CCAP ICWA Case Summaries June 2021-2022

Case Name: *In re A.C.* (2021) 65 Cal.App.5th 1060 , **District:** 4 DCA , **Division:** 2 ,
Case #: E075333
Opinion Date: 6/25/2021
Judges: Opinion by Ramirez, P.J., with Mckinster, J., concurring. Dissenting opinion by Menetrez, J
Case Holding:
The juvenile court erred by failing to ask Father whether he had Indian ancestry, but the error was harmless. The minor A.C. was removed from parents, who subsequently failed to reunify. Mother was an enrolled member of an Indian tribe. Father was never asked whether he had any Indian ancestry. When Mother's tribe declared A.C. was not eligible for membership, the juvenile court found that the Indian Child Welfare Act (ICWA) did not apply. Parental rights were terminated at the 366.26 hearing. Father appealed, and the appellate court affirmed the order. By failing to ask Father at his first appearance, or at any other time, whether he had Indian ancestry, the juvenile court failed in its affirmative and continuing duty to inquire whether a child who is the subject of a dependency petition is or may be an Indian child. However, a failure to comply with this duty of inquiry 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 that a parent asserting a failure to inquire must show that he or she would have claimed some kind of Indian ancestry. While a requirement that an appellant submit evidence outside the record is a substantial departure from normal appellate procedure, in a case in which a parent is claiming the child has Indian ancestry, but the social services agency failed to carry out its duty of inquiry, the court will make an exception to that general rule. Here, father had not ever claimed at any stage that he has any Indian ancestry. Thus, reversal is not required. [**Editor's Note:** Justice Menentrez dissented, relying on the holdings of *In re K.R.* (2018) 20 Cal.App.5th 701, 708 (appellate review of rulings that are preserved for review irrespective of action on the part of the parent should not fail simply because the parent is unable to produce an adequate record) and *In re N.G.* (2018) 27 Cal.App.5th 474, 484 (the burden of making an adequate record of the court's and the agency's ICWA inquiry efforts falls squarely and affirmatively on the court and the agency).]

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/E075333.PDF

Case Name: *In re Charles W.* (2021) 66 Cal.App.5th 483 , **District:** 4 DCA , **Division:** 1 , **Case #:** D078574
Opinion Date: 6/17/2021 (ordered published 7/9/2021)
Judges: Opinion by Huffman, J. with McConnell, P. J. and Irion, J. concurring.
Case Holding:
The juvenile court made an adequate Indian Child Welfare Act (ICWA) inquiry where ICWA had been found not to apply to full siblings in a previous dependency case and parents denied Indian ancestry. Minors Jr., and S.W. were detained in 2018 due to their parents' drug abuse. In January 2019, the court found that ICWA did not apply. Shortly after Mother reunified with the minors in July 2020, she gave birth to R.W., a full sibling to her older children. A few months later, all three minors were removed due to parents' drug abuse. Mother told the assigned social worker she had Yaqui and Aztec heritage but she had already gone through the court process and the court had found that ICWA did not apply. At a further hearing, Mother informed the court that she did not have any Native American ancestry. The court found that ICWA did not apply. The court assumed jurisdiction over the children and removed them from their parents, and Father appealed. The appellate court affirmed the orders. The Agency is required to make a further inquiry concerning Indian heritage only if an initial inquiry creates a reason to believe a child is an Indian child, There is reason to believe a child is an Indian child whenever the court or social worker has information suggesting that either the parent of the child or the child is a member or may be eligible for membership in an Indian tribe. Here, the juvenile court made an adequate inquiry under ICWA. If ICWA did not apply to the older two minors, then it would not apply to R.W. At a subsequent hearing, Mother also denied Indian heritage, as did Father, and thus, the court had no reason to believe the children were Indian children. The "Agency is not required to 'cast about' for information or pursue unproductive investigate leads." Even if the Agency's inquiry was inadequate, any error was harmless because Father does not assert on appeal that Mother or a relative has any new or pertinent information regarding Indian ancestry.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/D078574.PDF

Case Name: *In re Y.W. et al.* (2021) 70 Cal.App.5th 542 , **District:** 2 DCA , **Division:** 7 , **Case #:** B310566
Opinion Date: 10/19/2021
Judges: Opinion by Segal, J., with Perluss, P.J., and Feuer, J., concurring.

Case Holding:
A parent need not assert Indian ancestry to show that the Agency's failure to make an appropriate inquiry under the Indian Child Welfare Act (ICWA) was prejudicial. The minors were removed due to the parents' substance abuse. At the detention hearing, Father said he believed his grandmother was 95% Cherokee. Mother, who was adopted, said she did not have Indian ancestry. The Agency mailed ICWA-030 forms to the various Cherokee tribes. The notice listed Mother's biological parents as unknown, and specified some of Father's paternal grandmother's information, but neglected to include her date and place of birth. The Agency located Mother's adoptive parents who stated that they knew the name of Mother's biological father and had contact information for a maternal aunt. The Agency did not follow up to obtain further information about Mother's biological parents. At the section 366.26 hearing, the court found that ICWA notice was proper, that ICWA did not apply, and terminated parental rights. The appellate court affirmed the orders, but remanded the case with directions to comply with ICWA. If the court or Agency has reason to believe that an Indian child is involved in a proceeding, but does not have sufficient information to determine that there is a reason to know that the child is an Indian child, the court and the Agency shall make further inquiry regarding the possible Indian status of the child. (§ 224.2, subd. (e).) As part of its inquiry, section 224.2, subdivision (b) requires the Agency to ask extended family members whether the child is or may be an Indian child. Here, the Agency failed to satisfy its duty to inquire because once the social worker learned of a potentially viable lead to locate Mother's biological parents, it did not make meaningful efforts to locate and interview them. Further, the Agency omitted key information about Father's relative on the ICWA-030 forms. The appellate court disagreed with *In re Rebecca R.* (2006) 143 Cal.App.4th 1426 and *In re A.C.* (2021) 54 Cal.App.5th 1060, finding that "[i]t is unreasonable to require a parent to make an affirmative representation of Indian ancestry where the Department's failure to conduct an adequate inquiry deprived the parent of the very knowledge needed to make such a claim." A parent does not need to assert he or she has Indian ancestry to show the Agency's failure to make an appropriate inquiry under ICWA is prejudicial.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/B310566.PDF

Case Name: *In re Benjamin M.* (2021) 70 Cal.App.5th 735 **, District:** 4 DCA **, Division:** 2 **, Case #:** E077137
Opinion Date: 10/22/2021

Judges: Opinion by Raphael, J., with Slough, Acting P.J., and Menetrez, J., concurring.
Case Holding:
The Agency's failure to investigate readily obtainable information about whether the minor was an Indian child was prejudicial error. The minor was removed from Mother. Father's whereabouts remained unknown throughout the proceedings, though paternal relatives were in contact with the Agency. The Agency did not question paternal relatives about the minor's Indian ancestry. Mother denied Indian ancestry. The trial court found that the Indian Child Welfare Act (ICWA) did not apply. Parental rights were terminated at the 366.26 hearing. The appellate court conditionally reversed the orders and remanded to the juvenile court with directions to comply with ICWA. The Agency and the court have a duty to inquire whether a minor subject to the proceedings of the court may be an Indian child. Here, the parties agreed that the Agency and the juvenile court failed to comply with their duty of initial inquiry when they failed to inquire of Father's family members whether the minor had Indian ancestry on his paternal side. Thus, the sole issue on appeal was whether prejudice resulted from this failure. The appellate court declined to apply *In re A.C.* (2021) 54 Cal.App.5th 1060, noting that 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. Requiring a parent to prove that the missing information would have demonstrated a reason to believe that the Minor may be an Indian child would effectively impose a duty on that parent to search for evidence that the Legislature has imposed only on the Agency. "[I]n ICWA cases, a court must reverse where the record demonstrates that the agency has not only failed in its duty of initial inquiry, but where the record indicates that there was readily obtainable information that was likely to bear meaningfully upon whether the child is an Indian child."

Case Name: *In re Josiah T.* (2021) 71 Cal.App.5th 388 , **District:** 2 DCA , **Division:** 8 , **Case #:** B311213
Opinion Date: 11/8/2021
Judges: Opinion by Stratton, J. with Grimes, Acting P. J. and Wiley, J. concurring.
Case Holding:
Termination of parental rights was reversed where the Agency failed to fulfill its duties of initial and further inquiry under the Indian Child Welfare Act (ICWA), and relative later contradicted her initial statement regarding her Indian heritage. Josiah, the minor, was removed due to domestic violence, Father's alcohol abuse, and Mother's prior abuse of an older sibling. Father never participated in the dependency proceedings, but the Agency was in contact with paternal relatives throughout the case.

The Agency did not inquire about possible Indian heritage of paternal relatives for over one and a half years. Paternal grandmother then reported that she had Cherokee ancestry. The Agency did not follow up this report with any further investigation or inquiry, or disclose it to the court for almost a year. Paternal Grandmother later reported she did not have any Indian ancestry. The juvenile court found it had no reason to know Josiah was an Indian child. Mother failed to reunify and parental rights were terminated. Mother appealed the order, and the appellate court reversed. As part of its duty of initial inquiry, the Agency must ask extended family members if a child may be Indian. If this initial inquiry creates a reason to believe the child may be eligible for membership in an Indian tribe, the Agency must make further inquiry, including notifying the Bureau of Indian Affairs and any tribes reasonably expected to have information regarding the child's eligibility for membership. Here, the Agency did not meet its ICWA initial inquiry duties by failing to consult with paternal relatives for the initial 18 months of the case. Paternal grandmother's representation that she had Cherokee ancestry triggered the duty of further inquiry. Paternal grandmother's later report that she did not have Indian ancestry did not excuse the Agency's inactivity regarding her disclosure for seven months. "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." (*In re Gabriel G.* (2012) 206 Cal.App.4th 1160.)

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/B311213.PDF

Case Name: *In re H.V.* (2022) 75 Cal.App.5th 433 , **District:** 2 DCA , **Division:** 5 , **Case #:** B312153
Opinion Date: 2/18/2022
Judges: Opinion by Kim, J., with Moor, J., concurring. Dissenting opinion by Baker, Acting P.J.
Case Holding:
Mother did not have an affirmative duty to make a factual assertion of Indian ancestry in order to argue that ICWA notice was insufficient. In a dependency proceeding, the social worker inquired of Mother about the child's Indian ancestry. Mother did not give the social worker reason to believe the child might be an Indian child. Although the social worker also interviewed two other relatives, the record does not show the social worker asked the relatives about Indian ancestry. The juvenile court found that Mother had no Indian ancestry. The court inquired of Mother whether Father

had Indian ancestry, and Mother answered that he did not. The court also found that Father had no Indian ancestry. On appeal, Mother contended that the Department's first-step inquiry under ICWA was broader than just asking Mother, and it was required to interview extended family members and others who had an interest in the child. The Department did not contend it had discharged its first-step inquiry duty, effectively conceding that it had not. Instead, the Department argued that Mother had not made an "affirmative representation of Indian ancestry on appeal." The appellate court reversed the orders. Mother did not have an affirmative duty to make a factual assertion on appeal that she cannot support with citations to the record. Instead, on this record, which demonstrates that the Department failed to discharge its first-step inquiry duty, Mother's claim of ICWA error was prejudicial and reversible. Remand was required for the Department to comply with ICWA.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/B312153.PDF

Case Name: *In re S.S.* (2022) 75 Cal.App.5th 575 , **District:** 2 DCA , **Division:** 1 , **Case #:** B314043
Opinion Date: 2/24/2022
Judges: Opinion by Rothschild, P.J., with Chaney and Bendix, JJ., concurring.
Case Holding:
Failure to inquire of maternal grandmother regarding the minor's Indian ancestry did not require reversal where Mother did not show that the failure was prejudicial. At the beginning of the dependency case regarding S.S., Mother told the social worker that she had no Native American ancestry. DCFS filed a dependency petition which included a statement that the social worker had made an "Indian child inquiry," and that S.S. had no known Indian ancestry. Mother did not appear at the detention hearing, and the court deferred the determination of ICWA status. S.S. was placed in foster care, and Mother did not want to provide the father's information. At Mother's only court appearance, she again denied any Indian ancestry. A petition was sustained, and S.S. was ordered to remain with her caregiver, who later became the prospective adoptive parent. Maternal grandmother was visiting inconsistently. Her request for placement of S.S. was denied. Mother did not appear at the 366.26 hearing, and her parental rights were terminated. On appeal, Mother contended that DCFS failed to satisfy its duty to inquire whether S.S. is or may be an Indian child within the meaning of ICWA. DCFS argued Mother had failed to demonstrate that any such failure was prejudicial. The appellate court agreed with DCFS and affirmed. The maternal

grandmother initiated contact with DCFS and had contact with the social workers, and visited with S.S. Yet there was no record of any ICWA-related inquiry to her. But even if DCFS failed to fulfill its duty of inquiry with respect to the maternal grandmother, Mother failed to show that the failure is prejudicial under the *Benjamin M.* standard. Grandmother sought to have S.S. placed with her and expressed her desire to adopt S.S. Therefore, if S.S. were an Indian child, that fact would have supported Grandmother's efforts and she would have had strong incentive to bring to the court's attention any facts regarding S.S.'s Indian ancestry. Her failure to do so implies that the maternal grandmother was unaware of such facts. Therefore, the social worker's failure to make that inquiry is harmless.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/B314043.PDF

Case Name: *In re Darian R.* (2022) 75 Cal.App.5th 502, **District:** 2 DCA , **Division:** 1 ,
Case #: B314783
Opinion Date: 2/24/2022
Judges: Opinion by Bendix, J., with Rothschild, P.J., and Chaney, J., concurring.
Case Holding:
Where further inquiry would likely not have elicited any additional information regarding minors' Indian ancestry, Mother failed to show that the Department's failure to inquire further was prejudicial error. Mother appealed from an order terminating her parental rights to three children who all have the same father. On appeal, she argued that DCFS failed to interview her extended family members about their Indian ancestry. DCFS agreed it was error, but contended the error was not prejudicial. The appellate court agreed with DCFS, and affirmed the orders. There was a prior juvenile court finding that two of the minors were not Indian children. The juvenile court asked Mother, Father, and a paternal aunt about Indian ancestry and all of them denied having any. Mother was living with extended family members she could have asked about Indian ancestry. The record does not support Mother's argument that readily obtainable information would have shed light on the children's Indian ancestry. Under these circumstances it was unlikely that any further inquiry of family members would have yielded more information, Therefore, DCFS's failure to ask extended family members about Indian ancestry was not prejudicial.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/B314783.PDF

Case Name: *In re A.C.* (2022) 75 Cal.App.5th 1009 , **District:** 2 DCA , **Division:** 1 , **Case #:** B312391
Opinion Date: 3/4/2022
Judges: Opinion by Bendix, J., with Rothschild, P.J., concurring. Crandall, J., Concurring and Dissenting.
Case Holding:
Where DCFS made no inquiry of readily available relatives regarding the minor's possible Indian heritage, remand was required. During the proceedings in this dependency case, Mother stated on her ICWA form that she had no Indian ancestry. The minors were placed with Mother's extended family. The record did not show that DCFS interviewed Mother's family about the minor's potential heritage. After Father, who lived with his mother and brother, also stated on the ICWA form that he had no known Indian ancestry, the juvenile court found that ICWA did not apply. Father's relatives were also not interviewed regarding potential Indian heritage. On appeal, Father argued that DCFS's failure to make an initial inquiry as to extended family members was prejudicial. The appellate court agreed and remanded for compliance with ICWA notice procedures. Relatives on both sides were readily available to consult regarding Indian ancestry. The juvenile court merely relied on Mother's and Father's ICWA forms to conclude that the minor was not an Indian child. The ICWA forms themselves state that the form is not intended to constitute a complete inquiry into Indian heritage. Mother had grown up in foster care and may not have known her cultural heritage. The same may not have been true of her relatives. It cannot be concluded from this record that DCS's failure to conduct any inquiry as to Mother and Father's extended family members was not prejudicial. (A lengthy dissent concluded that absent an affirmative representation of "a reason to believe" that the child was an Indian child, the court's error was harmless and remand was unwarranted.)

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/B312391.PDF

Case Name: *In re Antonio R.* (2022) 76 Cal.App.5th 421 , **District:** 2 DCA , **Division:** 7 , **Case #:** B314389
Opinion Date: 3/16/2022 (modified 3/17/2022, 3/29/2022)
Judges: Opinion by Feuer, J., with Perluss, P.J., and Segal, J., concurring.
Case Holding:
Remand was required for the Department to fulfill its duty to inquire of maternal

relatives regarding the minor's Indian ancestry, where maternal relatives were present in the courtroom and it is unknown what information they could have provided. During the dependency proceedings involving four-year-old Antonio, the minor's mother, father, and paternal great-grandmother denied Indian ancestry. The Department did not inquire of maternal grandmother and maternal grandfather, who were designated the prospective adoptive parents, or of other extended maternal relatives who were present in the courtroom at the disposition hearing, whether Antonio is or may be an Indian child. The juvenile court found that ICWA did not apply. On appeal, Mother argued that section 224.2, subdivision (b), required the Department to inquire of the maternal extended family members, and the juvenile court erred when it found that ICWA did not apply absent sufficient inquiry. The appellate court agreed with Mother, and remanded the case to the juvenile court for the Department to comply with the inquiry provisions of ICWA. In most circumstances, the information in the possession of extended relatives is likely to be meaningful in determining whether the child is an Indian child, regardless of whether their information ultimately shows the child is an Indian child or not. Here, the error was prejudicial because it is unknown what kind of information the maternal relatives would have provided had the Department inquired. The appellate court rejected the line of cases which require that in order to demonstrate prejudice, a parent asserting failure to inquire must have a claim of Indian ancestry. It also disagreed with the reasoning of cases which found no prejudice where, despite the Agency's failure to inquire, readily obtainable information was likely to bear meaningfully upon whether the child is an Indian child. (*In re Darian R.*, *In re S.S.*) All the Department had to do here was inquire of the maternal relatives, who were identified by Mother and later present in the courtroom, whether Antonio is or may be an Indian child. The "burden" on the Department to satisfy its responsibilities cannot justify the potential to break up Indian families.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/B314389N.PDF

Case Name: *In re K.T.* (2022) 76 Cal.App.5th 732 , **District:** 4 DCA , **Division:** 2 , **Case #:** E077791
Opinion Date: 3/23/2022
Judges: Opinion by Slough, Acting P.J., with Raphael and Menetrez, JJ., concurring.
Case Holding:
Parental rights termination was reversed and remanded for further ICWA proceedings where the Agency failed to pursue leads regarding the minors' potential

Indian heritage which were available from early in the proceedings. Early in the dependency case, the minors' mother and K.T.'s father reported Cherokee, Choctaw, and Blackfeet ancestry, and gave the Agency contact information for family members who might be able to provide more detail. The Agency never followed up, and the juvenile court found that ICWA did not apply without ensuring the Agency had pursued these leads. About two years into the proceedings, the court terminated parental rights. On appeal, the parents argued that despite having reason to believe the minors were Indian children, the Agency failed to conduct adequate further inquiry to determine whether ICWA applied. The Agency conceded the error, and the appellate court reversed the orders and remanded for further proceedings. The court noted that it published the opinion because these errors are too common and serve only to add unnecessary uncertainty and delay into proceedings that are already difficult for the children, family members, and caretakers involved.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/E077791.PDF

Case Name: *In re J.C.* (2022) 77 Cal.App.5th 70 , **District:** 2 DCA , **Division:** 7 , **Case #:** B312685
Opinion Date: 4/4/2022
Judges: Opinion by Segal, J., with Perluss, P.J., and Feuer, J., concurring.
Case Holding:
Where the Department interviewed multiple family members, but did not ask about the minor's possible Indian ancestry, remand was required for a full ICWA inquiry. At the start of the dependency proceedings, both parents completed Form ICWA-20 , indicating that neither had any known Indian ancestry. In Mother's initial interview with the social worker, she denied Indian ancestry. At the detention hearing, the juvenile court confirmed that both parents had claimed no Indian ancestry, and made a finding that ICWA did not apply. The record did not show that either the Department or the court made any inquiry beyond asking the parents about the minor's Indian ancestry. In order to investigate the allegations in the petition, the social worker interviewed Father's mother and both grandmothers several times, but did not ask about Indian ancestry. The social worker also interviewed the minor's paternal great-grandmother and Mother's stepfather, but did not ask either of them about the minor's Indian ancestry. In an appeal from the termination of parental rights, the parents contended that the Department did not conduct an adequate inquiry into the family's possible Indian ancestry, and that the juvenile court failed to ensure the Department fulfilled its duty under ICWA. The

appellate court agreed, and remanded to ensure the Department fully complies with a complete ICWA inquiry, and if necessary, the notice provisions of ICWA. Neither the Department nor the juvenile court satisfied its duty to ensure an adequate investigation as to whether the minor was an Indian child. The record does not show that after the detention hearing, the court gave ICWA another thought throughout the three years of this dependency case. Respondent did not deny the lack of inquiry, but argued it was harmless because the parents both denied Indian ancestry. But that "is not how it works." Where the Department's failure to conduct an adequate inquiry makes it impossible for the parent to show prejudice, remand is required. Without benefit of a proper inquiry, parents can neither assert they have Indian ancestry, nor show their initial responses on the form were inaccurate or unreliable.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/B312685.PDF

Case Name: *In re I.F.* (2022) 77 Cal.App.5th 152 , **District:** 6 DCA , **Case #:** H049207
Opinion Date: 4/6/2022
Judges: Opinion by Grover, J. with Greenwood, P. J. and Elia, J concurring.
Case Holding:
Where the Department failed to comply with the statutory duty to further investigate whether the minors were Indian children, the juvenile court's negative ICWA findings were based on insufficient evidence, and reversal and remand was required. During a dependency proceeding involving the minor I.F., the social worker spoke with the maternal grandparents and inquired about I.F.'s possible Indian ancestry. Grandfather reported that his father may have had Native American ancestry and was from Minnesota. The social worker noted on the initial report that there was reason to believe I.F. was or may be an Indian child. Mother also told the court at the initial hearing that she "may" have Indian ancestry on her father's side. The court found that ICWA "may apply." I.F. was returned to his mother's care in January 2020. The following month the social worker recommended that I.F. should continue in Mother's care, and that the court should find ICWA did not apply. In March 2020, the court sustained the petition and ordered that the minor remain with Mother with family maintenance services. No ICWA finding was made at that time. In May 2020, a petition was filed on behalf of newborn B.F. due to Mother's inability to care for her. Again, Mother reported possible Indian ancestry, and the social worker's report for B.F. noted that earlier, in December 2019, a social worker had noted there was possible Indian ancestry through the maternal grandfather, and further inquiry was required. The petition

was dismissed with the understanding that Mother would remain in family maintenance services previously ordered. No ICWA finding was made.

Both minors were again detained in April 2021, and the Department filed new petitions. The initial new hearing report indicated "no reason to believe" that B.F. was an Indian child. The report did not document the previous information obtained from the maternal grandfather, and incorrectly reported that the court previously determined ICWA did not apply. At the hearing on the new petitions, Mother was asked about Indian ancestry, and reported that she understood from her paternal grandmother that she had Native American ancestry, but did not have any more information. The juvenile court stated that more investigation was in order, but there was not enough information to make an ICWA finding at that time. In May, 2021, the minors' social worker contacted the maternal grandfather, who said his father was from Minnesota and had Native American ancestry. Grandfather did not know the tribe, and did not know if the minors were eligible for enrollment. The Department recommended that the court find ICWA did not apply. The court sustained the petition, placed the minors in foster care, and made a finding that ICWA did not apply.

On appeal, Mother challenged the finding in the June 2021 orders that ICWA did not apply. She argued that the information she and her father provided to the Department provided a "reason to believe" I.F. and B.F. were Indian children, thereby triggering the duty of further inquiry which the Department failed to undertake. She contended that the ICWA finding was therefore based on insufficient information. The appellate court agreed and remanded. As a matter of law, Mother's statements that she had been told by her paternal grandmother that she had Native American ancestry through her paternal grandfather, coupled with the maternal grandfather's statements that his father told him the family had Native American ancestry in Minnesota, established a reason to believe the minors were Indian children and thus triggered the duty of further inquiry. The Department argued there was no reason to believe that the children were Indian children because there was no evidence that anyone in the family had ever been enrolled in a tribe, lived on a reservation, had services from an Indian health clinic, or been involved with a tribal court. Although those circumstances may provide a "reason to know" a child is an Indian child, they do not inform the threshold determination of whether there is a "reason to believe" the children are Indian children.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/H049207.PDF

Case Name: *In re A.R.* (2022) 77 Cal.App.5th 197 , **District:** 4 DCA , **Division:** 3 , **Case #:** G060677
Opinion Date: 3/29/2022 (published 4/7/2022)
Judges: Opinion by Goethals, J., with Bedsworth, Acting P.J., and Marks, J., concurring.
Case Holding:
Reversal and remand was required where neither the Department nor the court made any inquiry into the minors' possible Native American heritage. The minors became the subject of a dependency proceeding when their mother killed their father and was incarcerated for murder. The minors were placed with their paternal grandparents, and parental rights were terminated. At no point during the proceedings did either the Department or the court conduct any inquiry into whether the children had Native American heritage. On appeal, county counsel conceded that the Department failed to comply with ICWA, but contended the judgment should be affirmed because Mother failed to make any showing that her children may have Native American ancestry, and thus the error was harmless. The appellate court disagreed, and reversed and remanded. The law requires that an ICWA inquiry be conducted in every case. The tribes have a compelling legally protected interest in the inquiry itself. The failure to conduct the inquiry therefore constitutes a miscarriage of justice. The failure to conduct any inquiry at all leaves a case vulnerable to collateral attack in the event Native American heritage is later discovered. A conditional reversal was therefore required with instructions that the Department conduct the inquiry immediately, and the trial court resolve the issue as soon as possible.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/G060677.PDF

Case Name: *In re M.E.* (2022) 79 Cal.App.5th 73 , **District:** 3 DCA , **Case #:** C094587
Opinion Date: 5/25/2022
Judges: Opinion by Earl, J. with Blease, Acting P. J. and Robie, J. concurring.
Case Holding:
The Agency failed to conduct an adequate further inquiry, as required by the Indian Child Welfare Act (ICWA), when it neglected to interview relatives. At the hearing following the minors' detention, Mother claimed Native American ancestry and provided the names of relatives who could provide more information. Father also reported Native American ancestry. The court found a reason to believe the children might be Indian children and ordered the Agency to further investigate. The parents had a

previous dependency case from 2017 in a different county where ICWA had been found not to apply. At the jurisdiction and disposition hearing, this information was shared with the juvenile court, who then found that ICWA did not apply. Mother appealed following the termination of her parental rights at the selection and implementation hearing. The appellate court remanded the case to ensure compliance with ICWA. Here, Mother identified relatives who might have relevant ICWA information, yet the record does not demonstrate that the Agency attempted to contact any of these relatives. The Agency contacted a paternal aunt regarding placement, but there was no evidence that it inquired about possible Native American ancestry. The reports from the 2017 case were insufficient for the juvenile court to make a finding that the Agency had met its ICWA inquiry obligations. The reviewing court declined to follow the narrow reading of ICWA in *In re Austin J.* (2020) 47 Cal.App.5th 970, that the mere possibility of Indian ancestry is insufficient to trigger further inquiry and found the analysis in *In re T.G.* (2020) 58 Cal.App.5th 275, more persuasive. Further, the holding in *Austin J.* is inconsistent with section 224.2, subdivision (b), which requires the Agency to ask, as part of its initial duty of inquiry, extended family members whether the child is or may be an Indian child. There was no information that the relatives provided by Mother were interviewed by the Agency in the present case or in relation to the case in 2017. Therefore, there was not substantial evidence to support the juvenile court's ICWA finding and it cannot be said that the error is harmless.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/C094587.PDF

Case Name: *In re Allison B.* (2022) 79 Cal.App.5th 214 , **District:** 2 DCA , **Division:** 1 ,
Case #: B315698
Opinion Date: 5/27/2022
Judges: Opinion by Rothschild, P. J. with Chaney, J. and Bendix, J. concurring.
Case Holding:
Post appeal evidence submitted by the Agency regarding Indian Child Welfare Act (ICWA) inquiries rendered the appeal moot. At the outset of the dependency proceedings, parents said they did not have any Indian ancestry. In an appeal from the termination of her parental rights, Mother argued that the Agency failed to conduct an adequate ICWA inquiry because it did not interview the many extended family members with which it had or could have had contact. After the opening brief was filed, Respondent filed a motion to dismiss the appeal based on mootness. Respondent attached evidence which had been filed with the trial court showing that the maternal and

paternal grandparents had been interviewed and claimed no Indian ancestry. The appellate court dismissed the appeal. Code of Civil Procedure section 909 allows the reviewing court to take additional evidence for the purpose of making factual determinations. While this authority should generally be used sparingly, postjudgment evidence in support of motions to dismiss juvenile dependency appeals is routinely considered because it expedites the proceedings and promotes finality. The postjudgment evidence presented here showed that the Agency carried out the required ICWA inquiry, which renders any prior failure harmless. Therefore, the appeal was moot, and was dismissed.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/B315698.PDF

Case Name: *In re Dezi C.* (2022) 79 Cal.App.5th 769 , **District:** 2 DCA , **Division:** 2 , **Case #:** B317935
Opinion Date: 6/14/2022 (modified 6/28/2022)
Judges: Opinion by Hoffstadt, J., with Ashmann-Gerst, Acting P.J., and Chavez, J., concurring.
Petition for review granted 9/21/2022 (S275578).
Case Holding:
The Agency's failure to conduct an initial inquiry, as required by the Indian Child Welfare Act (ICWA), is harmless unless the record contains information suggesting a reason to believe that the children may be Indian children. The minors were removed from the parents due to drug use and domestic violence. The parents said they did not have any Indian ancestry. While investigating the allegations in the case, the Agency spoke with numerous extended family members, but did not inquire of any of them about Indian heritage. The appellate court affirmed the termination of parental rights. It is undisputed that the Agency's initial inquiry was deficient. However, the error was harmless. The Second District noted that there were currently three rules for assessing whether a defective initial inquiry is harmless, which exist along a continuum: (1) the automatic reversal rule; (2) the presumptive affirmance rule; and (3) the readily obtainable information rule. After rejecting each of the current rules, the Second District put forth a fourth rule, the "reason to believe rule." The failure to inquire is harmless unless the record contains information suggesting a reason to believe that the child may be an Indian child, 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.

In the present case, the record does not provide a reason to believe that minors are Indian children. Both parents grew up with their biological family members and attested that they had no Indian ancestry. Neither parent proffered additional information regarding ICWA on appeal. Thus, no remand is warranted.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/revpub/B317935M.PDF

Case Name: *In re Q.M.* (2022) 79 Cal.App.5th 1068 , **District:** 2 DCA , **Division:** 3 ,
Case #: B313171
Opinion Date: 5/18/2022 (ordered published 6/16/2022)
Judges: Opinion by Edmon, P. J. with Lavin, J. and Egerton, J. concurring.
Case Holding:
The Agency has no duty to inquire, as required by the Indian Child Welfare Act (ICWA), when no viable contact information for extended relatives was provided.
The minors were removed from the parents due to neglect and mental health concerns. Mother said she did not have any Indian ancestry and Father said he may have Cherokee ancestry. Following the appeal of the jurisdiction hearing, the parties stipulated to limited remand for further ICWA investigation. Father denied any Indian ancestry. The parents did not submit ICWA-020 forms when requested or provide contact information for extended family members. The trial court found that ICWA did not apply. The appellate court affirmed the termination of Mother's parental rights. Because members of the parents' extended families never appeared at a hearing, the Agency could have obtained their names and contact information only through the parents, who were either unwilling or unable to provide that information. The record does not identify any living extended family members and on appeal, Mother did not identify any specific individual whom the Agency should have interviewed. While it is reasonable to require the Agency to follow up on leads provided by parents, it is unreasonable to ask the Agency to intuit the names of unidentified family members or to interview individuals for whom no contact information has been provided. Father's initial statement that he might have Cherokee ancestry did not provide a reason to believe the children were Indian children because he later disavowed this statement. Substantial evidence supported the juvenile court's finding that ICWA did not apply.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/B313171.PDF

Case Name: *In re M.B.* (2022) 80 Cal.App.5th 617 , **District:** 2 DCA , **Division:** 7 ,
Case #: B312789
Opinion Date: 6/13/2022 (modified and published 6/29/2022)
Judges: Opinion by Perluss, P. J with Segal, J. and Feuer, J. concurring.
Case Holding:
Postjudgment evidence submitted by the Agency did not moot Mother's appeal claiming that the duty of further inquiry, as required by the Indian Child Welfare Act (ICWA), had not been complied with. The minor M.B. was removed from Mother due to substance abuse. Mother indicated that the she believed M.B. had Indian ancestry, of an unknown tribe, on the paternal side and that M.B.'s maternal great grandfather (MGGF) had Blackfoot ancestry. Mother did not know MGGF's date of birth but provided names and dates of birth of various maternal relatives. Mother appealed the termination of her parental rights and asserted that the Agency had failed to seek critical information regarding the minor's ancestry from accessible maternal relatives. Following the filing of the appeal, the Agency submitted postjudgment evidence of its performance of additional inquiry. The appellate court reversed the judgment for full compliance with ICWA. While reviewing courts are free to take judicial notice of the existence of a document in a court file, they may not take judicial notice of the truth of hearsay statements in those documents. Thus, while the reviewing court granted judicial notice of the existence of the postjudgment information submitted by the Agency, the substance of the postjudgment interviews conducted by the Agency and its description of unsuccessful efforts to reach other maternal family members are not properly before the reviewing court. Additionally, Welfare and Institutions Code section 366.26, subdivision (i)(1) expressly deprives the juvenile court of jurisdiction to modify or revoke an order terminating parental rights once it is final to that court. Thus, the Agency cannot remedy a defective ICWA investigation by conducting further interviews while the termination order is being reviewed on appeal. The most expeditious and efficient way to solve a potential problem with the Agency's fulfillment of its ICWA duty of further inquiry is for the parties to stipulate to a limited reversal and an expedited remittitur. Here, the Agency failed to conduct an adequate inquiry into M.B.'s Indian ancestry by failing to question readily available maternal relatives regarding ICWA. Further, the juvenile court failed to ensure the Agency adequately investigated M.B.'s Indian ancestry by passively accepting the Agency's reports without questioning the nature or extent of the Agency's inquiries.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/B312789.PDF

Case Name: *In re E.V.* (2022) 80 Cal.App.5th 691 , **District:** 4 DCA, **Division:** 3 , **Case #:** G061025
Opinion Date: 6/30/2022
Judges: Opinion by O'Leary, P.J., with Bedsworth and Moore, JJ., concurring.
Case Holding:
A clear rule of reversal is the appropriate approach for a failure to comply with the Indian Child Welfare Act (ICWA) in order to protect the interest of Native American tribes in maintaining cultural connections with Native children. The minor was detained from Mother due to substance abuse. Both parents denied Indian ancestry at detention. The social worker report included investigation of possible placement with relatives, but did not mention any ICWA inquiry with family members. Later, Father told the social worker regarding ICWA "I'm not too sure, so I can't really answer that." Father appealed the termination of his parental rights. The appellate court reversed the orders. The interests protected by ICWA include the broad interest of Native American tribes in maintaining cultural connections with children of Native American ancestry. The tribes have a compelling, legally protected interest in the ICWA inquiry itself. Adopting a rule requiring reversal in all cases where ICWA requirements have been ignored is consistent with the recognition that parents are effectively acting as surrogates for the interests of Native American tribes when raising this issue on appeal. Here, County Counsel conceded that several ICWA inquiry rules were not followed. Additionally, the court failed to obtain ICWA-020 forms and did not ask parents about their heritage on the record as required by California Rules of Court, rule 5.481 and Welfare and Institutions Code section 244.2, subdivision (c). The court cannot delegate its duty to a social worker, and thus, this error cannot be remedied by evidence that the social worker performed their duty under section 244.2, subdivision (a).

The Court of Appeal is not the appropriate venue for determining if the Agency's postjudgment ICWA investigation was adequate. County counsel moved the court to receive additional postjudgment evidence to demonstrate that ICWA did not apply or that any error was harmless. The appellate court here denied the request. Whether the Agency complied with its inquiry duty under ICWA should be considered by the juvenile court in the first instance. The Agency's remedial efforts do not supplant the juvenile court's own ICWA obligations. Having eliminated the possibility of a harmless error ruling, the Agency can start fulfilling its statutory obligations as soon as it has notice of error and can likely complete its ICWA obligation before briefing on appeal is complete, resulting in very little delay when the matter is remanded to the juvenile court.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/G061025.PDF

Case Name: *In re M.M.* (2022) 81 Cal.App.5th 61 , **District:** 2 DCA, **Division:** 8 , **Case #:** B315997
Opinion Date: 7/12/2022
Judges: Opinion by Grimes, Acting P.J., with Harutunian, J., concurring.
Dissenting opinion by Wiley, J.
Petition for review granted 10/12/2022 (S276099).
Case Holding:
The Agency's failure to inquire of extended relatives, as required by the Indian Child Welfare Act (ICWA), was error, but any error was harmless. Both parents denied they had Indian ancestry. There was no evidence in the record that the Agency ever asked paternal aunt or maternal grandmother, with whom the Agency was in contact, about their Indian heritage. In the absence of any evidence that the Agency complied with its section 224.2, subdivision (b) duty to inquire of extended family members, the juvenile court's finding that ICWA does not apply is error. However, the error here was harmless. The Second District declined to follow the "error per se" line of cases and found that, under any of the other tests, the error would be found harmless because there was nothing in the record indicating that the parents might have been unaware of having Indian ancestry. **[Editor's Note:** Justice Wiley dissented, arguing that he would find prejudice because the purpose of ICWA is to protect the tribal interest and it is not enough to ask only the parents about Indian heritage.]

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/revpub/B315997.PDF

Case Name: *In re J.W.* (2022) 81 Cal.App.5th 384 , **District:** 2 DCA , **Division:** 8 , **Case #:** B313447
Opinion Date: 7/19/2022
Judges: Opinion by Stratton, P.J., with Harutunian, J., concurring. Dissenting opinion by Wiley, J.
Case Holding:
The Agency's failure to inquire of extended relatives, as required by the Indian Child Welfare Act (ICWA), was harmless error because the minor was placed with a relative. The minor was removed from Mother when Mother allowed a registered sex offender to live in the family home with unlimited access to the minor. Both parents

denied Indian ancestry. The minor was placed with maternal aunt and uncle and then ultimately with maternal grandmother, who wanted to adopt the minor. The Agency did not inquire of these maternal relatives about their Indian heritage. After 18 months, 4 Mother's reunification services were terminated and her parental rights were subsequently terminated. On appeal, Mother argued that Welfare and Institutions Code section 224.2, subdivision (b), required the Agency to inquire of the maternal extended family members. The appellate court agreed with Mother that the Agency erred, but found the error was harmless. The minor was placed for adoption with maternal grandmother and there was nothing in the record to suggest the minor had Indian heritage. The purpose of the ICWA, to prevent the removal of Indian children from their families, is not implicated because the minor's prospective adoptive parent was her maternal grandmother, who would have been the placement preference under the ICWA. The court followed the harmless error analysis put forth by *In re Dezi C.* (2022) 79 Cal.App.5th 769, which directs that, where the parents were raised by their own biological relatives and where the record suggests no reason to believe that the parents' knowledge of their own heritage is incorrect or that the children may have Indian heritage, no prejudice arises from the Agency's failure to conduct a complete inquiry. There is nothing in the record to suggest Mother's denial of Indian heritage was ill informed. **[Editor's Note**: Justice Wiley dissented, noting that "Tribes are the victims here" and pointing out that "if the maternal grandmother has information about Indian ancestry, the tribal interest cannot turn on whether this grandmother has an active interest in making tribal contact." Justice Wiley would find prejudice because the purpose of the ICWA is to protect the tribal interest and it is not enough to ask only the parents about Indian heritage.]

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/B313447.PDF

Case Name: *In re Rylei S.* (2022) 81 Cal.App.5th 309 , **District:** 2 DCA, **Division:** 7 ,
Case #: B316877
Opinion Date: 7/18/2022
Judges: Opinion by Perluss, P.J., with Segal and Feuer, JJ., concurring.
Case Holding:
The Agency's failure to inquire of extended relatives, as required by the Indian Child Welfare Act (ICWA), was error requiring remand to ensure compliance with the duty of further inquiry. The minor was removed from parents due to Mother's history of violent behavior and Father's history of substance abuse. Mother reported that

her father had Cherokee ancestry and that maternal grandmother (MGM) may have more information. The minor was placed with MGM, who was unaware of any Indian heritage. The Agency did not make any additional attempts to interview maternal grandfather or any other maternal relatives. Mother appealed the dispositional orders, arguing that the 5 Agency failed to comply with Welfare and Institutions Code section 224.2, subdivision (e), when it failed to make an adequate further inquiry of Mother's claim of Cherokee ancestry. The appellate court agreed with Mother that the Agency erred and remand was necessary to ensure compliance with ICWA. Mother's reporting of possible Indian ancestry created a reason to believe an Indian child may be involved, and thus the Agency was obligated under section 224.2, subdivision (e), to make further inquiry. The duty of further inquiry required interviewing extended family members, contacting the Bureau of Indian Affairs, and contacting any tribes or persons that may reasonably be expected to have information regarding the child's potential membership. There is no indication the Agency attempted to have informal contact with the Cherokee tribe, as required by section 224.2, subdivision (e)(2)(C). Further, the juvenile court erred in failing to ensure the Agency had satisfied its duties of inquiry before finding ICWA did not apply. The appellate court followed its own precedent from *In re Y.W.* (2021) 70 Cal.App.5th 542, holding that when the Agency fails to conduct an adequate inquiry, remand is necessary. It objected to the holding being mischaracterized as requiring "automatic reversal" and asserted rather that the harmless error analysis parallels that adopted by the Supreme Court in *In re Manzy W.* (1997) 14 Cal.4th 1199, which held that, when a duty is mandatory, remand depends on whether the record otherwise reflects the exercise of discretion. The failure to fully comply with a mandatory duty may be harmless error so long as the record affirmatively reflects that the protections intended to be afforded through the exercise of that duty has been provided. Here, there was no genuine effort to investigate and thus, remand is necessary to make a meaningful and thorough inquiry regarding the minor's possible Indian ancestry.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/B316877.PDF

Case Name: *In re G.A.* (2022) 81 Cal.App.5th 355 , **District:** 3 DCA , **Case #:** C094857
Opinion Date: 7/1/2022 (order published 7/19/2022)
Judges: Opinion by Duarte, J., with Hull, Acting P.J., and Renner, J., concurring.
Petition for review granted 10/12/2022 (S276056).
Case Holding:

The juvenile court erred when it failed to make Indian Child Welfare Act (ICWA) findings, but the error was harmless because the record contained no information suggesting the minor may have Indian ancestry. The minor was removed from the parents as a newborn. Both parents denied Native American ancestry. Mother appealed following the termination of her parental rights, contending that the Agency failed to make an adequate inquiry of extended family members and that the juvenile court failed 6 to make ICWA findings. The appellate court concluded any error was harmless, but remanded for the juvenile court to enter its ICWA findings. The juvenile court must make findings as to the applicability of ICWA and its failure to do so was error. An ICWA violation may be held harmless when, even if notice had been given, the child would not have been found to be an Indian child and the substantive provisions of the ICWA would not have applied. The Third District adopted the rule put forth in *In re Dezi C.* (2022) 79 Cal.App.5th 769, that the 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, no information was ever supplied suggesting that parents or the minor were eligible for membership in an Indian tribe. When the Agency tried to reach family members, they were not responsive. The Agency had no evidence whatsoever of a tribal link. The burden on an appealing parent to make an affirmative representation of Indian heritage is de minimis. In the absence of such a representation, there can be no prejudice and no miscarriage of justice requiring reversal.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/revpub/C094857.PDF

Case Name: *In re Ezequiel G.* (2022) 81 Cal.App.5th 984 , **District:** 2 DCA , **Division:** 3 , **Case #:** B314432
Opinion Date: 7/29/2022
Judges: Opinion by Edmon, P.J., with Egerton, J., concurring. Dissenting opinion by Lavin, J.
Case Holding:
The juvenile court's finding that the Indian Child Welfare Act (ICWA) inquiry was proper, despite the Agency's failure to interview available relatives, was not an abuse of discretion because the parents denied having Indian ancestry. The minors

were removed from their parents due to domestic violence and placed with maternal relatives. Both parents reported that they did not have Indian ancestry. The Agency had contact with a variety of extended family members, but did not make any ICWA inquiry of these relatives. Mother appealed the termination of her parental rights. The Court of 8 Appeal affirmed. An Indian child is one with a tribal affiliation, not merely Indian ancestry. Because tribal membership typically requires an affirmative act by the enrollee or her parent, a child's parents will, in many cases, be a reliable source for determining whether the child may be eligible to be a tribal member. Whether a proper and adequate further inquiry has been pursued requires a court to engage in balancing, a discretionary function, and thus its findings should be reviewed for an abuse of discretion. It must also be considered whether an objection was made below to the adequacy of the ICWA inquiry. The juvenile court must be able to rely on counsel to review the Agency's reports and bring to its attention any ICWA issues. Further, ICWA inquiry error should require reversal only if prejudicial; that is, if "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." (*In re Dezi C.* (2022) 79 Cal.App.5th 769.) Here, both parents reported that they did not have Indian ancestry and no contrary evidence appears in the record. Neither parent objected below to the adequacy of the ICWA inquiry or the juvenile court's conclusions. Thus, the juvenile court's finding that there was no reason to know the children are Indian children was supported by substantial evidence and its finding that the Agency made a proper and adequate ICWA inquiry was not an abuse of discretion. Even if there was error, it was not prejudicial because nothing in the record gives reason to doubt the parents' denial of Indian heritage. [**Editor's Note:** Justice Lavin dissented, concluding that he would remand for ICWA compliance because Agency did not fulfill its duty of initial inquiry, substantial evidence did not support the juvenile court's finding that ICWA did not apply, and Mother's failure to make affirmative representations about possible Indian heritage does not render the error harmless. Justice Lavin urged the California Supreme Court to grant review in this case.]

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/B314432.PDF

Case Name: *In re Dominick D.* (2022) 82 Cal.App.5th 560, **District:** 4 DCA , **Division:** 2 , **Case #:** E078370
Opinion Date: 8/23/2022
Judges: Opinion by Menetrez, J. with Ramirez, P.J. and Raphael, J. concurring.

Case Holding:
Indian Child Welfare Act (ICWA) inquiry and notice errors do not warrant reversal of the juvenile court's jurisdictional or dispositional findings and orders. Mother left the five-month-old minor with no supplies at the home of a woman she met through a Facebook group. The minor's father is unknown. Following detention of the minor, the Agency spoke with maternal relatives, but did not inquire about possible Indian ancestry. The jurisdictional allegations against Mother were found true and the minor was removed from her care. On appeal, Mother argued that the Agency failed to comply with its duty of initial inquiry (§ 224.2, subd. (b).) The appellate court affirmed the orders with directions to the juvenile court to order the Agency to comply with its inquiry obligations under ICWA. Following the reasoning of the recently decided *In re S.H.* (2022) 82 Cal.App.5th 166, the appellate court held that, while the Agency failed in its duty of inquiry, the error does not warrant reversal of the juvenile court's jurisdictional or dispositional findings and orders, except for the ICWA finding itself.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/E078370.PDF

Case Name: *In re S.H.* (2022) 82 Cal.App.5th 166 , **District:** 1 DCA , **Division:** 1 , **Case #:** A163623
Opinion Date: 8/12/2022
Judges: Opinion by Humes, P.J. with Banke, J. and Wiss, J. concurring.
Case Holding:
Reversal of early dependency orders is not necessary, despite Indian Child Welfare Act (ICWA) initial inquiry errors, because the Agency and juvenile court can still satisfy their inquiry obligations. The minor was removed from Mother due to neglect. Mother initially stated that she did not have Native American ancestry, but then said she was not sure if she had Native American ancestry and maternal grandmother may have more information. Maternal grandmother was not questioned regarding her ancestry. The minor was placed with a maternal relative, who likewise was not questioned. Mother appealed the jurisdictional and dispositional orders, claiming that the court erred in finding ICWA did not apply and requesting remand so that the Agency could comply with its investigatory duties. The appellate court affirmed. The Agency conceded that it did not fulfill its duty of initial inquiry under ICWA because there were at least two maternal relatives it could have, but did not, question about possible Native American ancestry. However, there was no need to disturb the juvenile court's order. The fact that the Agency acknowledged error indicates that it understands its duty to ask the maternal

relatives about possible Native American ancestry and there is reason to believe that its continuing duty of inquiry will be satisfied. There was no need to conditionally affirm or reverse the jurisdiction and disposition orders because they would not be reversed even if new information were to be discovered confirming the child's Indian heritage. If the minor is an Indian child, the minor's tribe will have the right to intervene at any point in the proceedings. (Welf & Inst. Code, § 224.4.) It is unclear how a conditional affirmance would affect the proceedings at an early stage, except possibly to require yet another hearing in the proceedings. As long as the proceedings are ongoing and all parties recognize the continuing duty of ICWA inquiry, both the Agency and the juvenile court still have an adequate opportunity to fulfill their statutory duties.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/A163623.PDF

Case Name: *In re E.L.* (2022) 82 Cal.App.5th 597, **District:** 2 DCA , **Division:** 6 , **Case #:** B316261
Opinion Date: 8/23/2022
Judges: Opinion by P.J. Gilbert with J. Yegan and J. Perren concurring.
Case Holding:
Submission of postjudgment evidence pursuant to Code of Civil Procedure section 909 was proper. During the Probate Code section 1516.5 hearing, counsel represented that Mother did not have Indian ancestry. However, Mother later filled out an ICWA-020 form which stated that she had Indian heritage with the Tohono O'odham Nation. On appeal, Mother contended that the trial court failed to comply with ICWA. The minors' guardian requested that the appellate court take additional evidence pursuant to Code of Civil Procedure section 909, including Mother's ICWA-020 form and letters from the Tohono O'odham Nation stating that the children were not members of the tribe for the purposes of ICWA. The circumstances here warranted application of section 909 and the evidence was admitted. Remand would unnecessarily delay the likelihood of the children's adoption and would achieve the same result; a finding that ICWA does not apply. The appellate court relied on *In re Allison B.* (2022) 79 Cal.App.5th 214, 219, which stated that postjudgment evidence is routinely considered when submitted in support of a motion to dismiss a juvenile dependency appeal because, if the motion is granted, it would have the beneficial consequence of expediting the proceedings and promoting the finality of the juvenile court's orders and judgment.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/revpub/B316261M.PDF

Case Name: *In re Ricky R.* (2022) 82 Cal.App.5th 671 **, District:** 4 DCA **, Division:** 2 **,**
Case #: E078646
Opinion Date: 8/25/2022
Judges: Opinion by J. Menetrez with Acting P.J. McKinster and J. Slough concurring.
Case Holding:
The Agency failed to carry out its duty of initial inquiry, as required by the Indian Child Welfare Act (ICWA), and the error was not harmless. The minors were removed due to Mother's substance use. Father's whereabouts were unknown at the time of jurisdiction, but he was eventually located. Mother told the Agency she did not have any Indian ancestry. The juvenile court found that ICWA did not apply. Following 12 months of reunification services, a section 366.26 hearing was held and parental rights were terminated. The Agency spoke with multiple relatives regarding placement, but did not inquire about Indian ancestry. Mother appealed, raising a failure to adequately inquire under ICWA and the appellate court reversed. The Agency failed in its duty of initial inquiry under section 224.2, subdivision (b) and the juvenile court erred by finding that ICWA did not apply in the absence of evidence that the Agency had discharged this duty. The error was prejudicial because the extended family members were readily available and their responses would shed meaningful light on whether there was reason to believe that the minors are Indian children. (*Benjamin M.* (2021) 70 Cal.App.5th 735, 744.) The matter must be conditionally reversed so that the Agency can carry out this duty.

Submission of postjudgment evidence of further ICWA inquiry was not proper and did not moot the appeal. The Agency filed a motion to dismiss the appeal, arguing that postjudgment evidence mooted the issue. The evidence included declarations from the social workers that they spoke to the extended family members. The appellate court declined to take judicial notice of, or augment the record with, the declarations because they had not been filed in the juvenile court. Even if they had, the reviewing court could only take judicial notice of the existence of the documents, but not the truth of the matters asserted within. Augmentation does not function to supplement the record with materials not before the trial court. The juvenile court should consider, in the first instance, whether the Agency discharged its ICWA duties. The court distinguished *Allison B.* (2022) 79 Cal.App.5th 214 and disapproved of the Agency's approach in that case—presenting new ICWA evidence to the juvenile court while the order terminating parental rights is on appeal—because section 366.26, subdivision (i)(1) expressly deprives the juvenile court

of jurisdiction to modify the order terminating parental rights once it is final as to that court. The parties should stipulate a conditional ICWA reversal and immediate issuance of the remittitur.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/E078646.PDF

Case Name: *In re Y.M.* (2022) 82 Cal.App.5th 901 , **District:** 4 DCA , **Division:** 1 ,
Case #: D080349
Opinion Date: 9/2/2022
Judges: Opinion by McConnell, P. J. with Haller, J. and Buchanan, J. concurring.
Case Holding:
The Agency's failure to inquire, as required by the Indian Child Welfare Act (ICWA), was harmless under the *Benjamin M.* standard. The minor was removed due to drug abuse and domestic violence. Both parents denied Indian ancestry. Following twelve months of reunification services, a section 366.26 hearing was heard and parental rights were terminated. Father appealed, and the appellate court affirmed the orders. The parties agree that the Agency did not comply with its duty of initial inquiry under section 224.2, subdivision (b). State law error requires reversal only if the error has caused a miscarriage of justice under the California Constitution, article VI, section 13. The appellate court concluded that the appropriate standard is the standard of prejudice set forth in *Benjamin M.* (2021) 70 Cal.App.5th 735, which held the court must reverse if the record indicates that there was readily obtainable information that was likely to bear meaningful upon whether the child is an Indian child. Applying the *Benjamin M.* standard here, Father has not carried his burden on appeal to show that the error was prejudicial. Both parents denied Indian ancestry. Father lived with paternal grandmother and uncle and could have presumably asked them at any time whether they knew of any possible Indian ancestry. Additionally, paternal grandfather sought placement of the minor and presumably would have had a strong incentive to raise any Indian ancestry had it existed. Therefore, these relatives do not likely have information that would bear meaningfully on the question of whether there was reason to believe the minor was an Indian child, and any error was therefore harmless.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/D080349.PDF

Case Name: *In re Kenneth D.* (2022) 82 Cal.App.5th 1027 , **District:** 3 DCA , **Case #:** C096051
Opinion Date: 8/31/2022 (ordered published 9/7/2022)
Judges: Opinion by Robie, Acting P. J. with Mauro, J. and Krause, J. concurring.
Case Holding:
Failure to inquire, as required by the Indian Child Welfare Act (ICWA), was harmless where post-termination evidence submitted by the Agency showed that the Agency conducted an appropriate ICWA inquiry following the termination of parental rights. The minor was removed after testing positive for amphetamine at birth. Mother initially reported that she may have Native Ancestry from a tribe in Kentucky, though her relatives were not enrolled members. Thereafter, Mother denied Indian ancestry. Father's first appearance was at the jurisdiction/disposition hearing and he was not asked about Indian ancestry. No further ICWA inquiry was made. At the section 366.26 hearing, parental rights were terminated. Father appealed and the appellate court affirmed. The Agency's failure to inquire of Father about his ancestry was error, but Father failed to show that the error was prejudicial. During the pendency of the appeal, the reviewing court granted the Agency's motion to augment the record with additional information concerning the ICWA inquiry. The Agency had subsequently inquired of Father about Indian ancestry and concluded that the family had native heritage from Central America, but not Native American heritage. While Mother initially claimed Indian heritage, her later denials were substantial evidence supporting the juvenile court's finding that ICWA did not apply. The augmented record shows that shortly after terminating Father's parental rights, the Agency conducted an appropriate ICWA inquiry. There is nothing in the record to suggest that further contacts with other members of Father's family would provide additional relevant information. Remand is only appropriate where the record shows a reason to believe that the child may be an Indian child. Consideration of post termination evidence that has been made part of the official appellate record is appropriate because this evidence is within the appellate record and does not alter the order terminating parental rights.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/C096051.PDF

Case Name: *In re J.K.* (2022) 83 Cal.App.5th 498 , **District:** 2 DCA , **Division:** 6 , **Case #:** B319316
Opinion Date: 9/16/2022
Judges: Opinion by Perren, J. with concurrence by Gilbert, P.J. and dissent by Yegan, J.

Case Holding:
The Agency's failure to inquire of extended relatives about Indian ancestry, as required by the Indian Child Welfare Act (ICWA), was error requiring remand.
The minor was removed from his parents when he tested positive for drugs at birth. Both parents denied having Indian ancestry. The Agency spoke with multiple relatives, but did not inquire of them about Indian ancestry. Mother was bypassed and Father's services were terminated after six months. Mother appealed the subsequent termination of her parental rights. The appellate court remanded for the Agency to perform its statutory duty. The Agency's duty of initial inquiry requires it to ask extended family members about a minor's potential Indian status. That duty was not satisfied here. Agreeing with the holding in *In re Rylei S.* (2022) 81 Cal.App.5th 309, the appellate court found that when a statutorily mandated duty has not been performed, the matter must be remanded for satisfaction of the duty unless the record "affirmatively reflects that the protections intended to be afforded through the exercise of that duty have been provided." The appropriate remedy here is to issue a conditional affirmance with a limited remand. The parents identified all of their relatives and the social worker had their contact information, but did not inquire of these relatives about Indian ancestry. Declining to issue a remand in these circumstances would effectively absolve the juvenile court and Agency of their statutorily-mandated duties. Those duties must be enforceable, and statutes cannot be interpreted in a manner that renders language in the statute a nullity. A minor's best interests are served by a full resolution of ICWA-related issues. Any delay in the finality of these proceedings was contributed to by the Agency when it opposed the appeal rather than stipulating to a remand. [**Editor's Note:** Presiding Justice Gilbert concurred that a limited remand was appropriate here, but would have found so under the less rigid *Benjamin M.* (2021) 70 Cal.App.5th 735 standard. Also, Justice Yegan dissented, stating that the *Dezi C.* (2022) 79 Cal.App.5th 769 standard is the one which should be applied.]

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/B319316.PDF

Case Name: *In re Baby Girl M.* (2022) 83 Cal.App.5th 635 , **District:** 2 DCA , **Division:** 5 , **Case #:** B311176
Opinion Date: 9/21/2022
Judges: Opinion by Baker, J. with Rubin, P. J. and Moor, J. concurring.
Case Holding:

Father's appeal of the jurisdiction and disposition orders was moot where the Agency's investigation of Father's report of Indian ancestry, as required by the Indian Child Welfare Act (ICWA), was ongoing. The minor was removed from the parents due to domestic violence and marijuana use. Father reported that his grandmother was a member of a federally recognized Indian tribe. The Agency did not follow up with an investigation into Father's ancestry. Father appealed the jurisdiction and disposition orders, challenging the Agency's ICWA compliance. The Agency subsequently began to investigate Father's claims. The appellate court rejected the parties' joint stipulation for remand and dismissed the appeal as moot. All the court could order in resolving this appeal is that the Agency and juvenile court fulfill their inquiry and notice obligations under ICWA. Because that is what the Agency is already doing, there is no effective relief that the appellate court can provide. Thus, the appeal is moot and was dismissed.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/B311176.PDF

Case Name: *Adoption of M.R.* (2022) 84 Cal.App.5th 537 , **District:** 3 DCA , **Case #:** C095856
Opinion Date: 9/27/2022 (ordered published 10/21/2022)
Judges: Opinion by Duarte, J. with Hull, Acting P. J. and Boulware Eurie, J. concurring.
Case Holding:
The Indian Child Welfare Act (ICWA) applies to parental rights termination proceedings under the Probate Code and Family Code. Maternal grandmother (MGM) had legal guardianship of the minor. Following the death of Mother, MGM filed a petition to declare the minor free from parental custody and control, alleging that Father had abandoned the minor. Father submitted an ICWA-020 and reported no Indian ancestry. The probate court did not inquire further about possible Indian heritage or otherwise address ICWA during the hearing. The probate court granted MGM's petition. On appeal, the appellate court conditionally reversed and remanded for additional ICWA inquiry and entry of findings. The ICWA notice and inquiry requirements of the Welfare and Institutions Code apply to proceedings under both the Probate Code and the Family Code and it is error for a court to fail to determine whether ICWA applies. Here, the probate court made neither express nor implied findings as to application of the ICWA. There is no evidence that further inquiry was attempted of living relatives. Given the lack of information the probate court had before it regarding ICWA at the time of entry of judgment, the matter must be conditionally reversed and remanded for ICWA compliance. This case is distinguishable from *In re G.A.* (2022) 81 Cal.App.5th 355,

review granted 10/12/2022 (S276056/C094857), and *In re Dezi C.* (2022) 79 Cal.App.5th 769, review granted 9/21/2022 (S275578/B317935), where ICWA inquiry error was found harmless because those were dependency cases composed of multiple proceedings that resulted in multiple reports regarding the possible application of the ICWA. The instant case is not a dependency case with the benefit of a similar process. The matter must be conditionally reversed, and upon remand, Father may proffer to the probate court any information he contends would provide insight about the minor's Indian heritage, including inquiring of Mother's paternal relatives and the missing branches of her maternal family tree.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/documents/C095856M.PDF

Case Name: *In re K.H.* (2022) 84 Cal.App.5th 566 , **District:** 5 DCA , **Case #:** F084002
Opinion Date: 10/21/2022
Judges: Opinion by Meehan, J with Peña, Acting P. J. and Smith, J. concurring.
Case Holding:
When the juvenile court's Indian Child Welfare Act (ICWA) finding is based on an undeveloped record, it is not supported by substantial evidence and the court's conclusion to the contrary is an abuse of discretion. The minor was detained at birth due to his parents' drug use. At the detention hearing, both parents denied they had Indian ancestry. The juvenile court found that ICWA did not apply. Following this finding, the Agency conducted no additional ICWA inquiry and did not ask any of the 15 relatives it located whether K.H. may be an Indian child. After six months of reunification services, parental rights were terminated. On appeal, the court reversed the orders and remanded to the juvenile court for ICWA compliance. The determination that the Agency's inquiry was proper, adequate, and duly diligent should be reviewed under a hybrid substantial evidence and abuse of discretion standard. This hybrid standard better reflects the need for the juvenile court to engage in a balancing of factors and to exercise sound discretion in making the relevant determinations. The juvenile court's ability to exercise discretion is dependent on adequate record development by the Agency. When the court's finding rests on a cursory record and a patently insufficient inquiry the only viable conclusion is that the finding is unsupported by substantial evidence, and the court's conclusion to the contrary constitutes a clear abuse of discretion. Here, the Agency conceded that their inquiry fell short of the requirements of section 224.2, subdivision (b), but argued that the error was harmless under the *In re Dezi C.* (2022) 79 Cal.App.5th 769, 779-782, review granted 9/21/2022 (S275578/B317935), standard.

However, not every error under state law is amenable to assessment under *Watson's* usual likelihood-of-success test. This is because sometimes, the relevant injury is not related to a specific substantive outcome on the merits and placing the measure for prejudice on such an outcome falls short of meaningfully safeguarding the rights at issue. (*In re A.R.* (2021) 11 Cal.5th 234, 252.) In *A.R.*, the California Supreme Court pointed out in the context of a parent's claim of ineffective assistance of counsel arising from the failure to file a timely appeal that the relevant injury is not denial of any specific substantive appellate victory; it is the opportunity to appeal at all. Similarly, the relevant injury under ICWA is not whether the child is an Indian child, but the prejudice to the Indian tribes' right to receive notice by failing to gather and record the very information the juvenile court needs to ensure accuracy in determining whether notice is required. Where the opportunity to gather this information is lost because there has not been adequate inquiry and due diligence, reversal for correction is generally the only effective safeguard. As a result of the failure to develop the record beyond questioning Mother and Father, the juvenile court's implied finding of a proper, adequate, and duly diligent inquiry is unsupported by substantial evidence and its contrary conclusion was an abuse of discretion.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/documents/F084002.PDF

Case Name: *In re Oscar H.* (2022) 84 Cal.App.5th 933 , **District:** 2 DCA , **Division:** 8 ,
Case #: B318634
Opinion Date: 10/27/2022
Judges: Opinion by Wiley, J. with a concurrence by Harutunian, J. and a dissent by Stratton, P. J.
Case Holding:
The Agency's failure to inquire, as required by the Indian Child Welfare Act (ICWA), was not harmless despite the minor's placement with an extended family member. The minor was removed from parents at birth due to drug use. The minor went home from the hospital with maternal grandmother (MGM) and remained in her care. Mother denied Indian ancestry. The Agency had various communications with Father, but never asked him or his family members about Indian ancestry. The juvenile court found ICWA did not apply, relying on Mother's statements about paternal ancestry. Mother appealed the termination of her parental rights, raising the Agency's failure to comply with the ICWA. The appellate court conditionally reversed and remanded for ICWA compliance. The Agency erred by not inquiring of Father and extended family

members regarding possible Indian heritage. The minor's placement with MGM does not render the error harmless for several reasons. First, a tribe could have sought jurisdiction and the extended family placement preference would not bind the tribal court. Second, tribes may establish a different order of preference by resolution. Third, termination of parental rights and adoption are not inevitable as tribal involvement may have changed the case's trajectory. Fourth, placement with a maternal family member without identifying potential Indian ancestry from paternal relatives is a potential tribal harm because of the loss of a chance to transmit cultural values. Because the effect of tribal involvement cannot be known, the minor's placement with a relative does not establish harmlessness. [**Editor's Note:** Presiding Justice Stratton dissented, arguing that minor's placement with MGM implements ICWA's first preference for placement and prevents the abuses ICWA was enacted to prevent.]

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/documents/B318634.PDF

Case Name: *In re G.H.* (2022) 84 Cal.App.5th 15, **District:** 4 DCA , **Division:** 3 , **Case #:** G061166
Opinion Date: 10/6/2022
Judges: Opinion by Goethals, Acting P. J. with Sanchez, J. and Marks, J. concurring.
Case Holding:
The Agency failed to comply with the Indian Child Welfare Act (ICWA) when it neglected to search for Father's relatives on the social media platform previously used by Father to communicate with them. The minor was detained from his parents after testing positive for methamphetamine at birth. Father claimed Cherokee ancestry on the maternal side of his family. Father was estranged from his mother but told the juvenile court and the Agency that he had previously been able to contact her through the social media platform LinkedIn. The Agency subsequently reported that Father was unable to provide contact information for the paternal grandmother, and the juvenile court found ICWA did not apply. After 18 months of reunification services, parental rights were terminated. The appellate court conditionally reversed that order for ICWA compliance. The primary parties protected under ICWA are Native American tribes, whose right to intervene in an appropriate case will likely never be discovered without the statutorily required inquiry and notice procedures. If ICWA is not complied with, then the dependency proceedings, including an adoption following termination of parental rights, are vulnerable to collateral attack. Thus, a family member's belief that a child may have Indian ancestry must be adequately investigated. Here, the Agency did

not meet its duty of inquiry for three reasons. First, the juvenile court specifically directed the Agency at the detention hearing to attempt to reach Father's mother. Second, Father told the court the means by which he had previously reached his mother, via LinkedIn. Third, the Agency knew from the colloquy at the detention hearing that Father was now estranged from his mother. Despite this, the Agency's report did not describe any search efforts on the social media platform. Father's estranged relationship with his mother demonstrates why the inquiry duty rests with the Agency and the juvenile court, not the parent. Parents or other relatives may not have a good relationship with each other or may have diverse motivations or views on potential tribal involvement. A clear rule of reversal in all cases where the ICWA inquiry rules were not followed is appropriate because when ICWA requirements have been ignored, either outright or effectively, the failure to conduct the inquiry constitutes a miscarriage of justice.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/documents/G061166.PDF

Case Name: *In re E.C.* (2022) 85 Cal.App.5th 123 , **District:** 5 DCA , **Case #:** F084030
Opinion Date: 11/8/2022
Judges: Opinion by Meehan, J. with Peña, Acting P. J. and Smith, J. concurring.
Case Holding:
The juvenile court abused its discretion when it found that the Indian Child Welfare Act (ICWA) did not apply based on an undeveloped record. Following detention of the minor, Mother claimed she had Apache ancestry and that her relatives were enrolled Apache tribal members. At the jurisdiction/disposition hearing, County Counsel said that its inquiry showed that the Apache tribe named by Mother was not federally recognized, and the association with the tribe was by marriage. The juvenile court found that ICWA did not apply. Following a failure of reunification, parental rights were terminated. On appeal, the court reversed the orders to comply with ICWA. The determination that the Agency's inquiry was proper, adequate, and duly diligent should be reviewed under a hybrid substantial evidence and abuse of discretion standard. When the juvenile court's finding rests on a cursory record and a patently insufficient inquiry, the only viable conclusion is that the finding is unsupported by substantial evidence. Here, the juvenile court record is silent as to what inquiry the Agency conducted and what responses, if any, it received. The Agency failed to conduct further inquiry into the information Mother provided that maternal great-grandmother and two maternal great-uncles may be enrolled members of the Apache tribe. Additionally, the Agency failed to document its ICWA inquiry, and any results, in the record. The error here is prejudicial because neither the

Agency nor the juvenile court gathered information sufficient to ensure a reliable ICWA finding. The relevant injury under ICWA is not whether the appealing parent can demonstrate a likelihood that a child is an Indian child, but rather the prejudice lies in the failure to gather the very information the juvenile court needs to determine whether ICWA applies.

Submission of postjudgment evidence is not proper because claims of error under ICWA do not present "exceptional circumstances" to justify the reviewing court engaging in fact finding. The Agency submitted three declarations to the reviewing court under a request pursuant to Code of Civil Procedure section 909 to consider postjudgment evidence. Two declarations provided statements from Agency paralegals that they had made ICWA inquiries of maternal grandmother and aunt, both of whom indicated that the tribal connection was by marriage and that it related to the Lipan Apache Band of Texas. An individual with an unspecified connection to the tribe allegedly told one of the paralegals that the tribe is recognized by the state but not the federal government. A third declaration alleged that counsel received the aforementioned information prior to making her representation to the court at the jurisdiction/disposition hearing. Although appellate courts are authorized to make findings of fact on appeal by Code of Civil Procedure section 909, the authority should be exercised sparingly. The Agency's motion to submit postjudgment evidence does not present "exceptional circumstances" to justify the reviewing court engaging in findings of fact on review. Claims of error under ICWA are not rare and will not typically present the type of exceptional circumstances warranting deviation from the general rule.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/documents/F084030.PDF

Case Name: *In re A.C.* (2022) 86 Cal.App.5th 130 , **District:** 2 DCA , **Division:** 5 , **Case #:** B319752
Opinion Date: 12/12/2022
Judges: Opinion by Rubin, P. J. with Moor, J. concurring. Dissent by Baker, J.
Case Holding:
Conditional reversal was required for the Agency to comply with its inquiry requirements under the Indian Child Welfare Act (ICWA). Mother appealed the termination of her parental rights over minor. The parties stipulated there was error because the Agency did not satisfy its ICWA inquiry obligations. The Agency only inquired of the parents regarding Native American ancestry. It did not ask the minor's

caregiver and prospective adoptive parent, nor any of the extended known maternal and paternal family members about Indian heritage. The Court of Appeal conditionally reversed for compliance with ICWA. Justice Baker wrote a lengthy dissent with the intent to highlight "how awry things have gone," relying on the reasoning of *Ezequiel G.* (2022) 81 Cal.App.5th 984. Justice Baker would have found that there was substantial evidence supporting the juvenile court's ICWA findings because both parents denied Indian ancestry and there was no other indicia that the minor was an Indian Child.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/documents/B319752.PDF

Case Name: *In re Adrian L.* (2022) 86 Cal.App.5th 342 , **District:** 2 DCA , **Division:** 1 ,
Case #: B318627
Opinion Date: 12/14/2022
Judges: Opinion by Kelley, J. with Chaney, J and Bendix, Acting P. J. concurring.
Case Holding:
Any errors in the ICWA inquiry process were harmless under the prejudice standard set forth in *In re Benjamin M.* (2021) 70 Cal.App.5th 735. The minor was removed from Mother due to her history of substance abuse and failure to reunify with older siblings. Maternal grandmother and uncles and a paternal aunt sought placement. Both parents denied they had Indian ancestry, and the juvenile court found that ICWA did not apply. Mother appealed the termination of her parental rights, arguing that the Agency had failed to adequately investigate under ICWA. The appellate court affirmed, relying on the *Benjamin M.* line of reasoning regarding prejudice, and finding that any failures in the ICWA inquiry were harmless. *Benjamin M.* directs courts to examine the record and reverse or remand only if that review shows prejudice because there was "information that was likely to bear meaningfully upon whether the child is an Indian child." Here, the parents denied Indian ancestry, and there were extensive efforts to have the minor placed with extended family members who would have had a strong incentive to bring facts suggesting the minor is Indian to the juvenile court's attention due to placement preferences. Additional inquiry would not have yielded information that was likely to bear meaningfully on the question of whether the minor was an Indian child. Thus, any failure in ICWA inquiry was harmless. [**Editor's Note:** Justice Kelley wrote a concurring opinion concluding that the Agency did not fail in their ICWA inquiries because minor was removed based on section 340, subdivision (b) and the inquiry provisions of section 224.2, subdivision (b) only require inquiry when a child is placed in the temporary custody of the Agency pursuant to section 306.]

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/documents/B318627.PDF

Other Summaries of Interest

In re Rebecca R. **(2006) 143 Cal.App.4th 1426**
4 DCA, Division 2, Case # E039601
During the dependency proceedings, the court ordered the Department to inquire of the Father whether he had any Indian heritage. The record contained no documentation which showed that this was done, and the court later terminated Father's parental rights. On appeal, Father argued that the termination order should be set aside because of the failure to make the inquiry. The appellate court rejected the argument and affirmed. The evidence showed that the duty of inquiry was satisfied. The Department did not mark the boxes which showed that there was Indian ancestry, and the social worker's reports consistently stated that ICWA did not apply. There is no reason to think that the Department failed to carry out the court's order and Father has provided none in this appeal. Further, there would be no prejudice in the failure to inquire unless Father would have indicated that he had Indian ancestry. "ICWA is not a 'get out of jail free' card dealt to parents of non-Indian children, allowing them to avoid a termination order by withholding secret knowledge."

In re K.R. **(2018) 20 Cal.App.5th 701**
4 DCA, Division 2, Case # E069276
Limited remand for proper ICWA noticing was required after the juvenile court found ICWA notices were adequate without ensuring that the Agency had completed an adequate investigation. Mother informed the court that neither she nor the children had Indian ancestry, and the juvenile court found that ICWA did not apply. The Department sent notice to three Cherokee tribes and the BIA in response to information concerning the children's Father's heritage. The court found the notices proper, and concluded that ICWA did not apply. The social worker's reports were silent as to any efforts to contact other family members for information. At no time did Mother object to the notices or the noticing procedures. On appeal from the termination of parental rights, Mother contended that the Department did not properly investigate the children's possible Cherokee heritage and that it omitted mandatory information from the ICWA notices sent to the tribes. She contended that the court had a continuing duty through the 366.26 hearing to make ICWA inquiries, and that the sufficiency of the

investigation is therefore cognizable on appeal from the termination of parental rights order. The appellate court agreed, finding the issue cognizable in this appeal. The parent's failure to appeal from an earlier order does not preclude the parent from raising the issue of ICWA compliance in an appeal from a later order, including from the termination of parental rights. Further, there was insufficient proof that the social services agency made a meaningful effort to contact specified family members who might have had pertinent information. Some extended family members were not interviewed, including the living paternal grandfather or great-grandmother. The court has the responsibility to ascertain that the agency has conducted an adequate investigation. Since the court did not inquire as to what efforts the Department had made to contact the living relatives, it failed in its duty to ensure compliance with ICWA, and a limited remand was required.

***In re N.G.* (2019) 27 Cal.App.5th 474**

4 DCA, Division 2, Case # E070338

The juvenile court has a continuing and affirmative duty to inquire whether a child may be an Indian child; reversal was required where there was an incomplete inquiry despite available information. When the minor was taken into protective custody, Father filed a notice indicating that he may have Blackfeet or Navajo Indian ancestry, with a notation stating that he was "not exactly sure." Also, the minor's paternal grandfather reported that his grandfather was Native American and the tribe was "out of Michigan." The Agency noticed the Blackfeet Tribe of Montana, the Navajo Nation, the Colorado River Indian Tribes, and the Colorado River Tribal Council. The notices included no other identifying information concerning the minor's paternal lineal ancestors. The court found that ICWA notice had been given and that ICWA did not apply. Before the court made this finding, the Agency reported that Father told the Agency he had been in contact a year earlier with paternal cousins who were registered members of the Cherokee tribe, and that he and grandfather may have Cherokee ancestry. Father was subsequently killed in a motorcycle accident. The record did not show that any ICWA notices were given to any federally recognized Cherokee tribes or the BIA. The record did not show the Agency attempted to interview Father, paternal grandfather, or any of the cousins or any other persons in order to obtain the names and other identifying information concerning the minor's paternal lineal ancestors. Further, Mother's whereabouts were unknown when the minor was taken into protective custody. But the Agency and Mother were in contact some months later, and the record did not show that Mother ever completed or that the Agency asked her to complete a Parental Notification of Indian Status form, or asked her whether she had any Indian ancestry. The

Agency was also in contact with a maternal uncle, but the record did not show he was asked for identifying information concerning the maternal lineal ancestors. Mother appealed from the order terminating her parental rights, contending that the juvenile court erroneously failed to ensure the Agency fully investigated the minor's paternal lineal ancestry and sent ICWA notices to all federally recognized Cherokee tribes and the BIA. The appellate court agreed and reversed the orders. On remand, the court was ordered to fully investigate the minor's paternal lineal ancestry and include any newly discovered information in the ICWA notices to all the Cherokee tribes, the BIA, and all previously noticed tribes. The Agency was also ordered to inquire whether the minor had maternal Indian ancestry, and if so, send appropriate ICWA notices. Juvenile courts and protective agencies have an affirmative and continuing duty to inquire whether a child for whom a petition has been filed is an Indian child. Here, the record failed to show that the Agency ever attempted to inquire whether there was Indian ancestry on the maternal side, or attempted to contact the paternal cousins it knew about for identifying information concerning the minor's ancestors. Further there was no record of notice to the Cherokee tribes. The Agency had a duty to make all inquiries into the minor's Indian ancestry, and the record did not show this was done.

In re Zeth S. **(2003) 31 Cal.4th 396**

The Supreme Court granted review in this case to address the issue of whether, in a dependency case, the Court of Appeal may receive and consider postjudgment evidence that was never before the juvenile court and rely on such evidence outside the record on appeal to reverse the judgment. The evidence at issue in this case was a declaration from minor's counsel which informed the court that the minor's legal guardian, the maternal grandfather, was pressured into adoption, and that Mother was the minor's primary caretaker at the maternal grandfather's home. The Supreme Court here reversed the judgment of the Court of Appeal and held that consideration of postjudgment evidence of changed circumstances in an appeal of an order terminating parental rights would violate both the generally applicable rules of appellate procedures and the express provisions of section 366.26. To the extent that anything said in *In re Jonathan M.*, *Eileen A.*, or *Jayson T.* is inconsistent, those decisions were disapproved. Further, the court held that although a reviewing court is free to appoint separate counsel for a minor in an appeal of a termination of parental rights order, section 317 does not compel such an appointment, nor does that section purport to prescribe or regulate the duties of appointed counsel in dependency appeals.