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"DEPENDENCY LEGAL NEWS"

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NEW DEPENDENCY CASELAW

ICWA; WIC 224.2

In re Rylei S.—published 7/18/22; Second Dist., Div. Seven
Docket No. B316877
Link to Case: https://www.courts.ca.gov/opinions/documents/B316877.PDF

WHEN THE AGENCY'S FAILURE TO CONDUCT AN ADEQUATE INQUIRY MAKES IT IMPOSSIBLE FOR A PARENT TO SHOW PREJUDICE, THE COURT WILL REMAND FOR A PROPER INQUIRY, NOT REQUIRE REVERSAL OF A NO-ICWA FINDING.

The Indian Child Inquiry (ICWA-010) attached to the petition stated that mother gave social worker no reason to believe Rylei was or might be an Indian child. However, at the initial hearing mother filed the Parental Notification of Indian Status form (ICWA-020) and checked the box stating that she might have Indian ancestry and added that it was Cherokee on maternal grandfather's side and maternal grandmother had more information. The juvenile court asked the agency to inquire of maternal grandmother about possible Indian heritage; if the notice requirements were triggered, the agency was to provide appropriate notice. When interviewed

by the agency, the maternal grandmother said she had no knowledge of Indian ancestry on her side of the family, and if there was some, it would be so far back it would be untraceable. The agency made no effort to interview maternal grandfather or any other of Rylei's maternal relatives. At the jurisdiction hearing court just asked for results of the notices, did not address the adequacy of the agency's efforts to interview any of Rylei's other maternal relatives, and stated that the agency was not required to interview maternal grandmother any further. At the disposition hearing, a last-minute information for the court included a letter from the U.S. Department of Interior stating that the notice provided by the agency contained insufficient information to determine any tribal affiliation for Rylei. No copies of any notice to, or response from, the Cherokee Tribe were submitted. Without reviewing the notices or their adequacy, the court found it had no reason to believe ICWA applied. Mother timely appealed.

Conditionally affirmed and remanded with directions. Regardless of a parent's response on the Parental Notification of Indian Status form or when questioned by the court at the initial hearing, if a child has been detained and placed in temporary custody of the agency, section 224.2(b) requires the agency to ask the child, the parents, extended family members and others who have an interest in the child whether the child is, or 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 interviewed maternal grandmother. It also failed in its duty to make further inquiry when it failed to interview extended family members to develop specific biographical information, contact the Bureau of Indian Affairs and contact the tribe and any other person reasonably expected to have information regarding the child's membership, citizenship status, or eligibility. The error was not limited to the agency's failures and omissions. The juvenile court erred in failing to ensure the agency had satisfied its duties of inquiry before finding ICWA did not apply. Where failure to comply with section 224.2 has occurred, an offer of proof or affirmative representation indicating some Indian connection is not required to demonstrate prejudice; therefore, the agency's and the juvenile court's failure to comply with section 224.2 were not harmless error. Furthermore, contrary to *In re Dezi C's* characterization of some courts of appeal adopting an automatic reversal rule, where the agency's failure to conduct an adequate inquiry makes it impossible for a parent to show prejudice, the Court will remand for a proper inquiry, not require reversal of a no-ICWA finding. (NS)

ICWA; WIC 224.2
In re G.A.—published 07/19/2022; Third Dist.
Docket: C094857; 81 Cal.App.5th 355
Link to Case: https://www.courts.ca.gov/opinions/documents/C094857.PDF

EVEN WHERE THE RECORD REFLECTS NO REASON TO BELIEVE MINOR IS AN INDIAN CHILD, A JUVENILE COURT MUST MAKE FINDINGS AS TO THE APPLICABILITY OF ICWA; FAILURE TO DO SO IS ERROR.

Prior to detention, mother and father spoke to the agency and denied any Indian ancestry. At the detention hearing, mother advised the juvenile court that she did not have Indian ancestry. Mother and father each filed an ICWA-020 form, indicating no Indian ancestry. For nearly a year and a half, the agency filed numerous reports indicating that there was no reason to believe minor was an Indian child and/or that ICWA did not apply. No party objected to these statements. At no time did mother or father claim any Indian ancestry or contend that any family member may know about their ancestry. When the agency tried to contact relatives, the efforts were unsuccessful. At the 366.26 hearing, the juvenile court found notice was given and terminated parental rights as to mother and father but made no findings relating to ICWA. Mother appealed.

Affirmed but remanded for entry of ICWA findings. Although the juvenile court erred when it failed to make ICWA findings, this error and any alleged deficiency due to the agency's failure to contact extended family members as required under section 224.2(b) was harmless. In this regard, this Court agrees with the new rule for harmlessness proposed and adopted in *In re Dezi C.* (2022) 79 Cal. App. 5th 769: "[A]n agency's failure to conduct a proper initial inquiry into a dependent child's American Indian heritage is harmless unless the record contains information suggesting a reason to believe that the child may be an 'Indian child' within the meaning of ICWA, such that the absence of further inquiry was prejudicial to the juvenile court's ICWA finding. For this purpose, the 'record' includes both the record of proceedings in the juvenile court and any proffer the appealing parent makes on appeal." Here, parents repeatedly denied Indian ancestry to the agency and to the juvenile court. Neither parent ever suggested that a family member might know more about their ancestry. When the agency tried to reach family members, they were not responsive. No parent objected to the reports concluding that ICWA did not apply. On appeal, mother has not proffered any additional reason to believe minor has Indian ancestry. On this record, there is no indication that minor may be an Indian child, and no prejudice has been

shown due to the agency's failure to interview extended family members. (AMC)

ICWA; WIC 224.2

In re J.W.—published 7/19/22; Second Dist., Div. Eight
Docket No. B313447; 81 Cal.App.5th 384
Link to case: https://www.courts.ca.gov/opinions/documents/B313447.PDF

THE JUVENILE COURT'S ERRONEOUS FINDING REGARDING ICWA IS HARMLESS BECAUSE THE CHILD IS PLACED FOR ADOPTION WITH MATERNAL GRANDMOTHER AND NO EVIDENCE IN THE RECORD SUPPORTS A FINDING OF INDIAN ANCESTRY.

The agency filed a petition for then nine-year-old J.W., who was whereabouts unknown with mother at the time the petition was filed. The detention report stated ICWA did not apply for J.W. The juvenile court detained J.W. from mother and issued a protective custody warrant. Six months later, mother initiated contact with social workers and the agency removed J.W. from her custody. At a subsequent hearing, mother and alleged father appeared in court and filed ICWA forms stating neither of them had Indian ancestry. The juvenile court took jurisdiction and removed J.W. from mother. After mother failed to comply with her court-ordered case plan, the court terminated her reunification services. Regarding J.W., the agency temporarily placed J.W. with maternal aunt and uncle but later moved her to a permanent placement with maternal grandmother. J.W. previously had a close relationship with mother and was initially sad when removal occurred. However, after J.W. was placed with maternal grandmother, she expressed a preference to be adopted by maternal grandmother and stated she did not want to have a relationship with mother anymore. During the pendency of the case, the agency did not interview maternal aunt, maternal uncle, or maternal grandmother about possible Indian ancestry. Subsequently, the juvenile court terminated mother's parental rights. Mother appealed.

Affirmed. Although the agency failed in its duty to comply with ICWA provisions by not interviewing maternal aunt, maternal uncle, and maternal grandmother about possible Indian ancestry, any error made by the juvenile court in finding ICWA did not apply was harmless. First, no prejudicial error occurred because the purpose of ICWA – to prevent the removal of Indian children from their families – was fulfilled in this case after the agency placed J.W. with maternal grandmother. Assuming for the sake of argument

that J.W.'s maternal family had Indian heritage, the juvenile court's finding of adoptability of J.W. with maternal grandmother comported with ICWA because maternal grandmother was a family member that qualified as the first placement preference under ICWA requirements. Moreover, J.W. herself requested she be adopted by maternal grandmother and the placement ensured J.W.'s life would be stable with the support of other family members after mother failed to reunify with her. Second, this Court adopts the harmless error analysis set forth in *In re Dezi C.* (2022) 79 Cal.App.5th 769 in finding no prejudicial error occurred in this case. As in *In re Dezi C.*, no prejudicial error arises here because none of the information in the record suggests that mother's family had Indian ancestry. No evidence indicates that mother's denial of Indian ancestry was incorrect because Mother was informed of her own family history as she was raised by her biological family and continued to have contact with them throughout this case. (SW)

WIC 361.5(b)(5); WIC 361.5(b)(6); Bypass; ICWA

***J.J. v. Superior* Court**—filed 7/5/2022; cert. for publ. 7/21/2022; Third Dist. Docket No. C095308; 81 Cal.App.5th 447
Link to case: https://www.courts.ca.gov/opinions/documents/C095308.PDF

[1] SUBSTANTIAL EVIDENCE DID NOT EXIST TO SUPPORT A DENIAL OF REUNIFICATION SERVICES UNDER 361.5(B)(5) AND (6) BECAUSE THE EVIDENCE DID NOT SHOW MOTHER KNEW OR REASONABLY SHOULD HAVE KNOWN FATHER WOULD ABUSE THE CHILD AND MOTHER DID NOT CAUSE THE ABUSE BY EITHER HER OWN ACTS OR OMISSIONS. [2] ICWA ISSUES WERE NOT RIPE FOR REVIEW SINCE THE JUVENILE COURT DID NOT MAKE A FINAL ICWA RULING.

A petition was filed on behalf of A.C. and two older siblings with allegations under section 300(a), (b), (e), (g), and (j) after A.C. was found to have multiple serious injuries, including a parietal skull fracture and subdural hematomas. Father denied causing the injuries, first saying A.C. fell off the couch and then saying an older sibling dropped A.C. Mother was not home when A.C. was injured, but father called her and she instructed him to call 911. Mother also called paternal uncle for help since he was nearby. Father waited 30 minutes before calling 911. The attending physician stated he highly suspected child abuse, and that father's story was inconsistent with the injuries. Mother and A.C.'s father both reported Native American ancestry and named specific tribes. The petition was sustained at the jurisdiction

hearing. For the disposition report, mother told the social worker that father's medication mixed with alcohol use caused him to black out, that she knew he was blacking out but did not believe he would intentionally hurt A.C., that father had a problem with alcohol, and that she purchased him the alcohol that night. Father told the social worker he was not thinking straight so he did not call 911, but that his brother eventually did. Father provided a new explanation for the injuries, which the nurse practitioner at the hospital indicated were inconsistent with the injuries. The agency recommended not offering reunification services pursuant to section 361.5(b)(5), (6), and (7). After hearing testimony, the juvenile court denied reunification services, finding that both parents caused the injuries because father caused the actual injuries and mother's conduct led to the case coming before the court. Specifically, mother provided the father alcohol, left the children in his care, and did not call 911 herself, despite knowing about father's mental health, blackouts, and prior physical discipline of the older children. The court set a section 366.26 hearing and did not make any ICWA findings. Mother filed a writ petition.

Writ petition granted. Reunification services were improperly denied to the mother since there was insufficient evidence to show she caused the injuries by her acts, omissions, or consent, or that she knew or reasonably should know the father would abuse A.C. Section 361.5(b)(6) permits the denial of reunification services to a parent if they inflicted severe physical harm on the child by an act, omission, or actual or implied consent, but not to a parent who was only negligent. The facts here show that while the mother was extremely negligent in buying the alcohol and leaving the children with father, there was insufficient evidence to suggest she gave her consent for father to abuse A.C. Further, there is no evidence that mother's failure to call 911 herself, which resulted in a 30-minute delay in seeking services, was an omission that caused the injuries to worsen. Section 361.5(b)(5) permits the denial of reunification services to a parent if the child was brought within the jurisdiction of the court under section 300(e) because of the parent's conduct. It is enough that a parent knew or reasonably should have known of the abuse for section 361.5(b)(5) to apply, and it is possible to deny reunification services to only one parent under this subdivision. Here, while mother minimized the father's alcoholism and her enabling of his drinking, there was no evidence to suggest that she knew father had abused A.C. in the past or that he would abuse A.C. Since the mother was improperly denied reunification services under section 361.5 (b)(6) and (5), subdivision (b)(7) is inapplicable as it pertains to a parent not receiving reunification services for a sibling pursuant to (b)(3), (5), or (6). Finally, the ICWA issue raised by mother was not ripe for review because the court did not make a final ICWA

order at the disposition, and since the case is ongoing any deficiencies in ICWA inquiry and notice may still be resolved during the court of the case. (KH)

ICWA; WIC 224.2(b)

In re Ezequiel G.—published 7/29/22; Second Dist., Div. Three
Docket No. B314432
Link to case: https://www.courts.ca.gov/opinions/documents/B314432.PDF

WHERE NO EVIDENCE EXISTS SHOWING CHILDREN MIGHT BE INDIAN CHILDREN AND PARENTS DENY ANY INDIAN ANCESTRY, THE FAILURE TO INQUIRE OF EXTENDED RELATIVES IS NOT PREJUDICIAL

Ezequiel is one of ten children; this appeal pertains only to Ezequiel and siblings Dominic (same father) and Unique (different father). At the initial hearing of the older two children in 2017, mother and father Ezequiel Sr. stated on the record and in their ICWA-020 forms that they had no Indian ancestry. Unique's father, Randy, appeared later and denied any Indian ancestry both orally and on the ICWA-020 form. Following Ezequiel's birth and detention a couple months later, mother again denied any Indian ancestry and continued to deny any Indian ancestry during subsequent agency contacts. The agency attempted to make further contact with both fathers and was unable to do so. The agency also received contact information and/or had contact with various relatives but there was no indication the agency conducted any ICWA inquiry with any extended family members. Mother's services were terminated in 2020, and the court terminated parental rights in 2021. Mother timely appealed.

Affirmed. Claims of error related to the ICWA should be reviewed using a hybrid standard, where the determination of whether there is reason to believe or know the child is an Indian child is reviewed for substantial evidence, and the determination of whether the inquiry was adequate is reviewed for abuse of discretion. Errors require reversal only when the error is prejudicial. The automatic reversal approach, used in other ICWA decisions recently, is not compelled by the statute, and it harms children and the interests of Indian communities as they delay permanency and don't require parties and counsel to work collaboratively with tribes to raise ICWA issues early on in the case. Since application of the ICWA depends on whether the child is a member of an Indian tribe, or eligible for membership and the parent is a member, asking the parent whether they have a tribal affiliation should be enough to gain meaningful information as to whether

ICWA applies. WIC 224.2, subdivision (b), if interpreted literally, would require initial *and* further inquiry to include interviewing all extended family members. It would be overly burdensome and nearly impossible to require an agency to contact every member of a person's extended family, or to expect parents to provide accurate contact information for all such relatives. Even though the agency did not contact the identified extended family members here, there was no error given the parents' responses to initial inquiry, given mother did not raise possible Indian ancestry on appeal, and given that no counsel raised an objection with the trial court. And, even if this Court were to find error with the inquiry, it was not prejudicial as there is no evidence to suggest that the children or parents were eligible for tribal membership or members of an Indian tribe. In dissent, Justice Lavin disagrees with the interpretation of WIC 224.2 to allow an agency to fail to interview extended relatives in clear violation of the statute, and the majority misunderstands the purpose of the inquiry, which is to determine whether further inquiry and notice need to be provided so that the *tribes* can determine whether the parent and child are eligible for membership. (SH)