Children's Law Center of California

"DEPENDENCY LEGAL NEWS"

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NEW DEPENDENCY CASELAW

ICWA—WIC 224.2

In re E.C.—published 11/8/2022; Fifth Dist.
Docket No. F084030
Link to Case: https://www.courts.ca.gov/opinions/documents/F084030.PDF

FAILURE TO INQUIRE OF RELATIVES WITH POSSIBLE TRIBAL MEMBERSHIP CONSTITUTES A VIOLATION OF THE DUTY OF INITIAL INQURY AND IS PREJUDICIAL

During the initial investigation, mother disclosed possible Apache ancestry. At the initial hearing, mother submitted an ICWA-020 form indicating possible Apache heritage and testified the maternal great-grandmother and two maternal great-uncles were enrolled members of the tribe. She further testified that one of her great-uncles resided with the maternal great-grandmother. While mother did not provide contact information for maternal great-grandmother or maternal great-uncles, she did provide the cross streets to their residence. Mother also stated maternal grandmother had the telephone number for the maternal great-grandmother. In its adjudication

report, the agency reported its ICWA inquiry was pending. The agency's attorney made an oral representation at the adjudication and disposition hearing that the Apache tribe in question was not federally recognized and connection to the tribe was by marriage. At the six-month review hearing, the agency's report contained no new information regarding ICWA. Family reunification services were terminated and a section 366.26 hearing was set. Mother appealed; her sole claim on appeal was the agency failed to comply with section 224.2.

Conditionally reversed and remanded with directions. If the agency or the juvenile court has reason to believe a child is an Indian child, the agency and the juvenile court must make further inquiries. Here, mother's ICWA-020 form and her testimony demonstrated that there was reason to believe E.C. might be an Indian child. Such information triggered the duty of further inquiry. (WIC 224.2.) As a result, the juvenile court abused its discretion by finding ICWA did not apply. Failure to comply with the duty of further inquiry was prejudicial because Indian tribes have a statutory right to receive notice where an Indian child might be the subject of court proceedings. Because the agency failed to comply with section 224.2, the juvenile court could not accurately determine whether additional inquiry or notice to tribes was required. Ensuring that the agency and the juvenile court fulfill their duties of initial inquiry and further inquiry are the only meaningful way to safeguard the statutory rights of Indian tribes. Tribes determine whether a child is eligible for membership – not the agency or the juvenile court. Although the agency conceded that it failed to comply with section 224.2, it asked the court to consider post-judgment evidence consisting of declarations from maternal grandmother, maternal aunt, and an individual associated with the Lipan Apache Band of Texas. The agency also requested judicial notice of the list in the Federal Register of recognized tribal entities, which did not include the Lipan Apache Band. The agency's request was denied. The juvenile court is the appropriate venue to weigh the evidence the agency submitted. Even if this Court considered the post-judgment evidence, such evidence failed to remedy the agency's failure to conduct a further inquiry and the declarations were from maternal grandmother and a maternal aunt, not the maternal great-grandmother or maternal great-uncles identified by mother. On remand, the juvenile court was directed to conduct a further ICWA inquiry. (SL)

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Jurisdiction—WIC 300(b)(1); WIC 355.1(a)

In re G.Z.—published 11/30/22; Second Dist., Div. Eight
Docket No. B313378
Link to Case: https://www.courts.ca.gov/opinions/documents/B313378.PDF

[1] PERCEPTIONS OF RISK, RATHER THAN ACTUAL EVIDENCE OF RISK, ARE AN INSUFFICIENT BASIS FOR WIC 300(B)(1) JURISDICTION; [2] WHEN A PARENT PRESENTS EVIDENCE THAT THE INJURIES WERE NOT THE RESULT OF ABUSE OR NEGLECT, THE PARENT REBUTS THE WIC 355.1(A) PRESUMPTION AND THE BURDEN SHIFTS BACK TO THE AGENCY TO PROVE THE ALLEGATIONS

Ten-month-old G.Z. was detained from mother after G.Z was hospitalized for persistent vomiting. MRI and CT scan results showed G.Z. had two older subdural hematomas and one new subdural hematoma. G.Z. lived with mother, maternal grandparents, aunt, and uncles. Mother reported that G.Z. fell off her bed while co-sleeping a few months prior and a separate incident where G.Z. fell out of maternal grandfather's arms onto the kitchen floor. Maternal relatives reported they were aware of these two falls and corroborated mother's statements. All members of the household denied abuse or neglect. Prior to detention, mother had taken G.Z. to the hospital four times due to persistent vomiting. A pediatric ophthalmology consultation revealed no evidence of retinal hemorrhages or other signs of ocular trauma and a skeletal survey showed no evidence of fractures. In hearings leading up to the adjudication, the juvenile court liberalized mother's visitation, ultimately ordering G.Z released to both parents under the agency's supervision. At the adjudication hearing, experts gave conflicting opinions regarding G.Z.'s injuries. While both the agency's expert (Dr. Imagawa) and mother's expert (Dr. Weinraub) agreed that the subacute subdural hematoma could be a result of the arachnoid cyst and not due to significant force from inflicted trauma, Dr. Imagawa also concluded that non-accidentally inflicted trauma could not be excluded as the cause of G.Z.'s older subdural hematoma. The juvenile court sustained an allegation under section 300(b) but dismissed counts under 300(a) and 300(e). In its ruling, the juvenile court referenced section 355.1(a), finding that this child would not have suffered the injuries except for the unreasonable or neglectful acts of mother. The juvenile court released G.Z. to mother and father under a jointly shared custodial plan. Mother appealed.

Reversed and remanded with directions to dismiss the petition. [1] There was no substantial evidence in the record that the subdural hematomas were caused by abuse or neglect by mother or anyone else in mother's household.

Dr. Imagawa never stated that G.Z.'s injuries *were more likely than not* caused by abusive trauma. Dr. Imagawa concluded that non-accidentally inflicted trauma as the cause of G.Z.'s older subdural hematoma "cannot be excluded." However, it was not mother's burden to exclude non-accidentally inflicted trauma as a possible cause of G.Z.'s injuries. It was the agency's burden to prove by a preponderance of the evidence that non-accidental trauma caused the injury. Mother's expert, Dr. Weinraub, testified G.Z. had numerous medical conditions that explained the bleeding, including macrocephaly, an arachnoid cyst, and increased subarachnoid spaces and neomembranes. It was undisputed G.Z. exhibited no signs of having suffered noncontact injury, such as shaken baby syndrome or acute head trauma syndrome. The record contains no mention that G.Z. suffered any bruising, broken bones, fractures, or retinal hemorrhage – signs ordinarily seen in shaken babies. Finally, by the time of the adjudication, physical custody of G.Z. was split between mother and father, G.Z.'s arachnoid cyst was reportedly stabilized, and no additional hematomas or brain bleeds were found. The record did not support a finding of substantial risk of serious physical harm to G.Z. based on abuse or neglect by mother. [2] The presumption created by WIC 355.1(a) affects the burden of producing evidence. Once the agency establishes a prima facie case that a child is subject to dependency jurisdiction because the child has sustained an injury "of a nature as would ordinarily not be sustained except as the result of the unreasonable or neglectful acts or omissions" of a caregiver, the burden of producing evidence shifts to the parent to raise the actual cause of the injury or the fitness of the home. (§ 355.1(a).) If the parents submit rebuttal evidence, the agency maintains its burden of proving the alleged facts. Here, because the petition incorporated the language of WIC 355.1(a), mother was given adequate notice of the agency's intent to rely on this presumption. However, because mother presented evidence that G.Z's subdural hematomas were not the result of her abuse or negligence – primarily through Dr. Weinbraub – she rebutted the WIC 355.1(a) presumption. The burden was then on the agency to prove the petition's allegations by a preponderance of the evidence, which it failed to do. (DM)