiry) is the most appropriate. However, where, as here, the record is so undeveloped that the material facts are undisputed, the appellate court may abandon those deferential standards of review for an independent review of whether ICWA's requirements were satisfied. (II) Reasonableness of the Inquiry: Requiring the agency to conduct an exhaustive "no stone left unturned" inquiry would lead to absurd results unintended by the Legislature. Instead, the statute imposes upon the agency "substantial compliance" with its duty of inquiry. Second, reasonableness is the touchstone in evaluating the agency's inquiry. Thus, for example, an ICWA challenge as to a failure to question a second cousin or family friend is unlikely to prevail if the agency inquired of closer relatives on both sides which yielded no suggestion of ancestry and documented its efforts for the

juvenile court. However, where, as here, the inquiry falls so short, reversal for correction is required. (III) Injury-focused Rather than Outcome-focused (Harmless Error) Inquiry: The agency argued for affirmance under the Harmless Error test, which permits reversal only if it is shown that a result more favorable to the appealing party was likely to have occurred but for the error. While harmless error analysis generally applies in juvenile dependency proceedings including as to ICWA errors, there are some errors that evade this test, such as the one here where the inquiry was wholly inadequate so as to result in a complete lack of information on ancestry that precluded any way to show the error was indeed prejudicial. In these cases, the focus should instead be on whether the error resulted in injury or prejudice to the Indian tribe's right to intervene in or exercise jurisdiction over an Indian child. Here, the agency failed to inquire with numerous relatives it had identified from the outset. The nature of this defect left the juvenile court with no evidence upon which to find the inquiry was proper, adequate, and duly diligent. The error was necessarily prejudicial because there was no information gathered to meaningfully ensure the safeguarding of rights belonging to the tribes as required by ICWA and California law. (ML)

ICWA—WIC 224.2

In re Oscar H.—published 10/27/2022; Second Dist., Div. 8
Docket No. B318634
Link to Case: https://www.courts.ca.gov/opinions/documents/B318634.PDF

THE AGENCY'S FAILURE TO COMPLY WITH THEIR DUTY OF INITIAL INQUIRY IS PREJUDICIAL EVEN IF THE CHILD IS PLACED WITH A RELATIVE; FAILURE TO CONDUCT A PROPER INITIAL INQUIRY POTENTIALLY DEPRIVES THE TRIBES THE RIGHT TO INTERVENE.

Mother denied Indian ancestry and reported her biological parents were born in the United States and her grandparents were born in Mexico. She further disclosed father's grandmother was Mexican and denied being aware of any Native American ancestry as to father. At the detention hearing, the juvenile court found no reason to find ICWA applied based on maternal ancestry. The child was placed with the maternal grandmother. The father was not present and the court deferred ICWA findings as to him. Ultimately, the juvenile court used mother's statements as a basis to find ICWA did not apply to father before terminating parental rights. Although father never appeared before the juvenile court, the agency had sporadic contact with him. The agency never inquired of possible Indian heritage.

Reversed. The agency erred by not inquiring of the father and of extended paternal family members. The agency had at least two meetings and eight phone calls with father, but it never asked him about Indian ancestry. The agency could have gotten names and contact information of paternal relatives by asking a few questions and could have inquired by making a few calls. It failed to take these simple steps. Father's drug and mental health struggles were also found to be irrelevant in influencing the duty of initial inquiry. The inquiry duty is mandatory. As to mother, the agency also failed their duty of initial inquiry by failing to inquire of the maternal grandfather. The child's placement with the maternal grandmother did not relieve the agency of their obligation to inquire of the maternal family. Although the child was placed with a relative, which is generally the preference under ICWA, if the child is an Indian Child, the tribe has the right to intervene. Such intervention may impact the direction and outcome of the case. As such, the agency's failures were prejudicial. In dissent, Justice Stratton agreed the agency failed its initial duty of inquiry, but the error was harmless. Justice Stratton reasoned, "[t]he minor is not in danger of being separated from his biological family, the evil ICWA was enacted to prevent." (MO)