APPELLATE DEFENDERS, INC.

RECENT TRENDS IN DEPENDENCY CASE LAW

March 2020 through March 2022

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Federal Cases

State Cases

SECTION 366.26

Termination of Parental Rights & *In re Caden C.*

In re L.A.-O. (2021) 73 Cal.App.5th 197 (4th Dist., Div. 2) [San Bernardino]

Where it is unclear whether the juvenile court relied on improper factors in determing the beneficial-relationship did not apply, the Court of Appeal reversed and remanded for the trial court to assess the exception based on the recent California Supreme Court holding in *In re Caden C.* (2021) 11 Cal.5th 614. The children were five and four years old when the case began because of a filthy home and drug use. The parents received 18 months of reunification services but were unable to reunify. The agency reported visits were consistent but remained supervised. At the section 366.26 hearing, the agency entered into evidence the two most recent reports. On appeal, the parents argued the trial court erred by relying on improper factors to deny the beneficial-relationship exception after *Caden C., supra*.

The Court of Appeal found the parents did not challenge the trial court's reliance on whether the parents fulfilled a "parental role" that was used primarily in cases prior to *Caden C*. The Supreme Court in *Caden C*., did not use the phrase "parental role" and the Court of Appeal found there were good reasons avoid its use. The opinion carefully reviewed the prior use of "parental role" in pre-*Caden C*. cases and found that because the trial court used this terminology, the appellate court could not tell whether its ruling conformed with *Caden C*. and remanded for reconsideration of the parental-benefit exception.

As for the evidence issue, the Court of Appeal declined to consider any evidence outside the two agency reports and mother's testimony entered into evidence at the section 366.26 hearing. The Court found this policy is sound by noting that, if the juvenile court were to base its decision, without any warning, on a fact that it just happened to remember from a report filed years earlier, no doubt the parties would cry foul. [V. Lankford, mother; J. Smith, father]

THE INDIAN CHILD WELFARE ACT (ICWA)

Federal case

Brackeen v. Haaland (2021) 994 F.3d 249 (5th Circuit, U.S. Court of Appeal)

In a challenging involving a variety of federal issues, the 5th Circuit of the U.S. Court of Appeal upheld the application of the ICWA for placement preferences and termination standards, the ICWA validly preempted contrary state law to the extent they applied to state courts, and the ICWA "Indian child" classification did not violate equal protection. Foster and adoptive parents and states of Texas, Louisiana, and Indiana brought action against the U.S., U.S. Dept. of the Interior, Bureau of Indian Affairs (BIA), Department of Health and Human Services (HHS) for a declaration that

the ICWA was unconstitutional. Cherokee Nation, Oneida Nation, Quinalt Indian Nation, and Morengo Band of Mission Indians intervened as defendants. The United States District Court for the Northern District of Texas, Reed O'Connor, J., 338 F.Supp.3d 514, partially granted plaintiffs' motions for summary judgment. Defendants appealed. The Court of Appeals, 937 F.3d 406, affirmed. Rehearing en banc was granted.

Affirming in part and reversing in part, the Court of Appeals, held ongoing injury of increased regulatory burdens satisfied injury-in-fact requirement for standing; causation and redressability requirements were satisfied; States challenging Department of Interior rule on placement preferences of ICWA were entitled to special solicitude in standing inquiry; Congress had authority under Indian Commerce Clause to provide minimum protections for Indian children and families in child custody proceedings under the ICWA; the ICWA provisions regarding placement preferences and placement and termination standards validly preempted contrary state law to extent they applied to state courts, as opposed to state agencies; the ICWA "Indian child" classification did not violate equal protection; and administrative rules implementing the ICWA did not violate Administrative Procedure Act (APA).

As background, the states who sued have little experience with the ICWA and the court found that combined, Texas, Louisiana, Indiana, and Ohio (which filed an amicus brief in support of plaintiffs) are home to only about 1% of the total number of federally-recognized Indian Tribes and less than 4% of the national American Indian and Alaska Native population. On the other hand, 26 other states and the District of Columbia have filed amicus briefs asking the Court to uphold the ICWA. These states (listed in the opinion) are collectively home to 94% of federally recognized Indian Tribes and 69% of the national American Indian and Alaska Native population. The court did not make its decision based on a majority vote but noted it could not ignore the irony of the situation where 26 states and the District of Columbia, which are home to a large majority of federally-recognized Tribes and the nation's overall indigenous population, do not view the ICWA as any sort of burden on their child welfare systems. Conversely, only four states with relatively few Tribes regard the ICWA as offensive to their sovereignty and seek to have the law struck down completely because it intrudes upon their otherwise unimpeded discretion to manage child custody proceedings involving Indian children.

The court noted the plaintiffs and their amicus wrongly asserted repeatedly that the ICWA regulates all of their child custody and adoption proceedings but this is incorrect. Congress drew the ICWA narrowly to provide minimum protections only to qualified Indian children – safeguards that Congress found necessary and proper to stop the abusive practices that had removed nearly a generation of Indian children from their families and Tribes and that threatened the very existence of the Indian nations.

State Cases

In re Antonio R. (March 17, 2022, B314389) __ Cal.App.5th ___ [2022 WL 794843] (2d Dist., Div. 7) [Los Angeles]

Asking the parents alone about Indian heritage is not sufficient and the Court of Appeal found that the failure to ask several maternal relatives, including the prospective adoptive parents, about possible Indian heritage was error and conditionally reversed for compliance with the ICWA. In determining whether the error was prejudicial, the court considered whether the information in the hands of the extended family members was likely to be meaningful in determining whether the child is an Indian child and found it was. In most circumstances, the information in the possession of extended relatives is likely to be meaningful regardless of the results of that information. The appellate court concluded the error was prejudicial because it is unknown what information the maternal relatives would have provided had the agency or juvenile court inquired.

The case began when Antonio was one-year-old and involved mother's drug use, leaving Antonio with inappropriate caregivers, and that Antonio's older sibling had a prior dependency case. Mother denied Indian heritage when asked and completed her ICWA-020 form denying as well. Father was absent from the detention hearing but paternal great-grandmother was present and denied Indian heritage in the paternal family. At the jurisdiction hearing, father denied Native American heritage.

Appearing variously in the case were the maternal grandparents, maternal aunts, and a maternal uncle. Antonio was initially placed with father for about a year but was then removed under a section 342 petition. The trial court held the section 366.26 hearing approximately two years later in August 2021. The parents likely were granted reunification services but failed to reunify. At the hearing terminating parental rights, the juvenile court designated the maternal grandparents as the prospective adoptive parents. The appellate court noted that both state law and federal regulations require the juvenile courts to ask participates about Indian heritage. The Court of Appeal agreed with mother's argument that the agency was required to ask maternal grandmother, maternal grandfather, the maternal aunts, and a maternal uncle about Antonio's possible Indian ancestry. In failing to satisfy its initial duty of inquiry under section 224.2, subd. (b), the agency erred.

Further, a juvenile court erred in making a finding the ICWA did not apply without first ensuring the agency had made an adequate inquiry. The agency argued substantial evidence supported the juvenile court's finding because mother, father, and paternal great-grandmother denied Indian ancestry but this position ignored the express obligation imposed by section 224.2, subd. (b). By requiring the agency to inquire of extended family members, the Legislature determined that inquiry of the parents alone is not sufficient.

The agency contended any error was harmless but the court found the error was prejudicial. The Court recognized the Courts of Appeal are divided as to whether a parent must make an affirmative showing of prejudice to support reversal where the agency failed to perform its initial duty of inquiry. After reviewing the various rationales for determining prejudice the court disagreed with the reasoning in *In re S.S.* (Feb. 24, 2022, B314043)___ Cal.App.5th___and *In re Darian R.* (2022) 75 Cal.App.5th 502 (and their application of *In re Benjamin M.* (2021) 70 Cal.App.5th 735) and found no persuasive reason to depart from its decision in *In re Y.W.* (2022) 70 Cal.App.5th 542. Speculation as to whether extended family members might have information likely to bear meaningfully on whether the child is an Indian child has no place in the analysis of prejudicial error where there is an inadequate initial inquiry. The analysis is whether it is meaningful and not whether the information is likely to show the child is in fact an Indian child. Consequently, the court rejected the agency's contention at oral argument that the error was harmless because there were "slim" odds the information in the possession of the extended maternal relatives would show Antonio qualified for membership in an Indian Tribe.

This opinion further rejected the dissent in *In re H.V.* (2022) 75 Cal.App.5th 433 (dis. opn. of Baker, J.) and found the agency here needed to only inquire of the maternal relatives identified by mother for possible placement and later present in the courtroom. The trial court's order terminating mother's and father's parental rights was conditionally affirmed but the case remanded for further compliance with the inquiry and notice provisions of ICWA.

In re A.C. (2022) 75 Cal.App.5th 1009 (2d Dist., Div. 1) [Los Angeles]

Despite the parents' lack of a claim of Indian heritage on appeal, and their denial of Indian heritage in the juvenile court, the Court of Appeal found the failure to question extended family members was prejudicial and required reversal. In this appeal from the juris/dispo hearing, A.C. was originally removed due to mother driving under the influence and being in a collision with the children in the car. The case involved three children now aged 13, 11, and five years old. After initially being placed with mother, A.C. was later removed because of domestic violence and father's abusive conduct and drug use. At the juris/dispo hearing, the trial court held the ICWA did not apply and father appealed.

The parents completed ICWA-020 forms and denied Indian heritage. However, the children were placed with at least three maternal relatives and these extended family members were not asked about the ICWA. The record reveals readily obtainable information that was likely to bear meaningfully on whether A.C. was an Indian child. Mother, as a child in foster care, may not know her cultural heritage, but her biological relatives may have that information. Because the detention report indicated the ICWA may apply, the court was unwilling to assume that the parents' mere denial of Indian

ancestry on a form was sufficient to dispel prejudice from the agency's failure to ask A.C.'s extended family members about potential Indian ancestry.

The Court of Appeal held it is undisputed that the agency failed to ask extended family members about Indian ancestry in derogation of state law implementing the ICWA. In making a determination about whether the error was prejudicial, the appellate court likened defining prejudice can sometimes resemble Lewis Carroll's description of logic in "Through the Looking-Glass:" " '[I]f it was so, it might be; and if it were so, it would be but as it isn't, it ain't.' " (Carroll, Alice's Adventures in Wonderland and Through the Looking-Glass (1998) p. 157.) Despite the difficulties, the appellate court concluded the agency's failure to ask extended family members about potential Indian ancestry was prejudicial. [P. Saucier]

CONCUR & DISSENT (J. Crandall) The opinion noted the tension between the child's interest in a swift resolution and the purpose of the ICWA to protect the interests of Indian children and their Tribes. The prejudice urged by the opinion requires continued application of a "harmless error" standard that places some reasonable burden on the appealing party to show prejudice based upon the agency's incomplete ICWA inquiry. Since father made no claim either in trial court or on appeal, this lack of evidence supports a finding of a lack of prejudice. Further, although appellate counsel is not paid to conduct independent investigations the opinion urges trial counsel to identify information relevant to the ICWA inquiry.

In re S.S. (2022) 75 Cal.App.5th 575 (2d Dist., Div. 1) [Los Angeles]

The Court of Appeal held the agency's failure to ask the maternal grandmother about possible Indian heritage, without more, was not prejudicial because the parties had a strong incentive to provide relevant Indian heritage to the juvenile court since grandmother was a proposed placement and any error did not warrant reversal of the order terminating mother's parental rights. The case began because of mother's drug use and arrest in 2019. Mother denied Indian heritage when asked. Mother did not want S.S. placed with maternal grandmother and she declined to provide information about father. Mother appeared only once at the jurisdiction hearing but she completed an ICWA-020 form and denied Indian heritage. The juvenile court found the ICWA did not apply. Father was never identified and his whereabouts remained unknown for the duration of the case.

Four months after the jurisdiction hearing, maternal grandmother contacted the agency and requested custody. A year later, the trial court denied grandmother's request for placement. Six months after that, the trial court terminated parental rights and mother appealed challenging only the ICWA findings.

On appeal, mother argued the agency failed to satisfy its duties under the ICWA by not questioning the maternal grandmother about Indian heritage. The agency argued mother failed to show prejudice and the Court of Appeal agreed. The appellate court

found social workers have no duty under federal law to ask extended family members about possible tribal membership making any error a violation of state law and the appellate court was required to make a harmless error analysis. Since the maternal grandmother was the only person mother identified as a family member, the Court considered only whether the failure to ask the maternal grandmother was prejudicial under the standard in *In re Benjamin M*. and concluded it was not. (*In re Benjamin M*. (2021) 70 Cal.App.5th 735.) The appellate concluded asking grandmother was not necessary because grandmother, mother's counsel, and S.S.'s counsel, each requested the juvenile court place S.S. with the maternal grandmother. Therefore, these parties had a strong incentive to bring to the court's attention any facts that suggest that S.S. is an Indian child and did not. Their failure to do so implies that the maternal grandmother is not aware of such facts. Consequently, the social worker's failure to make any inquiry is harmless and the trial court's orders are affirmed. [D. Rooney]

In re Darian R. (2022) 75 Cal.App.5th 502 (2d Dist., Div. 1) [Los Angeles]

The agency was statutorily required to interview maternal aunt and maternal grandfather, as extended family members, about the children's Indian ancestry, but the agency's failure to conduct these interviews did not prejudice mother, and thus did not warrant reversal because there was a prior dependency that found the ICWA did not apply. In distinguishing recent case law, the Court of Appeal found mother did not contest the findings in an earlier dependency where the trial court found the ICWA did not apply, the children all have the same parents, and mother, at various times, lived with the relatives she claimed the agency failed to interview. (*In re Benjamin M*. (2021) 70 Cal.App.5th 735.)

The agency conceded the error but argued it was not prejudicial and the Court of Appeal agreed. The Court of Appeal's finding is based on there being a prior juvenile court finding that two of mother's children are not Indian children, the juvenile court asked mother, father, and paternal aunt about Indian ancestry, both parents eschewed Indian ancestry, and mother was living with extended family members whom she could have asked about potential Indian ancestry. These prior findings helped the Court to conclude, under these circumstances, it was unlikely that any further inquiry of family members would have yielded information about Indian ancestry.

The case began for the three children then aged 11, 8 and 2 years old, because of the parents' drug use and mental health issues including bipolar disorder and depression. The parents were granted services but failed to reunify. For the ICWA, each parent was asked and denied Native American heritage. Although the maternal grandmother and aunt were interviewed, they were not asked about the Indian heritage. The paternal aunt was asked and denied Indian heritage.

In its analysis, the Court of Appeal found the trial court and the agency have different duties and held section 224.2, subd. (b), requires only the agency to interview a

child's extended family about Indian ancestry. Despite the agency's error, it was not prejudicial and the trial court's orders were affirmed. [E. Min]

In re H.V. (2022) 75 Cal.App.5th 433 (2d Dist., Div. 5) [Los Angeles]

Where only mother was questioned about possible Indian heritage, but she did not make an affirmative claim of Indian heritage on appeal, the Court of Appeal held the agency failed to fulfill its duty to complete the initial inquiry under the ICWA and the omission is prejudicial and requires reversal. The case began when mother to three-year-old H.V. engaged in a violent altercation with a female companion in H.V.'s presence where mother brandished a knife and pushed the female companion. The Court affirmed the juris/dispo orders but reversed based on the ICWA findings.

The agency questioned mother, but none of child's extended family and this is a failure to fulfill its duty of initial inquiry under the ICWA. Mother denied any tribal connection and denied Indian heritage on an ICWA-020 form. She further denied Indian heritage for the alleged father. The social worker spoke to maternal great-grandparents but it is unknown whether they were asked about Indian heritage.

As the California Supreme Court has made clear, the trial court and agency have an affirmative and continuing duty in every dependency proceeding to determine whether ICWA applies. (§ 224.2, subd. (a); Cal. Rules of Court, rule 5.481(a); *In re Isaiah W*. (2016) 1 Cal.5th 1, 10-11.) The court set out a three-step process for inquiry and notice. First, the agency has a duty of inquiry to ask all involved persons whether the child may be an Indian child. (§ 224.2, subds. (a), (b).) Next, if this 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…." Third, if that further inquiry results in a reason to know the child is an Indian child, then the formal notice requirements must be completed. Here, the agency only spoke to mother about possible Indian heritage.

On appeal, the agency did not argue it had discharged the initial inquiry essentially conceding the issue but contended, instead, that since mother did not make an affirmative representation of Indian ancestry on appeal that she failed to show prejudice. The Court of Appeal found mother did not have an affirmative duty to make a factual assertion on appeal that she cannot support with citations to the record. Instead, the record demonstrated the agency failed to discharge its first-step inquiry duty. Consequently, mother's claim of ICWA error was prejudicial and reversible. The opinion provides the step-by-step requirements for the case which has been conditionally reversed. [M. Coffey, mother]

DISSENT: (Acting P.J. Baker) If the agency is to achieve any measure of simplicity and predictability, the agency may be left to follow a new unspoken rule: interrogate every person contacted in a child welfare investigation about ICWA issues and hope both the juvenile courts and reviewing courts will agree that is enough.

In re Josiah T. (2021) 71 Cal.App.5th 388 (2d Dist., Div. 8) [Los Angeles]

The agency completed the initial inquiry into child's Indian ancestry but, after paternal grandmother's disclosed possible Cherokee ancestry, the duty to make further inquiry was triggered and the failure to pursue a further inquiry or to inform the juvenile court of the grandmother's disclosure required reversal and remand. Paternal grandmother's subsequent denial of Indian ancestry did not excuse the duty to make further inquiry into child's Indian ancestry and the agency's inadequate inquiry and reporting deprived the juvenile court of evidence needed to rule on ICWA applicability.

In an appeal from the termination of parental rights, mother challenged the ICWA orders. In September 2017, shortly before Josiah T.'s birth, the agency filed a dependency petition under section 300, subds. (a), (b), and (j) as to three children in mother's care alleging severe domestic violence, mother's medical neglect of an older child no longer in her custody, and father's alcohol abuse. Mother lied about her location and, at the time the petition was filed, the agency did not know where the family was located. A month later, the family was found in Arizona. Even with a restraining order and father's arrest for domestic violence, the parents remained together. Father was granted a year of reunification services but did not participate. Mother was granted 18 months of services and, although she participated, she also continued to see father, had another child with him, and lied to the agency about the nature of their relationship.

Father was not contacted and was not asked Indian heritage. Paternal grandmother, paternal uncle, paternal grandfather, paternal aunt appeared in the case. In preparation for the 18-month review hearing in early 2019, paternal grandmother heritage through the Cherokee Tribe. Grandmother did not provide information about the paternal great-grandmother who was the ancestor with a tribal connection. Later in 2019, a different social worker asked paternal grandmother about Indian heritage and grandmother denied any. The paternal aunt was questioned and claimed possible Indian heritage in 2019 through paternal grandfather and disclosed possible heritage through the Choctaw Tribe. Paternal grandfather provided information for the paternal great-grandparents.

The agency did not inform the juvenile court about paternal grandmother's initial claim of Cherokee heritage until early 2020 in preparation for the section 366.26 hearing. After grandmother's disclosure, the agency did not make further inquiries or pursue notice to the Cherokee Tribe. Notice was sent to the Bureau of Indian Affairs and the Choctaw Tribes in early 2020. At the section 366.26 hearing, in early 2021, the trial court found the ICWA did not apply.

In discussing the statutory scheme for the ICWA, a court's finding there is "reason to know" a child is an Indian child requires formal notice to the Tribe. Sharing information with a Tribe at the "further inquiry" stage is distinct from formal notice. Here, despite having four paternal family members known to the agency and potentially

available to consult about American Indian ancestry, no ICWA inquiry was made for a full 18 months after Josiah T.'s petition was filed. The agency's initial inquiry was not made until after the jurisdictional and dispositional hearings, the six-month review hearing, the 12-month review hearing, and only three days before the scheduled date of the 18-month review hearing. Despite the agency's argument to the contrary, the paternal grandmother's claim required further inquiry. But no further inquiry was made following this disclosure for seven months. Failing to perform any inquiry whatsoever for seven months cannot be considered a timely, diligent, or good faith effort to gather further information. In finding the agency's assertion unpersuasive that no further inquiry was necessary because the grandmother changed her answer, the Court of Appeal found a mere change in reporting, without more, is not an automatic ICWA free pass; when there is a conflict in the evidence and no supporting information, the agency may not rely on the denial alone without making some effort to clarify the relative's claim.

Further, California Rules of Court, rule 5.481(a)(5), requires the trial court be informed of all inquiries and all information received, but the agency did not inform the court in a timely fashion that paternal grandmother had disclosed Cherokee ancestry. Instead, the agency simply ignored paternal grandmother's initial statement in nearly every subsequent report, informing the court only of the later conversation in which she denied Indian ancestry. Importantly, the information was omitted from the reports prepared for the section 366.26 hearing so the trial court did not have this information when it made its findings that the ICWA did not apply. Consequently, the agency's failures to fulfill its ICWA obligations and to disclose information to the juvenile court undermined the court's ICWA ruling.

In an unusual ruling, the order terminating parental rights under section 366.26 was reversed and the matter remanded with directions that within 10 days of the remittitur the agency demonstrate the scope and adequacy of its investigation of Josiah T.'s potential Indian ancestry. Reversed and remanded with directions. [J. Tavano]

In re Benjamin M. (2021) 70 Cal.App.5th 735 (4th Dist., Div. 2) [San Bernardino]

In conditionally reversing the ICWA findings, the appellate court found reversal is required in ICWA cases where the record demonstrates that agency has not only failed in its duty of initial inquiry into whether child was Native American child, but where the record indicates there was readily obtainable information that was likely to bear meaningfully upon whether child is Native American child, and the agency's error in failing to comply with duty of initial inquiry was not harmless.

Three children were involved, aged five and four years old at the start, along with three parents. Father to the youngest child was never located and he was reported as homeless. Mother was asked but denied Indian heritage. However, the agency was in touch with father's sister-in-law and mother had once visited Benjamin at the paternal uncle's home and knew the address. The agency sent someone to interview the uncle but it

is unknown if father had other siblings or if the uncle was asked about Indian heritage. The trial court held the ICWA did not apply at the juris/dispo hearing and, later, terminated parental rights. Mother appealed and argued the agency failed to comply with the ICWA involving only the father to the youngest child.

Mother argued and the agency conceded that it failed to comply with the initial inquiry duties of the ICWA but the agency asserted the error was harmless. The appellate court found that on the record the error required reversal. The ICWA imposes notice requirements that are, at their heart, as much about effectuating the rights of Indian Tribes as they are about the rights of the litigants already in a dependency case. The Court of Appeal discussed the difference between federal and state requirements and held state law more broadly imposes on social services agencies and juvenile courts, but not parents, an "affirmative and continuing duty to inquire." Because the error of initial inquiry is a violation of state law, the appellate court may not reverse unless it finds the error was prejudicial. In finding the error prejudicial, the Court of Appeal found the agency could still gather the required information and make it known and until the agency did so, the court cannot know what information an initial inquiry, properly conducted, might reveal.

Requiring a parent to prove that the missing information would have demonstrated a "reason to believe" would effectively impose a duty on that parent to search for evidence that the Legislature has imposed only on the agency. In the ICWA context, it would frustrate the statutory scheme if the harmlessness inquiry required proof of an actual outcome (that the parent may actually have Indian heritage). The approach adopted by the court requires reversal only where the initial inquiry is incomplete and there is readily obtainable info available in the record. [J. Smith]

In re Y.W. (2021) 70 Cal.App.5th 542 (2d Dist., Div. 7) [Los Angeles]

In failing to interview mother's adoptive parents to locate and question mother's biological parents, the agency and trial court erred in finding the initial inquiry of the ICWA was completed, and the agency provided incomplete notice of father's ancestry in the ICWA notice which was not harmless error. In an appeal from the termination of parental rights the sole issue was failure to comply with the ICWA. A petition was filed under section 300, subds. (b)(1) and (j), alleging the parents' history of substance abuse and current use of marijuana placed their one-year-old son, Y.W., and one-month-old daughter, Y.G., at risk.

The parents received six months of reunification services and, at the section 366.26 hearing, the trial court held the parents had not visited consistently and terminated parental rights. The parents completed ICWA-020 forms and mother denied Indian heritage but father claimed a possible tribal connection with the Cherokee Tribe. Father disclosed that his maternal grandmother was 95 percent Cherokee and he provided information for his mother and grandmother. The trial court found this information gave it a reason to know the children may be Indian children and triggered the notice

requirements. Completed ICWA-030 forms were sent to the three Cherokee Tribes but some of the information for father's grandmother was omitted including her date and place of birth. Further, the trial court requested that the agency interview mother's adoptive parents to obtain the name of mother's biological parents.

In preparation for the section 366.26 hearing, the trial court ordered new notices be sent to illicit responses from the two remaining Tribes. These notices were missing the same information as the earlier version. At the hearing, the trial court the ICWA did not apply. On appeal, the parents argued the agency failed to conduct an adequate inquiry into possible Indian ancestry and omitted essential information on the notice to the Indian Tribe father identified and the Court of Appeal agreed.

The Court of Appeal held the agency failed to fulfill its duties of inquiry because it did not make meaningful efforts to locate and interview mother's biological parents, who were "extended family members," as defined by ICWA. Mother's adoptive parents thought they could locate the maternal grandfather and possibly a maternal aunt but the social worker did not pursue these leads. The agency argued that because mother and her adoptive mother denied any Indian ancestry, "there was no reason to believe the children were Indian children through mother's parentage to trigger a duty to make 'further inquiry….'" The Court of Appeal held the agency's continuing duty of inquiry is not so narrow. The appellate court found the trial court's holding in *In re Austin J.* (2020) 47 Cal.App.5th 870 is inconsistent with section 224.2, subd. (b). Nothing in section 224.2, subd. (b), relieves the agency of its broad duty to seek that information from "all relevant" individuals. Despite mother's denial of possible Indian heritage, relying on this information ignored the reality that parents may not know their possible relationship with or connection to an Indian Tribe.

The court also distinguished *In re J.S.* (2021) 62 Cal.App.5th 678. The agency argued harmless error because the parents did not assert on appeal that the biological parents would present any information the children were Indian children. A parent, however, does not need to assert Indian ancestry to show the agency's failure to make an appropriate inquiry under the ICWA. It is unreasonable to require a parent to make an affirmative representation of Indian ancestry where the agency's failure to conduct an adequate inquiry deprived the parent of the very knowledge needed to make such a claim.

In addition, the Court of Appeal held the agency failed to provide proper notice. The notices omitted essential background information about the paternal grandmother. The agency contended the omission of the birthplace of paternal grandmother in the ICWA notice was harmless because "there is no reason to believe that this information would have produced a different result concerning the children's Native American heritage." But the Court of Appeal found the agency's incomplete notices to the Tribes violated the ICWA. The appellate court could not say the Cherokee Tribes would have made the same determination that Y.W. and Y.G. were not Indian children had the agency fulfilled its obligations under the ICWA.

Disagreeing with the court's narrow view of the duty of inquiry under ICWA in *In re Austin J.*, *supra*, and the court's broad view of harmless error in *In re A.C.* (2021) 65 Cal.App.5th 1060, the appellate court held that the parents' contentions have merit and the juvenile court erred in ruling the ICWA did not apply. The termination of parental rights was conditionally affirmed but was reversed as to the ICWA findings and was remanded. [C. Blake, mother; J. Smith, father]

In re A.C. (2021) 65 Cal.App.5th 1060 (4th Dist., Div. 2) [San Bernardino]

In affirming the trial court's finding that the ICWA did not apply, the appellate court found the juvenile court erred when it failed to ask father whether he had any Indian ancestry, but the juvenile court's failure did not prejudice father because he made no claim of Indian heritage on appeal. Father was not questioned because mother had apparent Indian ancestry - she was an enrolled member of a federally-recognized Indian Tribe and an older daughter had been removed from her custody and transferred to the jurisdiction of the Tribe. When mother's Tribe unexpectedly reported A.C. is not a member of the Tribe, father was not asked about Indian heritage.

The agency did not dispute there was a failure to inquire but argued father had not shown any prejudice and the Court of Appeal agreed. Mother was asked about Indian heritage and identified she was a member of the Confederated Tribes of the Colville Reservation (Colville Tribes), a federally-recognized Indian Tribe and she completed an ICWA-020 form to that effect. Father was in jail, was not asked and did not complete an ICWA-020 form. After the Tribe determined A.C. was not eligible for enrollment, the trial court found the ICWA did not apply.

The appellate court agreed the agency and trial court erred in failing to ask father but found the error was not prejudicial. The court found "[A]ny failure to comply with a higher state standard, above and beyond what ... ICWA itself requires, must be held harmless unless the appellant can show a reasonable probability that he or she would have enjoyed a more favorable result in the absence of the error." This means a parent asserting failure to inquire must show - at a minimum - that, if asked, he or she would, in good faith, have claimed some kind of Indian ancestry.

On appeal, father argued the lack of inquiry of the paternal family denied him a chance to discover possible Indian heritage. The Court of Appeal disagreed finding an appellant has the burden of producing an adequate record that demonstrates reversible error. Agreeing that it is unusual in appeals to require a parent to produce evidence outside the record, the court nonetheless found that when the parent can make no good-faith claim that the child has Indian ancestry, the possibility that an inquiry would nevertheless show that the child is an Indian child is de minimis. In addressing the use of post-judgment evidence, the Court of Appeal found father's silence on this point only affirmed the judgment and promoted finality and prevented further delay. The appellate

court followed the precedent in *In re Rebecca R*. (2006) 143 Cal.App.4th 1426. [E. Uhre]

DISSENT (J. Menetrez) The majority's approach to require father to make a showing of possible Indian heritage even though the lack of inquiry deprived him of any evidence in the record is legally unsound. Instead, the dissent found case law **after** *In re Rebecca R., supra*, to be more compelling and would treat ICWA inquiry violations like the one in this case as presumptively prejudicial, putting the burden on the trial court and the agency to compile a record showing that their errors were harmless. (*In re K.R.* (2018) 20 Cal.App.5th 701; *In re N.G.* (2018) 27 Cal.App.5th 474.) Further, the majority opinion is in tension with the Supreme Court's decision in *In re Isaiah W*. (2016) 1 Cal.5th 1 and *Rebecca R., supra*, was legally wrong when it was decided in 2006, because it conflicts with the Supreme Court's decision in *In re Zeth S*. (2003) 31 Cal.4th 396. Finally, requiring father to produce new evidence outside the record does not favor him and is a barrier because parents' appellate counsel ordinarily do not, need not, and are not paid to conduct any investigation of facts outside the record.

In re Charles W. (2021) 66 Cal.App.5th 483 (4th Dist., Div. 1) [San Diego]

Where a prior dependency case found the ICWA did not apply, the child in this case shared the same parents, and the prior ICWA findings were not challenged on appeal, the agency's reliance on the prior findings is sufficient to comply with the ICWA. Father appealed from the juris/dispo hearing and challenged the ICWA findings. The parents had a prior dependency case which was closed in July 2020 after mother reunified with her children who were then three and two years old. Two months later, after the birth of another child, the police found illicit drugs in the family's hotel room and the parents were arrested.

Mother claimed heritage through the Yaqui and Aztec Tribes but, relying on the finding in the prior case, claimed no tribal connections. Father denied Indian heritage. In its paperwork, the agency indicated the youngest child had possible Sioux heritage. The origin of this information is unknown. At the detention hearing, the court ordered the agency to investigate and make further inquiries. At a subsequent special hearing for the ICWA, mother's counsel indicated mother did not claim Native American ancestry. Based on this, the juvenile court held the ICWA did not apply.

Mother argued the juvenile court and the agency failed to make adequate inquiry into possible Indian heritage but the Court of Appeal disagreed. The appellate court concluded the juvenile court and the agency made an adequate inquiry and the inquiry yielded no reason to believe the children were members of or eligible for membership in an Indian Tribe. In its initial investigation and report, the agency learned that in January 2019, the juvenile court found the ICWA did not apply to the two older children and this prior finding is undisputed and unchallenged. Baby R.W. is a full sibling of the two older children, i.e., all three children share the same ancestry so if the ICWA did not apply to the two older children, then it would not apply to the baby. Minor's counsel questioned

mother's claim of Yaqui heritage at a hearing and, once mother denied any Indian heritage on the record again, minor's counsel was satisfied. Furthermore, the trial court reasonably relied on a prior finding involving the same family. Substantial evidence supports the finding that ICWA does not apply.

As to the note about Sioux heritage, and the lack of an ICWA-020 form, the appellate court found that even if the court's or the agency's inquiry was inadequate, any error harmless. Father did not assert on appeal that mother or a relative has any new or pertinent information regarding Indian ancestry. The trial court's findings were affirmed. [M. Coffey]

In re S.R., et al. (2021) 64 Cal.App.5th 303 (4th Dist., Div. 2) [San Bernardino]

Mother challenged the termination of parental rights and contended the agency and trial court failed to comply with the inquiry requirements of the ICWA because late in the case the maternal grandparents revealed possible Indian heritage and the Court of Appeal agreed and conditionally reversed.

The case began in 2017, when the children were four and one years old, after the older child, who is autistic, was found naked and wandering the streets unsupervised. The home was also found to be unsanitary and dangerous, the mother was using drugs, mother had mental illness including paranoid schizophrenia, and the parents were involved in domestic violence. Mother and father both denied Indian heritage at the detention hearing and the trial court held the ICWA does not apply.

The parents were granted 12 months of reunification services but were unable to reunify. Prior to the section 366.26 hearing, and five months after services were terminated, maternal grandmother expressed an interest in placement. She lived in Colorado and an assessment under the Interstate Compact for the Placement of Children (ICPC) was started. As part of the assessment, the grandparents completed forms about Indian heritage. Grandmother indicated she was unsure if she had Indian ancestry but that the children had other unidentified relatives with Indian ancestry and had family members who had lived on federal trust land, on a reservation, or on a Rancheria. The grandfather checked boxes indicating he has ancestry tracing to the Yaqui Tribe of Arizona.

Grandfather identified the great-grandmother, Virginia G., as the Yaqui ancestor and disclosed that she lived with the grandparents. The grandparents' ICPC was approved and the children were placed with them in Colorado. Because of COVID delays, the section 366.26 hearing was held more than a year after the children were placed with their grandparents. The agency nor the trial court asked the grandparents any questions about Indian heritage. The court terminated parental rights and mother appealed the same day.

In its opinion, the Court of Appeal noted that the parents' denials in 2017 were sufficient for the trial court to find the ICWA did not apply. However, those findings were adopted again at the section 366.26 hearing more than three years later, after the California ICWA statute had been modified and the grandparents had disclosed possible

Indian heritage. Central to effectuating the ICWA's purpose, an adequate investigation of a family member's belief a child may have Indian ancestry is essential to ensuring a Tribe entitled to ICWA notice will receive it. It isn't easy to track tribal affiliations and those connections are easily lost. This case is a stark example of that dynamic, because the children's parents apparently had no idea of their family's connection to the Yaqui Tribe of Arizona, even though the children's great-grandmother was a member and still lived with the grandparents in Colorado.

The Legislature has imposed a duty of further inquiry if information becomes available suggesting a child may have an affiliation with a Tribe, even if the information isn't strong enough to trigger formal notice. Here, the grandparents' revelation about children's maternal great-grandmother gave the agency reason to believe Isaiah and Summer may be Indian children and triggered a duty for the agency to inquire further, including by contacting the Yaqui Tribe of Arizona. The appellate court held the recent amendment to section 224.2, subd. (e), confirms the "reason to believe" standard requiring further inquiry should be broadly interpreted. Consequently, the court declined to follow *In re Austin J.* (2020) 47 Cal.App.5th 870, 885 and its narrow reading and instead agreed with the reasoning in *In re T.G.* (2020) 58 Cal.App.5th 275, 288. The Court of Appeal found the bottom line is that further inquiry was required. On remand, the juvenile court must direct the agency to make a meaningful inquiry regarding the children's Indian ancestry, including interviews with extended family members and contact with the Yaqui Tribe of Arizona. [C. Peterson]

In re A.T. (2021) 63 Cal.App.5th 267 (1st Dist., Div. 3) [Sonoma]

Where a child is not removed from the parents, the ICWA does not apply and the trial court properly followed the mandates of the UCCJEA and terminated jurisdiction over A.T. Here, the juvenile court asserted emergency jurisdiction over seven-year-old A.T., whose mentally ill mother had removed him from Washington State to California in violation of Washington family court orders. The court detained A.T., placed him temporarily with his father in Washington, and initiated contact with the Washington family court to address which state had jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). In the meantime, the Wiyot Tribe (the Tribe) intervened and, with A.T.'s mother, asserted the ICWA required the juvenile court to retain jurisdiction in California. The case represents the intersection of two statutory schemes relevant to child custody adjudications: the ICWA and UCCJEA.

The juvenile court determined the ICWA was inapplicable and the Washington family court had continuing exclusive jurisdiction. Accordingly, it dismissed the dependency in favor of the family court proceedings in Washington. On appeal, mother contended the court erred in finding the ICWA inapplicable and dismissing the dependency case without returning A.T. to her custody. The Court of Appeal found the juvenile court correctly discerned and applied the law in a legally and procedurally

complex situation and consequently affirmed.

A.T. lived in Washington with his parents until a few months before the case began but mother had a history of mental instability including paranoia, schizophrenia, anxiety disorder, unspecified delusional disorder and acute post-traumatic stress disorder. The family had a CPS history in Washington dating back to 2015. The parents divorced in 2019 when A.T. was almost seven years old. The family court awarded mother custody with visits for father. The next month, mother took A.T. to California in violation of the family court order. Four months later, mother came to the attention of the agency in California due to mother's mental illness. Mother claimed membership in the Yurok and Wiyot Tribes but A.T. was not eligible based on a lack of blood quantum.

A petition was filed in October 2019 and, although father requested placement, there were concerns with his alcohol use. Father's attorney reported the Washington court found mother in contempt and ordered A.T. returned to Washington and father's custody. While waiting to confer with the Washington court abut UCCJEA jurisdiction, the Wiyot Tribe intervened in the dependency case in California. According to the Wiyot Tribe, A.T. was eligible to enroll in the Tribe. By January 2020 the juvenile court had conferred with the Washington court and found the Washington family court had exclusive jurisdiction. On how best to proceed, the agency urged dismissal, the Wiyot Tribe asserted A.T. was not an "Indian child" within the meaning of ICWA because mother was not a member of the Tribe and A.T. was placed with father, and A.T. and father both requested the case be dismissed in favor of jurisdiction in Washington. Mother and the Tribe asked the court the retain the case in California. After further briefing, the trial court held A.T. was not an Indian child within the ICWA because he was not removed from his parents since he was placed with his father, and the court dismissed the case. Mother appealed.

Mother argued the ICWA applied and precluded dismissal under the UCCJEA. Mother did not dispute that, if the ICWA did not apply, the trial court properly dismissed the case under the UCCJEA. The opinion reviewed when the ICWA applies in a child custody proceeding and noted it does not apply when a child is removed from one parent and placed with the other. Because the court correctly found the ICWA was inapplicable, the appellate court declined to address mother's other contentions that it erred in finding A.T. is not an "Indian child" as defined by ICWA or that ICWA required the court to restore him to Mother's custody. The court affirmed the trial court's orders. [S. Gorman, mother; R. McLaughlin, father]

In re J.S. (2021) 62 Cal.App.5th 678 (2d Dist., Div. 7) [Los Angeles]

Even where DNA results show Native American history but did not name a specific tribe, the lack of other available relatives to ask meant the agency conducted an adequate and proper initial inquiry and the trial court's orders were affirmed. In this appeal from the juris/dispo hearing, mother challenged jurisdiction but also the

determination that the ICWA did not apply. The jurisdiction facts are unpublished but mother had more than one dependency case going back to 2006 and these involved criminal conduct, domestic violence, physical abuse, lack of appropriate supervision and drug use. The children at the start of the current case were 16 and 12 years old.

Mother denied Indian heritage. Father claimed possible Indian heritage and disclosed that the paternal grandmother was 58 percent Native American. According to the paternal grandmother, her DNA test found she had 54 percent Native American lineage. The Indian heritage was not associated with a specific Tribe, grandmother was "shocked," and was nearly 100 percent sure no one in her family was eligible or enrolled in any Tribe. Grandmother also indicated the maternal great aunt took a DNA test and found Native American heritage. However, she did not have contact information for the great aunt. The trial court held that, based on the lack of credible evidence that the children are eligible for enrollment, the ICWA does not apply.

In analyzing the DNA results, the appellate court found the term "Native American" has a different connotation for purposes of ancestry.com. According to its website, the "Native American Ethnicity" group includes "ethnic origins" from North America and South America, "[s]tretching from Alaska to the tip of Argentina." Under these circumstances, because grandmother's ancestry.com results did not contain the identity of a possible Tribe or any specific geographic region from where her ancestry may have originated, the ancestry.com results, even if a reliable source of possible Indian ancestry, suggested "Native American" ancestry over a vast geographic area. As such, the information had little usefulness in determining whether J.S. and M.S. were Indian children as defined under ICWA.

Consequently, to the extent that grandmother's information constituted "reason to believe that an Indian child is [or may be] involved," the agency conducted an adequate and proper investigation under section 224.2, subd. (e). Further, grandmother had no other information, and there were no other paternal relatives identified. Given the lack of further possible leads for Indian heritage, the appellate court found substantial evidence supported the juvenile court's findings that there was "no reason to know" that M.S. and J.S. were Indian children, an adequate inquiry was conducted into whether these children were Indian children, and that ICWA did not apply.

In re T.G. (2020) 58 Cal.App.5th 275 (2d Dist., Div. 7) [Los Angeles]

The Court of Appeal held the biological father, whose paternity was established by DNA testing, had standing as a parent under ICWA to appeal juvenile court's order; statements by mother of possible Cherokee ancestry on her maternal side and possible Native American ancestry through her paternal grandfather triggered an affirmative duty for agency to make further inquiry; and, as a result, the appellate court reversed and remanded.

Four children are involved in the case aged 16, 14, 12 and 8 years old and on appeal

mother and father to the oldest child challenged the placement of the children in a guardianship and termination of jurisdiction. The sole issue in both appeals is whether the agency and the juvenile court complied with the ICWA. The Court of Appeal held the agency failed to adequately investigate mother's claim of Indian ancestry and the juvenile court failed to ensure an appropriate inquiry was conducted before concluding, if it ever actually did, that the ICWA did not apply. In reaching this result, the court disagreed with the holding in *In re Austin J.* (2020) 47 Cal.App.5th 870 that the amendments to the state statute enacting the ICWA were intended to limit the agency's robust duty of inquiry.

The case began in December 2017 when the agency filed a petition on behalf of the children under section 300, subds. (a) and (b)(1), alleging mother and the father of the younger children had a history of domestic violence, mother had a history of mental and emotional problems, and mother allowed the children to reside with a relative who was an abuser of marijuana. Appellate father had a DNA test for the oldest child and he was found to be the biological parent. The parents were granted 12 months of reunification services but failed to reunify. Originally, the agency recommended adoption but, after the two oldest children objected, the agency changed its recommendation. In January 2020, at the section 366.26 hearing, the court ordered the children placed in a non-relative guardianship.

Mother claimed heritage in the Cherokee Tribe on her maternal side and also possible Indian ancestry on her paternal side through her great-grandfather. The maternal grandmother also confirmed possible Indian heritage through the Cherokee Tribe. The trial court also asked grandmother and mother a series of questions about tribal heritage and ancestors at the detention hearing. It is disputed whether the trial court's comments ordered the agency to make a further inquiry or to provide notice. Despite being aware of the claims of possible heritage, the trial court held the ICWA did not apply. No notice of any kind was sent in the case.

The court addressed the agency's request to dismiss father from the appeal because he was a non-party and was not aggrieved because he failed to appear in the juvenile court and did not assert a position as to his child's case. The court found that because he is a biological parent, father falls within the definition of a parent under the ICWA. Further, non-Indian parents have standing to raise issues of ICWA compliance in an appeal. Consequently, father is entitled to appeal the failure to comply with the ICWA.

As for the inquiry issue, the appellate court found mother and grandmother's preliminary responses unquestionably provided reason to believe Indian children might be involved in these dependency proceedings and triggered the agency's duty to make further inquiry. The agency's breach of that duty and the juvenile court's failure to ensure compliance required a conditional reversal of the orders made at the section 366.26 hearings and a remand for an adequate investigation of the children's Indian ancestry. [M. Coffey, father]

In re Dominic F. (2020) 55 Cal.App.5th 558 (2d Dist., Div. 8) [Los Angeles]

Where mother and maternal grandfather made claims of possible Indian heritage, and where the agency provided informal notice to 29 Tribes which could have a connection to Dominic, the Court of Appeal found the required further inquiry was conducted, that the further inquiry did not change the "reason to believe" to a "reason to know" and the trial court's finding that the ICWA did not apply was affirmed. In this appeal from the juris/dispo hearing, the case began in June 2019 when the agency filed a petition alleging the three children involved were described by section 300, subds. (a) and (b). At the detention hearing, the parents completed ICWA-020 forms. Father indicated he has "no Indian ancestry" but mother indicated she "may have Indian ancestry" and handwrote "unknown tribe name from New Mexico" on her ICWA-020 form.

The agency contacted the maternal grandparents. Maternal grandfather reported "his family believed they were of [N]ative American descent, but that it was never proven." He said his "family was out of New York" so "it could be from that area." Maternal grandmother said her mother did not have Native American heritage, however, the children's maternal great-great grandmother was "part [N]ative American" and recalled she was born in New Mexico. In response, the social worker sent ICWA notices via certified mail to 21 Tribes in New Mexico, nine Tribes in New York, and the BIA. Following this notice, 24 Tribes responded and found the children were not eligible for tribal membership. The juris/dispo hearing was held more than 60 days after the agency received responses to the ICWA notice and the trial court held the ICWA did not apply. Jurisdiction was taken over the children and they were removed from their parents. Mother appealed.

On appeal, the agency argued the vague statements about possible Indian heritage from mother and maternal grandparents did not rise to the level of indicating the children are Indian children, and thus, did not trigger the formal notice provisions of ICWA and the appellate court agreed. As to whether further initial inquiry was required, the Court of Appeal found that based on representations by mother that she may have Indian heritage from a Tribe in New Mexico, the court correctly ordered the agency to make further inquiries into mother's claim - which was done. As to whether the further inquiry was completed, mother conceded in her reply brief that the agency "satisfied its duty of further inquiry when it identified 29 federally-recognized Tribes, which the social worker contacted by mail." However, mother argued formal notice was required but the appellate court found the agency's further investigation did not yield results that pushed their "reason to believe" the children are Indian children, to "reason to know" the children are Indian children. Based on this, the Court concluded the juvenile court's finding that the ICWA did not apply is supported by substantial evidence and affirmed. [C. Gabrielidis]

In re M.W. (2020) 49 Cal.App.5th 1034 (3d Dist.) [Sacramento]

Where the family's disclosures about possible Indian heritage did not provide a reason to know the child was an Indian child, and where the agency provided informal notice to several Tribes, the Court of Appeal found the requirements of a further inquiry were completed, formal notice was not triggered, and affirmed the trial court's ICWA findings and orders. Mother appealed from the termination of parental rights and contended the requirements of the ICWA were not fulfilled. A petition for newborn M.W. was filed in December 2018 alleging the child was described by section 300, subds. (b) and (j), and disclosed a prior dependency case involving M.W.'s three half-siblings. Mother reported the maternal grandfather had Native American heritage with the Apache Tribe and later confirmed her claim on an ICWA-020 form.

The child's first alleged father was excluded by DNA. A second father was identified and, after confirming a biological connection, was asked about Indian heritage. Father reported he had Indian ancestry but was neither a member of, nor seeking membership in, any tribe. He also stated his grandparents "may have membership." At his first appearance, father denied Indian heritage and denied knowing of another family member with additional information. On his ICWA-020 form, father claimed possible Indian heritage but did not name a specific Tribe. A paternal aunt was also present at the hearing and she indicated she believed the family had Native American heritage but could not name a specific Tribe. The trial court ordered the agency to conduct further ICWA inquiry of father's relatives. The agency's investigation involved interviewing father and paternal aunt and neither were able to name other family members with further information. In an additional interview with the paternal grandfather, he reported the paternal great-great-grandmother was part Navajo and the paternal great-great-great-grandfather was part Apache. Grandfather was unable to provide other relatives to question.

The agency relied on the half-siblings' case to provide maternal information in notices that were sent to the BIA and numerous Apache Tribes. The agency's declaration noted the previous findings by the juvenile court that the ICWA did not apply as to the minor's three half-siblings. Eventually, as a result of notice, all but one of the Tribes found the children were not Indian children.

At the continued paternity hearing, based on information provided by the father, the trial court held there is reason to believe M.W. may be an Indian child and the agency was ordered to make further inquiry regarding the possible Indian status. Paternal grandfather indicated he would gather further family information and provide it to the agency but that does not appear to have happened. The social worker located the designated tribal agents for Navajo, Apache, and Cherokee Tribes and contacted 12 identified Tribes, four of which confirmed the minor was not an Indian child for purposes of the ICWA but the remainder did not respond. By the time of the section 366.26 hearing and father's 388 petition, the agency indicated six additional Tribes found M.W. was not

an Indian child and two others had not responded. The trial court denied father's 388 petition asking for presumed father status, return of M.W. to his custody, or reunification services. The court terminated parental rights and father appealed.

Preliminarily, the appellate court found the newly revised California statute applied since father first appeared in March 2019. The court agreed the facts required a further inquiry based on disclosures of father, the paternal aunt, and paternal grandfather. Based on the agency's investigation, the Court of Appeal found there was sufficient evidence to support the juvenile court's finding that there was no reason to know the minor was an Indian child and no further ICWA noticing was required. Father also argued that the record did not contain the specific information provided to the Tribes but the appellate court held, section 224.2, subd. (e), does not require that any extensive or particular formal documentation of ICWA inquiry be provided to the juvenile court. Despite the lack of all the relevant information, the agency's ICWA report contained evidence sufficient to support the juvenile court's findings. The agency's report contained evidence of interviews of father and his extended family members, contact with the BIA and California Department of Social Services (CDSS) Office of Tribal Affairs to identify any federally-recognized Navajo, Apache, and Cherokee Tribes, contact with the identified Tribes and sharing of information via the minor's ICWA family tree.

The opinion contended father conflated the standards for "reason to believe" and a "reason to know" a child is an Indian child. The Court held the information provided by the paternal family did not rise to the level of "information indicating that the [minor] is an Indian child." As a result, there was no reason to know M.W. was an Indian child and no further noticing was required, and the juvenile court's determination that the ICWA did not apply was supported by substantial evidence and was affirmed. [P. Saucier]

In re Austin J. (2020) 47 Cal.App.5th 870 (2d Dist., Div. 1) [Los Angeles]

Where mother claimed possible Indian heritage, the appellate court found these claims did not create a "reason to know" these were Indian children requiring formal notice, and despite failing to ask one presumed father about Indian heritage, the Court of Appeal affirmed the trial court's orders. This case involved seven children, mother, two presumed fathers, and two prior dependency cases in North Carolina in 2017 and 2018. The children ranged in age from 10 to two years old. Mother moved to California in 2019 and the case began because of a referral for general neglect. Mother appealed from the juris/dispo hearing and made claims of error under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (Fam. Code, § 3400 et seq.) and the ICWA.

On her ICWA-020 form, mother claimed possible Cherokee heritage through the maternal great grandmother. At the detention hearing, mother said she was told the maternal grandmother had Cherokee heritage from the Little Rock, Arkansas area. In a later interview, mother repeated the claim of Cherokee heritage and added possible

Creole heritage. Mother did not know if she was registered with a Tribe. Mother named a maternal aunt as a source of further information. The maternal aunt confirmed possible Cherokee connections through the maternal great grandmother and that the maternal great grandfather may have Indian heritage but she could not identify a Tribe.

According to its own report, the agency was ordered to investigate mother's claims. One presumed father, Leslie, denied Indian heritage. The second presumed father, Edward, was not asked about Indian heritage and did not complete an ICWA-020 form. At the July 2019 juris/dispo hearing, the trial court found the allegations true, took jurisdiction over the seven children, and removed them from their parents.

As to the UCCJEA issue, mother argued the prior dependency cases in North Carolina gave that state exclusive continuing jurisdiction. The Court of Appeal held that California was the children's home state because the family had lived there for more than six months and the California juvenile court had subject matter jurisdiction.

As to the ICWA issues, the appellate court found the duties under the ICWA were not met for presumed father Edward (parent to the three younger children) but were fulfilled as to mother and the other presumed father, Leslie. Mother argued that the agency was required to provide notice to the Cherokee Tribe because the agency had a reason to know these children were Indian children. However, the appellate court found it could summarily reject four of the six statutory reason-to-know criteria. The two remaining criteria are when "[a] person having an interest in the child ... or a member of the child's extended family informs the court that the child is an Indian child," or when "[a]ny participant in the proceeding… informs the court that it has discovered information indicating that the child is an Indian child." Relying on the statutory language, the Court of Appeal held the mother's and the aunt's statements merely suggest the possibility that the children may have Cherokee ancestry but Indian ancestry is not among the statutory criteria for determining there is a reason to know a child is an Indian child. The statements, therefore, do not constitute information that these children could be "an Indian child" or information indicating that the child is an Indian child which required formal notice.

For support, the court distinguished *In re A.M.* (2020) 47 Cal.App.5th 303 and rejected reliance on *In re N.G.* (2018) 27 Cal.App.5th 474. The Court of Appeal affirmed the trial court's orders. The court noted father Edward was not asked about Indian heritage. Despite this, the trial court's orders were affirmed. As to father Leslie, he denied Indian heritage and this did not create a duty to make further inquiries into the paternal family. [N. Gold]

In re A.M. (2020) 47 Cal.App.5th 303 (4th Dist., Div. 2) [Riverside]

Mother was unsure about whether she had Indian heritage but made a claim of possible heritage on her ICWA-020 form and this lead to further inquiry by the agency and resulted in notice to the BIA, but where mother was not otherwise

registered as a member of any Indian Tribe and could not name other relatives, the Court of Appeal found the agency complied with its duties under the ICWA. Two children involved now aged 11 and 6 years old. The case began in December 2017 because mother allowed another person to sexually abuse the children, the oldest child could not remember the last time he went to school, the family was homeless, mother used drugs and had mental illness including depression, anxiety, and attention deficit disorder. The father for the older child, J.T., lived in Arizona and a family law case existed there. When contacted, J.T.'s father indicated the children had only been with mother for a few months and he requested custody.

Regarding the ICWA, mother was "unsure" about Indian heritage but denied she or the children were registered with a Tribe. However, on mother's ICWA-020 form, she indicated possible Indian heritage. Fathers J.T. and R.O. denied American Indian ancestry. At the detention hearing, both mother and father J.T. denied Indian ancestry. The agency provided notice through the ICWA-030 forms and provided some information about the parents and the maternal grandparents. Limited information was provided about either paternal family. This notice was sent only the BIA since no tribe was specified. Later the same month, mother claimed Indian heritage in the Cherokee and Blackfoot Tribes. Since mother claimed she was not registered with these Tribes but planned to start the process, no notices were sent to the Tribes.

At the six-month review hearing, the trial court found the ICWA did not apply and continued reunification services. Four months later, the children were placed with the paternal grandmother in Nevada after an Interstate Compact for Placement of Children (ICPC) was approved. At the 12-month review hearing held February 2019, the court confirmed the ICWA did not apply, terminated reunification services and set a section 366.26 hearing. At the combined section 388 and 366.26 hearing held in September 2019, the court terminated parental rights and mother appealed.

On appeal, mother argued the agency sent incomplete ICWA notice and the trial court's orders must be reversed. As a preliminary matter, the appellate court was required to determine which version of the California statue applied since the case began in 2017. The juvenile court also explicitly found the ICWA did not apply at the contested 12-month review hearing held in February 2019, and by then, the current ICWA statutes were in effect. The Court of Appeal agreed with the agency that the present statute is not being applied retroactively because the juvenile court has a continuing duty to determine whether the ICWA applies.

The appellate court found that, at most, mother's information showed she may have Indian heritage but it did not rise to the level of a “reason to know” these children are Indian children. The Court of Appeal was not persuaded that mother's statements, alone, were sufficient to trigger the ICWA notice provisions. However, the court found mother's statements were sufficient to trigger a further inquiry. Even so, in this case the agency could not have obtained further information. Both maternal grandparents were deceased

and mother did not provide information for other maternal relatives and no maternal relative appeared at any hearing or participated in this matter. The Court of Appeal affirmed the trial court's orders. [J. Dodd]

In re D.S. (2020) 46 Cal.App.5th 1041 (4th Dist., Div. 1) [San Diego]

Where the paternal aunt was asked about Indian heritage and she, in turn asked the paternal great-grandmother, but no other relatives were identified for additional ICWA information, and the social worker provided informal notice to a number of possible Tribes, the agency fulfilled the requirements for a further inquiry and the trial court's orders were affirmed. Mother appealed from the juris/dispo hearing and challenged compliance with the ICWA. The case began in July 2019 when D.S.'s paternal aunt was no longer able to care for him. Mother had her parental rights terminated after she was convicted of killing D.S.'s brother and D.S. was placed with his father. Father died suddenly in March 2018 and the paternal aunt took placement but she was no longer able to care for D.S. because of her health issues.

Mother denied Native American heritage, but the aunt claimed possible Indian ancestry based on father's lineage. The aunt spoke to D.S.'s great grandmother and she indicted D.S.'s great- great- great- great-grandmother was associated with the Sioux and Blackfeet Tribes. However, the aunt did not have any reason to believe D.S. is an Indian child. In its further investigation, the agency contacted, or attempted to contact, multiple Sioux and Blackfeet Tribes. One Tribe responded that D.S. was not a member; two Tribes agreed to check their records; one Tribe stated that "formal ICWA notice would be needed" to make a determination; and the agency made multiple attempts to communicate with eight other Tribes.

At the juris/dispo hearing, the trial court found the agency had used reasonable inquiry and there is no reason to believe or know that the ICWA applies. The court sustained the petition, ordered reunification services for the aunt but denied reunification services to mother. Mother appealed and argued the agency and the trial court failed to satisfy the inquiry requirements of the ICWA.

The parties agreed the aunt's statements provided a reason to believe D.S. may be an Indian child and triggered a duty of further inquiry. The court held that interviewing the great grandmother is not required since she is not identified in the statute as an extended family member. The agency's interview with the aunt was sufficient to meet the further inquiry requirements. The appellate court found that based on this record – including aunt's representations, after having spoken with her grandmother, that she had no "reason to believe [D.S.] is an Indian child," and had no "further information" to give the agency – there was substantial evidence supporting the trial court's conclusion that the agency complied with its further inquiry obligations. Further, the agency was required to contact the pertinent Tribes and, in doing so, was required to "shar[e] information identified by the tribe as necessary for the tribe to make a membership or eligibility

determination." This step was also done by the social worker. Finding the trial court's order was supported by substantial evidence, the appellate court affirmed. [J. Shargel]