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IN THE SUPREME COURT OF CALIFORNIA

In re K.D., a Person Coming under the Juvenile Court Law

Placer County Department of Health and Human Services,
Plaintiff and Respondent,
v.
J.T.
Defendant and Appellant.

Review of a Decision by the Court of Appeal
Third Appellate District, case no. C096051
Placer County Superior Court, case no. 53005180

Petition for Review

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By appointment of the Court of Appeal

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To the Honorable Chief Justice, and to the Honorable Associates Justices of the Supreme Court of the State of California:

Petitioner J.T. petitions this court for review following the decision filed in the Court of Appeal, Third Appellate District, on August 31, 2022 and certified for publication on September 7, 2022. A copy of the decision of the Court of Appeal is attached as Exhibit A. The Order Certifying Opinion for Publication is attached as Exhibit B.

Issues Presented

1. Whether the Court of Appeal can take additional evidence on appeal to remedy failure of the social services agency and the court to comply with the inquiry, investigation and notice requirements of the Indian Child Welfare Act (ICWA), through augmentation, judicial notice, or Code of Civil Procedure section 909.

2. In a proceeding to terminate parental rights whether the Court of Appeal can remedy ICWA errors without the opportunity of a hearing where a parent can challenge evidence of inquiry and information of the tribes before the court determines that ICWA does not apply.

Introduction

This case affords the Court the opportunity to secure uniformity of decision and settle an important question of law. (Cal.Rules of Court, rule 8.500(b)(1).)

The federal Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.) and related California law (Welf. Inst. Code § 224 et seq.) require social workers and the court to inquire about Native

American ancestry. The court and the county have an "affirmative and continuing duty" to inquire whether the child is an Indian child, which includes, but is not limited to, asking the parents, "extended family members, others who have an interest in the child, and the party reporting child abuse or neglect, whether the child is, or may be, an Indian child. . . ." (Welf. & Inst. Code § 224.2, subds. (a), (b).)

The Courts of Appeal agree that failure to make this ICWA inquiry is error. They disagree on when and under what circumstances the error is prejudicial and requires reversal or conditional affirmance with remand. They also disagree on whether the appellate court can remedy the error and consider postjudgment evidence of ICWA inquiry in a proceeding to terminate parental rights without an opportunity for the parent to challenge that evidence in the trial court.

Recent cases have addressed the issue, with different results, such as *In re Allison B.* (2022) 79 Cal.App.5th 214 and *In re Ricky R.* (2022) 82 Cal.App.5th 671. This case, reported at *In re Kenneth D.* (2022) ___ Cal.App.5th ___ [2022 Cal.App.Lexis 759], relies on *Allison B.* (Opn. at p. 8.)

"The California courts are deeply divided on a narrow issue of juvenile dependency law that, when resolved, may also speak to the broader issue of when a trial court's misstep necessitates a 'do over.'" (Hoffstadt, J., *Divide & Prejudice*, L.A. Daily J. (Sept. 23, 2022) pp. 1, 6.)

Under *In re Dezi C.* (2022) 79 Cal.App.5th 769, review granted Sept. 21, 2022, S275578, an error in the agency's initial inquiry warrants reversal only if the parent establishes the error was prejudicial by making a proffer on appeal as to why further inquiry would lead to a different ICWA finding. (Hoffstadt, J., *supra*, at p. 6.)

In re Ezequiel G. (2022) 81 Cal.App.5th 984 (petn.for

review pending, petn. filed Sept. 1, 2022) notes some courts have begun to independently review compliance with statutory ICWA requirements and to reverse, if they conclude an agency's inquiry was deficient. "In just the last 12 months, this approach to asserted ICWA error has resulted in, by our count, appellate courts returning more than 100 dependency cases to the juvenile courts with directions to conduct further ICWA inquiries *after* parental rights were terminated." (*Id.* at p. 1001, original italics.) *Ezequiel G.* affirmed the orders terminating parental rights. (*Id.* at p. 1015.)

The dissenting opinion in *Ezequiel G.* noted that California appellate courts have developed at least four different approaches to evaluating whether error at the inquiring stage is prejudicial, citing *Dezi C., supra,* 79 Cal.App.5th at pp. 777-782. "This confusion benefits no one. Because the issues raised in this appeal are of substantial importance to dependent children, the children's families, and Indian tribes, I urge the Supreme Court to review this decision . . ." (81 Cal.App.5th at p. 1025, Lavin, J. dissenting.)

In this case, *In re Kenneth D.*, the Court of Appeal aligns with *Dezi C.*

Background

A. The Superior Court Judgment

J.T. (Father) appealed the March 22, 2022 order terminating his parental rights over minor Kenneth D. He contended the Department and juvenile court failed to comply with the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). Father argued the errors are prejudicial requiring reversal and that posttermination ICWA inquiries did not cure the alleged noncompliance. (Opn. at pp. 1-2.)

In April 2021 Placer County Department of Health and

Human Services (Department) filed a section 300 petition alleging Kenneth came within the provisions of section 300 due to substance abuse by mother, who had previously had another child taken away as a result of her substance abuse. (Opn. at p. 2.) J.T. was not named in the section 300 petition.

J.T. first appeared in the case on May 26, 2021, the jurisdiction and disposition hearing. The court did not appoint counsel for J.T. pending return of a paternity test. The court did not inquire of J.T.'s possible Native American status, but did determine that the ICWA did not apply. (Opn. at p. 3.)

Around July 6, 2021 J.T. was determined to be the biological father but the matter was not placed back on calendar to address this development, and the record does not reflect any inquiries by the Department or the Juvenile court regarding J.T.'s possible Native American heritage leading to the termination of parental rights hearing. The juvenile court failed to ask J.T. about ICWA at the November 17, 2021 and December 7, 2021 review hearings. (Opn. at p. 3.)

At the section 366.26 hearing on March 22, 2022 the juvenile court made no express ICWA findings when it terminated parental rights, nor did it ask J.T. about any possible Native American heritage. (Opn. at p. 3.) Father timely appealed. (Opn. at p. 4.)

After J.T. appealed, the Department filed a motion to augment the record in the appeal to include a Department memorandum filed with the juvenile court on April 28, 2022, which the Court of Appeal granted. (Opn. at p. 4.) The Department requested the juvenile court find ICWA was properly noticed and ICWA did not apply to the minor. (Opn. at p. 4.)

B. The Court of Appeal Opinion

In its published opinion, filed August 31, 2022, the Court of

Appeal focused on the information related to Father's ICWA claims. (*Kenneth D., supra,* opn. at p. 2.)

The Court of Appeal granted the Department's motion to augment the record in this appeal to include a postjudgment memorandum the Department filed with the juvenile court on April 28, 2022. The memorandum stated Father told the Department on April 21, 2022 that he might have Cherokee ancestry out of Oklahoma and identified his mother as the family member who might have more information. Father's mother spoke with the Department and explained she had a DNA test result that identified her as having "Native Heritage" but her entire family was from Mexico. Father's mother provided the Department with names, dates of birth, and dates of death of multiple family members from Mexico. (Opn. at p. 4.)

The Department contacted the Bureau of Indian Affairs and confirmed that native heritage originating in Mexico would not be federally recognized for purposes of the ICWA. The Department requested that the juvenile court find ICWA was properly noticed and ICWA did not apply to the minor Kenneth. (Opn. at p. 4.)

The Court of Appeal concluded the "abject failure of the Department and juvenile court to inquire as to father's possible Native American heritage (see § 224.2, subds. (a), (c))," was error but concluded the error was not prejudicial, based on the augmented record of an ICWA inquiry after the judgment terminating parental rights. (Opn. at p. 7.)

The Court recognized and disagreed with appellant J.T.'s authority suggesting posttermination remedial efforts should not be considered. (*In re M.B.* (2022) 80 Cal.App.5th 617, 627-629; *In re E.V.* (20220 80 Cal.App.5th 91, 700-701.) The Court found it appropriate to consider the Department's posttermination evidence, citing *Allison B., supra*, 79 Cal.App.5th 214, 218-220.

(Opn. at p. 8.)

Legal Discussion

This case presents an ongoing disagreement among the Courts of Appeal on a basic issue in juvenile dependency law, the affirmative and continuing duty of social workers and the court to inquire of parents, extended family, and others about Native American ancestry and how to determine if the error in failing to comply with the ICWA inquiry is or is not prejudicial.

Noncompliance with the ICWA can be raised for the first time at the end of a dependency case, that is, on appeal from the order terminating parental rights. (*In re Isaiah W.* (2016) 1 Cal.5th 1, 10-11 [ICWA issue cognizable on appeal from termination of parental rights even though no express ICWA finding was made at that hearing].) (Opn. at p. 4.)

I.

This Court must grant review to resolve the conflict between the Courts of Appeal as to whether the posttermination ICWA inquiries can remedy noncompliance in the trial court and whether the errors are prejudicial, requiring reversal.

Under California Rules of Court, rule 8.500 (b)(1), the split of authority on posttermination ICWA inquiries constitutes grounds for review of this case.

Here the Department moved to augment the record on appeal with a three-page memorandum filed with the juvenile court on April 28, 2022. This post-judgment memorandum was not part of the normal record on appeal from the March 22, 2022 judgment terminating parental rights. The Department relied on California Rules of Court, rules 8.410 and 8.155 to support its motion to augment.

The Court of Appeal recognized J.T.'s authority that posttermination remedial efforts should not be considered when making an ICWA determination. (Opn. at p. 8, citing *M.B., supra,* 80 Cal.App.5th 617, 627-629; *E.V., supra,* 80 Cal.App.5th 691, 700-701.) The Court of Appeal disagreed and found it was appropriate to consider the Department's posttermination evidence "that has been made part of the official appellate record" and the finding that the minor is not an Indian child within the meaning of ICWA, relying on *Allison B., supra,* 79 Cal.App.5th 214, 218-220. (Opn. at p.8.)

The Court did not cite *Ricky R., supra,* 82 Cal.App.5th 671, 682-683, which distinguished *Allison B.* and disapproved of the agency's approach, presenting new ICWA evidence to the juvenile court while the order terminating parental rights was on appeal. The juvenile court should consider in the first instance whether DPSS discharged its duties under ICWA and related state law, citing *E.V., supra.* To the extent the juvenile court in *Allison B.* failed to give the parent an opportunity to challenge the evidence, the reviewing court must do so (*Ricky R., supra,* at p. 683.)

Ricky R. declined to consider the agency's declaration under any of DPSS's theories -- judicial notice, augmentation, or Code of Civil Procedure section 909. (p. 683.)

In *Allison B.* the appellate court considered postjudgment evidence under Code of Civil Procedures section 909 but declined to do the same with minute orders. (79 Cal.App.5th at p. 219.) It took judicial notice of minute orders. (*Id.* at p. 217.)

In re E.L. et al. (2022) 82 Cal.App.5th 597 (petn. review pending, petn. filed Sept. 21, 2022, S276508), another case relying on *Allison B.*, the respondent asked the Court of Appeal to consider several documents pursuant to Code of Civil Procedure section 909. Those documents of ICWA inquiry were not considered by the trial court before it terminated parental rights

under Probate Code section 1516.5. The Court determined the application of Code of Civil Procedure section 909 was appropriate based on additional evidence it took on appeal. The Court affirmed the order terminating parental rights of both parents. (*E.L. et al., supra,* 82 Cal.App.5th at p. 600.)

M.B., supra, E.V., supra, and Ricky R., supra, have all rejected the reasoning of *Allison B.* As stated in *Ricky R.*, deficiencies in the ICWA inquiry and investigation process should be handled by the trial court in the first instance, giving the parent an opportunity to challenge the evidence. (82 Cal.App.5th at p. 683.)

"[T]he juvenile court should consider in the first instance whether [the agency] discharged its duties under ICWA and related state law. (*E.V., supra*, 80 Cal.App.5th at p. 700; *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 703 [denying the agency's motion to take additional evidence consisting of ICWA notices, because '[m]aking the appellate court the trier of fact is not the solution'].)" (*Ricky R., supra,* 82 Cal.App.5th at p. 682.)

Here J.T. did not have the right to challenge the proffered evidence of ICWA inquiry in the trial court. He had the right to dispute the evidence and the forum for disputing evidence is the trial court, not the Court of Appeal or even this Court. That is a fundamental flaw of *Allison B.* and this case. The Court of Appeal dispensed with the right of cross-examination, something guaranteed by due process of law.

Review must be granted to resolve that judicial notice, augmentation, Code of Civil Procedure 909, cannot be used to salvage improper or incomplete ICWA inquiries, investigations and notices. Although it may be more "convenient" and "quicker" for the appellate court to resolve the dispute, that is not how the system operates. Trial courts resolve factual disputes; appellate courts resolve legal disputes. Review must be granted to protect

the traditional roles of trial and appellate courts.

II.

Review must be granted to affirm that in a proceeding to terminate parental rights the Court of Appeal can not remedy ICWA errors without the opportunity of a hearing in the trial court where a parent can challenge any evidence of inquiry and information to the tribes before a determination that ICWA does not apply.

Here the post judgment information presented to the trial court consisted of a 3 page memorandum (Memo) from the Department dated April 27, 2022. It first summarized the ICWA steps taken February 15, 2021, and the April 22, 2021 finding by the trial court that ICWA did not apply. (Opn. at p. 4; Memo at p. 1.) The Memo summarized April 21, 2022 statements by J.T. and his mother (biological paternal grandmother). The Department then contacted the Bureau of Indian Affairs to confirm that native heritage originating in Mexico would not be federally recognized for purposes of the ICWA. (Opn. at p. 4.)

The Department did not contact any tribe, either formally or informally. The Department stated PGM had DNA ancestry findings of some Native Heritage but assumed it was from Mexico. Father stated he believed he had Native American heritage from Oklahoma, Cherokee. Although the Department had names, date of birth and date of death of various paternal relatives, it did not send notice to the Cherokee tribes in Oklahoma. (Opn. at p. 4.)

The Department was required to provide the trial court with information sent to the tribes so the trial court could make a proper determination that the Department fulfilled its duties under ICWA. It provided no notices and no responses, just a

phone call to the Bureau of Indian Affairs. (Opn. at p. 4.)

Father J.T. did not have an opportunity of a hearing in the trial court, with counsel, where he could challenge any evidence of inquiry and information to the tribes before a determination that ICWA did not apply.

Conclusion

Petitioner J.T. respectfully requests that this Court grant review and resolve the conflict between *Allison B., M.B., E.V., Ricky R.* and *E.L.;* conditionally reverse the orders terminating parental rights as to K.D. and remand to the trial court for appropriate legal proceedings.

Dated: September 30, 2022.

Respectfully submitted,

_____

Janette Freeman Cochran
Attorney for Petitioner J.T.

Certificate of Length

(California Rules of Court, rule 8.504)

By my signature below, I certify that this brief consists of 2,672 words, as counted in the word count function of the word processing program used to prepare this brief.

_____

Janette Freeman Cochran
Attorney for Petitioner J.T.

Proof of Service

Case name: In re K.D. Court of Appeal Case Number: C096051 Placer County No.: 53005180

At the time of service I was at least 18 years of age and not a party to this legal action. My business address is 301 East Colorado Boulevard, Suite 304, Pasadena, California 91101. My electronic service address is: janettecochran@sbcglobal.net

On September 30, 2022, I mailed or electronically served a copy of **Petition for Review** indicated below:

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I am employed in the county where the mailing occurred. The document was served from Pasadena, California. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Dated September 30, 2022, at Pasadena, California.

Janette Freeman Cochran

Exhibits

Exhibit A - Opinion, Court of Appeal, filed August 31, 2022

Exhibit B - Order Certifying Opinion for Publication, filed September 7, 2022

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

In re K.D., a Person Coming Under the Juvenile Court Law.	C096051
PLACER COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff and Respondent, v. J.T., Defendant and Appellant.	(Super. Ct. No. 53005180)

J.T. (father) appeals from the juvenile court's order terminating his parental rights over Kenneth D. (minor) and adopting the recommended findings and orders of the Placer County Department of Health and Human Services (Department). Father's contentions on appeal are limited to the Department's and juvenile court's compliance

with the requirements of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). Specifically, father complains the juvenile court and the Department failed to make the required initial inquiries of father's ICWA status prior to finding the ICWA inapplicable and terminating his parental rights. Father also complains the Department's investigation into mother's possible Native American heritage was inadequate. He argues these errors are prejudicial requiring reversal and that posttermination ICWA inquiries did not cure the alleged noncompliance.

We disagree. Father has not shown the juvenile court's ICWA determination premised upon information provided by mother is unsupported by substantial evidence, and in light of the augmented record filed May 5, 2022, father cannot show the juvenile court's and Department's failure to initially comply with their ICWA duties was prejudicial. Accordingly, we affirm.

BACKGROUND

Given father's limited issues on appeal, we focus on the information related to his ICWA claims. Following the minor's premature birth and positive test for amphetamine, the Department filed a Welfare and Institutions Code[1] section 300 petition on his behalf alleging he was a person described in subdivisions (b)(1) and (j)(1). The petition alleged the minor suffered, or was at substantial risk of suffering, harm due to substance abuse by C.B., the minor's mother, who had previously had another child taken away as a result of her substance abuse.

On April 20, 2021, mother reported to the Department that she may have Native American heritage on her father's side, but her relatives were not enrolled members, and she believed the tribe was out of Kentucky. Thereafter at the April 22, 2021 emergency detention hearing and in response to court inquiries, mother informed the court she did

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[1] Subsequent undesignated statutory references are to the Welfare and Institutions Code.

not have any Native American heritage that made her eligible for registration as a tribal member. Accordingly, the court determined the ICWA did not apply.

Mother repeated her denial of Native American heritage to the Department on May 4, 2021. It was during this interview that she identified J.T. as a possible father, and J.T. subsequently consented to a paternity test. J.T.'s first appearance in the case was at the juvenile court's combined jurisdiction and disposition hearing on May 26, wherein the court found jurisdiction and ordered reunification for mother, but did not appoint counsel nor order services for J.T. pending return of the paternity test. If J.T. was determined to be the biological father, the matter would be put back on calendar. The court did not inquire regarding J.T.'s possible Native American status, but did determine that the ICWA did not apply.

J.T. was determined to be the biological father around July 6, 2021, but the matter was not placed back on calendar to address this development, and the record does not reflect any inquiries by the Department or the juvenile court regarding father's possible Native American heritage leading up to the termination of parental rights hearing.[2] Nonetheless, at the six-month review hearing on December 7, the juvenile court again found that the ICWA did not apply, and in February, the Department spoke with mother's mother K.B., who denied there was any Native American heritage anywhere in mother's family.

Thereafter, the juvenile court made no express ICWA findings at the section 366.26 hearing on March 22, 2022, wherein it terminated mother's and father's parental rights, nor did it ask father concerning any possible Native American heritage. Nonetheless, the juvenile court's previous ICWA determination was incorporated by virtue of the court's orders taking judicial notice of previous orders and recognizing that

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[2] This included the juvenile court's failure to ask father concerning the ICWA at the November 17, 2021, and December 7, 2021 six-month review hearings.

unless modified all previous orders remained in effect. (See *In re Isaiah W.* (2016) 1 Cal.5th 1, 6, 9, 14-15 [ICWA issue cognizable on appeal from termination of parental rights even though no express ICWA finding was made at that hearing].) Father timely appealed.

We granted the Department's motion to augment the record in this appeal to include a Department memorandum filed with the juvenile court on April 28, 2022. This memorandum states father told the Department on April 21, 2022, that he "might have Cherokee ancestry out of Oklahoma." Father identified his mother as the family member who would have more information. The Department spoke with father's mother the same day and learned that the family does not have any Native *American* heritage. Father's mother explained she had received a DNA test result that identified her as having "Native Heritage," but her entire family is from "Culican, Sinaloa, Mexico," and therefore, she believed her "Native Heritage" originates from Mexico. Father's mother also provided the Department with names, dates of birth, and dates of death of multiple family members from Mexico.

Following up on this information, the Department contacted the Bureau of Indian Affairs (Bureau), Pacific Regional Office, and confirmed that native heritage originating in Mexico would not be federally recognized for purposes of the ICWA. Further, without the name of a tribe or registration in a tribe, the minor would not be considered an "Indian child" for purposes of the ICWA. Accordingly, the Department requested the juvenile "[c]ourt find [the] ICWA was properly noticed and that [the] ICWA does not apply" for the minor.

DISCUSSION

Father argues the Department's and juvenile court's failure to comply with their respective initial and continuing ICWA duty to investigate whether the minor may be an Indian child requires reversal of the termination order. (See §§ 224.2, 366.26.)

As this court recently explained: " 'The ICWA protects the interests of Indian children and promotes the stability and security of Indian tribes by establishing minimum standards for removal of Indian children from their families, and by permitting tribal participation in dependency proceedings. [Citations.] A major purpose of the ICWA is to protect "Indian children who are members of or are eligible for membership in an Indian tribe." [Citation.]' (*In re A.W.* (2019) 38 Cal.App.5th 655, 662.) The ICWA defines an ' "Indian child" ' as a child who 'is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.' (25 U.S.C. § 1903(4).) The juvenile court and the social services department have an affirmative and continuing duty, beginning at initial contact, to inquire whether a child who is subject to the proceedings is, or may be, an Indian child. (Cal. Rules of Court, rule 5.481(a); § 224.2, subd. (a).)" (*In re G.A.* (2022) 81 Cal.App.5th 355, 360.)

" '[S]ection 224.2 creates three distinct duties regarding [the] ICWA in dependency proceedings. First, from the [Department]'s initial contact with a minor and his [or her] family, the statute imposes a duty of inquiry to ask all involved persons whether the child may be an Indian child. (§ 224.2, subds. (a), (b).) Second, if that initial inquiry creates a "reason to *believe*" the child is an Indian child, then the [Department] "shall make *further inquiry* regarding the possible Indian status of the child, and shall make that inquiry as soon as practicable." (*Id.*, subd. (e), italics added.) Third, if that further inquiry results in a reason to *know* the child is an Indian child, then the formal notice requirements of section 224.3 apply. (See § 224.2, subd. (c) [court is obligated to inquire at the first appearance whether anyone "knows or has reason to know that the child is an Indian child"]; *id.*, subd. (d) [defining circumstances that establish a "reason to know" a child is an Indian child]; § 224.3 [ICWA notice is required if there is a "reason to know" a child is an Indian child as defined under § 224.2, subd. (d)].)' (*In re D.S.* (2020) 46 Cal.App.5th 1041, 1052.)" (*In re G.A., supra*, 81 Cal.App.5th at p. 361.)

When there is reason to believe the child is an Indian child, further inquiry is necessary to help determine whether there is reason to know the child is an Indian child, including: "(A) Interviewing the parents, Indian custodian, and extended family members to gather the information required in paragraph (5) of subdivision (a) of Section 224.3[;] [¶] (B) Contacting the [Bureau] and the State Department of Social Services for assistance in identifying the names and contact information of the tribes in which the child may be a member, or eligible for membership in, and contacting the tribes and any other person that may reasonably be expected to have information regarding the child's membership status or eligibility[;] [¶] (C) Contacting the tribe or tribes and any other person that may reasonably be expected to have information regarding the child's membership, citizenship status, or eligibility. Contact with a tribe shall, at a minimum, include telephone, facsimile, or electronic mail contact to each tribe's designated agent for receipt of notices under the [ICWA] [citation]. Contact with a tribe shall include sharing information identified by the tribe as necessary for the tribe to make a membership or eligibility determination, as well as information on the current status of the child and the case." (§ 224.2, subd. (e)(2).) There is no need, however, to continue on to section 224.2, subdivision (e)(2)(B) and (C) if the inquiry contemplated in subdivision (e)(2)(A) is completed and fails to yield information from which a specific tribal affiliation could be deduced.

"[C]laims of inadequate inquiry into a child's Native American ancestry [are reviewed] for substantial evidence." (*In re G.A.*, *supra*, 81 Cal.App.5th at p. 361.) "We must uphold the [juvenile] court's orders and findings if any substantial evidence, contradicted or uncontradicted, supports them, and we resolve all conflicts in favor of affirmance." (*In re A.M.* (2020) 47 Cal.App.5th 303, 314.)

Starting with the claims regarding mother, father has not shown the juvenile court erred. While mother initially reported she may have Native American heritage through her father in Kentucky, she unequivocally stated those relatives were not enrolled in a

tribe and denied she was eligible for membership in a Native American tribe at the emergency detention hearing. Accordingly, the court determined the ICWA did not apply. Thereafter, mother consistently maintained she did not have Native American heritage in a follow-up interview with the Department and failed to suggest this was incorrect at any of the later hearings wherein the juvenile court found again that the ICWA did not apply. That mother did not have Native American heritage was further confirmed by her mother K.B., who denied there was any Native American heritage anywhere in mother's family. Accordingly, substantial evidence supports the juvenile court's finding that the ICWA does not apply to the minor as a result of mother's heritage. (*In re G.A., supra*, 81 Cal.App.5th at p. 361; *In re A.M., supra*, 47 Cal.App.5th at p. 314.)

As to the abject failure of the Department and juvenile court to inquire as to father's possible Native American heritage (see § 224.2, subds. (a), (c)), we agree this was error but conclude father has not shown this error was prejudicial. The augmented record shows that shortly after terminating father's parental rights, the Department conducted an appropriate ICWA inquiry, which included interviewing father and father's mother concerning their possible Native American heritage. The Department then followed up on this information with the Bureau, and the Bureau advised the Department that native heritage from Mexico would not trigger the ICWA.

There is nothing in the record to suggest further contacts with other members of father's family might contradict the unqualified statement by father's mother that the family did not have Native *American* heritage. Accordingly, the information in the record shows no reason to believe that father has Native American heritage. As such, any error the Department and juvenile court committed in not interviewing father and his mother *prior* to the termination hearing was harmless. (See *In re G.A., supra*, 81 Cal.App.5th at p. 363 [" '[A]n agency's failure to conduct a proper initial inquiry into a dependent child's American Indian heritage is harmless unless the record contains

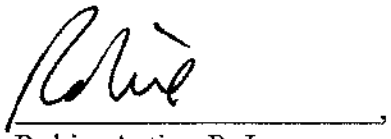
information suggesting a reason to believe that the child may be an "Indian child" within the meaning of [the] ICWA, such that the absence of further inquiry was prejudicial to the juvenile court's ICWA finding' "]; *In re Dezi C.* (2022) 79 Cal.App.5th 769, 779.)

Moreover, even if we were to accept there was initially a reason to believe the child may have been an Indian child premised upon father's original statement, the Department complied with its duties of further inquiry by interviewing father's mother, who had been identified by father as the individual within the family with knowledge on this subject. Father's mother unequivocally identified all native heritage as being of Mexican origin, and the Department confirmed with the Bureau that because the native heritage was Mexican in origin, the minor was not an Indian child. (§ 224.2, subd. (e)(2).)

Finally, in finding father has failed to demonstrate prejudicial error, we recognize that father cites authority suggesting posttermination remedial efforts should not be considered when making this determination. (See *In re M.B.* (2022) 80 Cal.App.5th 617, 627-629; *In re E.V.* (2022) 80 Cal.App.5th 691, 700-701.) However, we disagree and find it is appropriate to consider the Department's posttermination evidence that has been made part of the official appellate record and the finding that the minor is not an Indian child within the meaning of the ICWA. (*In re Allison B.* (2022) 79 Cal.App.5th 214, 218-220.) We are not convinced by *In re M.B.* at pages 627-629 that the juvenile court's alleged inability to modify a termination order (§ 366.26, subd. (i)(1)) equates to an inability of this court to consider evidence within the appellate record of a subsequent ICWA investigation which does not alter the termination order. Nor do we agree with *In re E.V.* at pages 700-701 that *any* ICWA error is presumptively prejudicial requiring remand. Rather, we find it appropriate to remand only where the record shows " 'a reason to believe that the child may be an "Indian child" within the meaning of [the] ICWA.' " (See *In re G.A., supra*, 81 Cal.App.5th at p. 363.) Father cannot establish prejudicial error under this test.

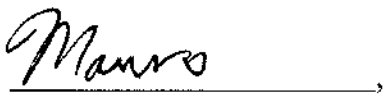
DISPOSITION

The juvenile court's termination order is affirmed.



Robie, Acting P. J.

We concur:



Mauro, J.

Krause, J.

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

MAILING LIST

Re: Placer County Department of Health and Human Services v. J.T.
C096051
Placer County
No. 53005180

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Sacramento, CA 95833

Honorable Colleen M. Nichols
Judge of the Placer County Superior Court - Main
P.O. Box 619072
Roseville, CA 95661
(By email)

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

In re K.D., a Person Coming Under the Juvenile Court Law.	C096051
PLACER COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff and Respondent, v. J.T., Defendant and Appellant.	(Super. Ct. No. 53005180) ORDER CERTIFYING OPINION FOR PUBLICATION

THE COURT:

The opinion in the above-entitled matter filed on August 31, 2022, was not certified for publication in the Official Reports. For good cause, it now appears that the opinion should be published in the Official Reports and it is so ordered.

BY THE COURT:

Robie, Acting P. J.

Mauro, J.

Krause, J.

EDITORIALS

APPEAL from a judgment of the Superior Court of Placer County, Colleen M. Nichols, Judge. Affirmed.

Janette Freeman Cochran, under appointment by the Court of Appeal, for Defendant and Appellant.

Karin E. Schwab, County Counsel, Lydia B. Stuart and Jason M. Folker, Deputy County Counsel, for Plaintiff and Respondent.

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **In re K.D.**
Case Number: **TEMP-SEB14RCN**
Lower Court Case Number:

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PETITION FOR REVIEW	C096051_pet rev_JT

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

9/30/2022
Date

/s/Janette Cochran
Signature

Cochran, Janette (102643)
Last Name, First Name (PNum)