Filed 1/6/23 In re Athena R. CA2/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re ATHENA R. et al., Persons Coming Under the Juvenile Court Law.	B318751 (Los Angeles County Super. Ct. No. 19CCJP05249)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. Y.R. et al. Defendants and Appellants.	ORDER MODIFYING OPINION AND DENYING REHEARING; NO CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed on December 13, 2022, be modified as follows:

1. At page 9, line 2 of the first full paragraph, before the word "Mexico" insert "Uruapan," so that line reads in part as follows:

"Mother was born in October 1986 in Uruapan, Mexico"

2. On page 17, line 7 of the paragraph beginning with "We have declined," at the end of the citation following "p. 744" insert the parenthetical "[holding reversal is warranted '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']" so the citations read as follows:

> (*In re Darian R.*, *supra*, 75 Cal.App.5th at p. 509, quoting *In re Benjamin M.*, *supra*, 70 Cal.App.5th at p. 744 [holding reversal is warranted "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"].)

3. On page 18, first full paragraph beginning with "As far as Father's" and ending with footnote 11, the first sentence is modified to read as follows:

> As far as Father's extended family members are concerned, the paternal grandfather is the only one still living with whom Father had any contact as well as the only one Father indicated as potentially having Indian heritage, and he was interviewed.

4. The paragraph commencing at the bottom of page 18 with "The only other" and ending at the top of page 19 with "*ante*" is modified to read as follows:

> The only other paternal relatives are (1) Father's sister, for whom Father lacked current contact information, and (2) four half-brothers, with whom he has no contact. There is no reason to believe these persons were "readily available" to DCFS for purposes of conducting an ICWA inquiry. (See *In re Benjamin M., supra*, 70 Cal.App.5th at p. 744 [any failure to contact an extended family member is harmless when the person is not "readily available" to social workers]; *In re A.M.* (2020) 47 Cal.App.5th 303, 323 [social workers are not required " 'to cast about' " for investigative leads to satisfy the duties of inquiry].) There is also no indication in the record that Father's sister has any greater knowledge than Father about their family

history. Nor is there any reason to believe that any of the unidentified half-brothers would have any greater information regarding the paternal grandmother's family history (if they were her sons) and certainly no reason to think that they had any greater information about the paternal grandfather (if they were his sons) than was already in the record from Father's own recall and his testimony about DCFS interview of his father discussed, *ante*.

5. On page 19, footnote 12 is modified to read as follows:

> [12] It is also far from clear that Father's stepbrothers would meet the definition of extended family members, which covers a child's "uncle[s]" but is silent about "half-uncles." (25 U.S.C. § 1903(2).)
>
> Moreover, it bears mention that an "Indian child" is an unmarried person under 18 years of age who is (1) a member of a federally recognized Indian tribe or (2) is eligible for membership in a federally recognized tribe and is the biological child of a member of a federally recognized tribe. (25 U.S.C. § 1903(4) & (8); see § 224.1, subd. (a) [adopting federal definitions], subd. (b) [expanding the age range stated in the federal definition to include persons over 18, but under 21, years of age].) There is no reason to believe Father's sister or his half-brothers have superior information to Father as to whether he is a member of a federally recognized Indian tribe.

6. On page 19, the paragraph beginning with "As for the maternal family," the first two sentences are modified to read as follows:

> As for the maternal family, Mother's parents raised her, and she repeatedly denied Indian ancestry.

There is no change in the judgment. Appellants Y.R.'s and Jonathan O.'s petitions for rehearing are denied.

KELLEY, J.* ROTHSCHILD, P. J. BENDIX, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Filed 12/13/22 In re Athena R. CA2/1 (unmodified opinion)

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

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LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. Y.R. et al. Defendants and Appellants.	

APPEALS from an order of the Superior Court of Los Angeles County, Jean M. Nelson, Judge. Affirmed.

William Hook, under appointment by the Court of Appeal, for Defendant and Appellant Y.R.

Terrance M. Chucas, under appointment by the Court of Appeal, for Defendant and Appellant Jonathan O.

Dawyn R. Harrison, Acting County Counsel, Kim Nemoy, Assistant County Counsel, and Sarah Vesecky, Deputy County Counsel, for Plaintiff and Respondent.

Presumed father Jonathan O. (Father) and mother Y.R. (Mother) (sometimes referred to herein as Appellants) appeal from the juvenile court's February 14, 2022, order terminating their parental rights relating to their children Athena R., born 2019, and Jonathan O., Jr. (Junior), born 2020. Appellants' sole contentions on appeal are that the juvenile court erred in finding that the Indian Child Welfare Act of 1978 (ICWA; 25 U.S.C. § 1901 et seq.) did not apply. Specifically, Appellants contend that the Los Angeles County Department of Children and Family Services (DCFS or the Department) failed to make required inquiries of the children's extended family members under Welfare and Institutions Code[1] section 224.2, subdivision (b) and that the juvenile court failed to comply with section 224.2, subdivision (i)(2) and California Rules of Court, rule 5.481(b)(3)(A). For reasons discussed more fully below, we find that any error by DCFS in failing to undertake inquiries under section 224.2, subdivision (b) is harmless and the argument regarding section 224.2, subdivision (i)(2) and rule 5.481(b)(3)(A) of the California Rules of Court lacks merit.

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

FACTUAL AND PROCEDURAL BACKGROUND[2]

In its brief, DCFS incorporated Appellants' summary of the proceedings below. The summary that follows is taken principally from those briefs.[3] As noted, *post*, it is supplemented by two additional points the Department has presented in its brief and supported by references to the record.

A. Factual Summary

As noted in Mother's brief, she has a history with the Department regarding the children's four half-siblings starting in 2009. In February 2009, the juvenile court declared half-siblings D.W. and J.W. dependents due to sustained allegations of domestic violence between Mother and the father of those children (who is not the father of the children in this case). After participating in reunification services, in September 2010, the juvenile court terminated jurisdiction with a family law order awarding Mother sole physical and legal custody of these

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[2] Because the only issues on appeal are whether the juvenile court complied with duty under section 224.2, subdivision (i)(2) and California Rules of Court, rule 5.481(b)(3)(A); and whether DCFS failed to comply with its duty of inquiry under section 224.2, subdivision (b) and, if so, what remedy is appropriate, we focus on the facts and procedural history relevant to these specific issues.

[3] Through our own record review, we observe Mother's brief mistakenly cites to a section 388 petition filed by Athena's then caregiver as having been made by the maternal grandmother. Although it is correct, as discussed *post*, that the maternal grandmother sought placement of both children throughout the proceedings below, the referenced section 388 petition was not a vehicle she employed in aid of that request.

children. In 2017, the juvenile court declared half-siblings D.W., J.W., E.W., and P.W. dependents due to sustained allegations that Mother abused methamphetamines and had untreated mental health issues. The sustained petition also contended that Mother continued to engage in domestic violence with the father of these children. In June 2018, the juvenile court terminated Mother's reunification services and the children were referred to permanent placement services. At the time DCFS commenced the current case, maternal grandmother, Georgina R., was in the process adopting these children.

Regarding the current case on August 15, 2019, the Department filed a dependency petition alleging that Athena came within the juvenile court's jurisdiction under subdivisions (b)(1) and (j) of section 300 due to a failure to protect and the abuse of a sibling. Specifically, the Department contended Athena was at risk of harm because of the following: (1) Athena had been born with a positive toxicology screen for methamphetamines; (2) Mother and Father both had a history of substance abuse; (3) Mother had untreated mental health issues; and (4) Athena's four half-siblings were currently dependents of the juvenile court, receiving permanent placement services due to Mother' substance abuse and mental health issues.

The juvenile court held Athena's jurisdictional hearing on October 4, 2019. At the conclusion of the hearing, the court found the allegations in the child's dependency petition to be true and assumed jurisdiction over the matter.

On November 15, 2019, the juvenile court held Athena's disposition hearing. At the conclusion of the hearing, the court declared Athena a dependent and placed her in foster care. The

court ordered that both parents participate in reunification services.

On August 13, 2020, the Department filed a dependency petition, alleging that newborn Junior came within the juvenile court's jurisdiction under subdivisions (b)(1) and (j) of section 300 due to a failure to protect and the abuse of a sibling. Specifically, the Department contended Junior was at risk of harm because of Mother's issues with substance abuse, her issues with mental health, Father's inability to care for the child, and Mother's failure to reunify with the four half-siblings.

On October 18, 2021, the juvenile court denied placement of Athena or Junior with maternal grandmother. Maternal grandmother was already caring for Mother's four other children, but she was "at capacity" under her Resource Family Approval (RFA) and her request to increase that capacity had been denied "due to the number of children she was caring for and the services the children were receiving including mental health and [individualized education program] services which was very challenging for the maternal grandmother to maintain." Accordingly, the juvenile court observed adding two additional young children to her household would create a risk of insufficient care for the children.

On October 28, 2020, the juvenile court held Athena's six-month review hearing followed by Junior's jurisdiction hearing. It found that Mother had made minimal progress towards alleviating the causes necessitating Athena's placement and terminated her reunification services. The court then found that Father had made partial progress and continued his services another six months. At the conclusion of Junior's jurisdiction hearing, the juvenile court found the allegations in the child's

dependency petition to be true and assumed jurisdiction over the matter.

On November 24, 2020, the juvenile court held Junior's disposition hearing. It declared him a dependent and placed him in foster care. The juvenile court then ordered that both parents participate in the reunification services.

At Athena's 12-month review hearing on April 19, 2021, the juvenile court found that Father had not made substantial progress toward alleviating the causes necessitating the child's placement and terminated his reunification services. The court then scheduled a section 366.26 hearing to choose a permanent plan for Athena and notified the parents of their right to challenge the court's orders by writ petition.

At Junior's six-month review hearing on August 16, 2021, the juvenile court found that Mother's progress toward alleviating the causes necessitating the child's placement had been minimal and that Father's progress had not been substantial. The court then terminated reunification services and scheduled a section 366.26 hearing to choose a permanent plan for Junior. The court also notified the parents of their right to challenge the court's orders by writ petition.

Throughout the proceedings below, the maternal grandmother sought to have the children placed in her custody, which Mother and Father supported through their respective counsels' arguments at several hearings.

On February 14, 2022, the juvenile court held Athena's and Junior's section 366.26 hearings. Mother appeared and requested a continuance so the Department could obtain more information regarding Athena's mental health as it related to her adoptability. The juvenile court denied the request, finding that

Athena had been doing well in placement and that there was no indication her mental state would affect adoptability.

Mother then renewed her request that the juvenile court place the children with the maternal grandmother, contending the court must give relatives who request placement preferential treatment. She also objected to the termination of her parental rights, arguing the parental-benefit exception to adoption applied and that Athena would not be adopted within a reasonable amount of time due to the child's mental health issues. Father joined Mother's request that the court place the children with the maternal grandmother and asserted the parental-benefit exception to adoption. The Department and the children's attorneys both contended that none of the exceptions to adoption applied and requested the court terminate parental rights. Athena's attorney also asserted that Athena's behaviors were normal for a two-year-old and pointed out she was doing well in placement with her brother.

At the conclusion of the hearing, the juvenile court denied the request to place the children with the maternal grandmother. The court stated it had already made a ruling on the issue recently and found that no new evidence had been offered for the court to reconsider its decision. The court also noted that Athena's behaviors had improved in placement after a transition period and found that both parents had failed to visit consistently and did not have significant relationships with the children. It found Athena and Junior adoptable and that no exception to

adoption applied to the case. The court terminated parental rights and ordered adoption as the children's permanent plan.[4]

B. ICWA Proceedings

On August 14, 2019, Mother told the social worker her family had no Indian ancestry. On August 12, August 14, and September 12, 2019, the social worker interviewed the maternal grandmother, who was in the process of adopting Mother's other four children. The record is silent as to whether the social worker asked the maternal grandmother if Athena and Junior had Indian ancestry.

At Athena's August 16, 2019 detention hearing, Mother filed a Parental Notification of Indian Status form stating she had no Indian ancestry. The court found that the ICWA did not apply as to Mother.

Father also filed a Parental Notification of Indian Status form on August 16, 2019 and reported that he may have Indian ancestry; adding a note to the form stating: "[Paternal grandfather] possibly, Jose [O]." The juvenile court ordered the Department to investigate Father's claim, interview extended relatives, and send appropriate notice to any relevant tribes as required under ICWA. The court also ordered the Department to provide a supplemental report addressing their ICWA investigation.

Between August 16 and September 17, 2019, the social worker had several conversations with Father related to the paternal grandfather's possible Indian ancestry.

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[4] Neither Mother nor Father contests on appeal the juvenile court's rulings on any ground other than its ICWA finding.

In the jurisdiction report dated October 4, 2019, the social worker reported that Mother was born in October 1986 in Mexico, and was raised in California by her parents, Georgina R. and Elias R. The social worker further reported that Mother had a sister. The social worker also reported that Father was born in February 1988 in Beverly Hills, California, and his mother, Loria B., who died in early 2019, and his father, Jose O., raised him in California.

On September 12, 2019, the social worker interviewed Father regarding his Indian ancestry. Father said he was not sure if he had Indian heritage but said paternal great grandfather was from "Indian Blood." He explained that no tribe was ever mentioned and that he did not think paternal great grandfather was from American Indian heritage as he was of Mexican descent. Because paternal great grandfather was deceased, Father offered to set up a three-way call with the social worker and paternal grandfather to see if he had more information. On September 19, 2019, the social worker reported that her attempts to follow up with Father had been unsuccessful.

At Athena's combined jurisdiction and disposition hearing on November 15, 2019, Father testified on ICWA issues. His relatively brief testimony is set forth verbatim given its importance to the juvenile court's efforts to inquire fully of Father regarding his initial vague assertion of the paternal great grandfather's possible Indian ancestry and his then-current denial of American Indian ancestry. The following exchanges

took place between Father, DCFS counsel, "Mr. Lee,"[5] and the juvenile court.

"Q . . . As far as you are aware, do you have any Indian status?

"A It was word of mouth at the time, but no. After talking to my father, he says he might have but he didn't really know his father too well, and that was in Mexico, so I don't know if it is different than over here.

"Q Have you recently spoken to your father regarding possible Indian ancestry?

"A Yes, I have with [the social worker].

"Q And that is one of the social workers on your case?

"A That is the social worker for my daughter, Athena.

"Q When did you speak with your father with the social worker?

"A I don't remember the exact date. It was last time I was here for my visitation at the DCFS office in Glendora, but I'm sure she could give you the actual date. Within the last two or three weeks.

"Q Were you present during the time when—were you present when you and the social worker and your father spoke about this all together?

"A Yes.

"Q What did your father say about Indian ancestry?

"A He said that his father was Native American, but he didn't really understand the question. My dad had a stroke, so you can't understand what he said but he didn't really know his

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[5] Father's brief in presenting these passages refers to Mr. Lee as Father's counsel, but this is incorrect.

father that well, so he is already at the age where I don't know if he—don't know if he is telling the truth or not.

"Q Do you have any contact with your grandfather?

"A No, I never met him.

"Q Do you have contact information for your grandfather?

"A No.

"Q Do you know if your father has contact information for your grandfather?

"A As far as I know, no.

"Q You indicated that your grandfather is in Mexico?

"A I think he is deceased.

"The Court: Where was your father born?

"The Witness: Jalisco.

"The Court: When he was asked about whether he had Indian ancestry, what did he indicate?

"The Witness: It was told to me verbally that his father was Native American but —

"The Court: Let me clarify. Your dad was told at some point?

"The Witness: My father told me. Just one of the things I asked about his father and he said he was —

". . . [¶]

"The Court: . . . When you and the social worker talked to your father—first of all, was it a conversation in English or another language?

"The Witness: In English.

"The Court: Does your father—is his first language English or some other language?

"The Witness: Spanish.

"The Court: Does he understand—so the conversation was in English?

"The Witness: It was in English. First language is Spanish, but he speaks English very well. It is just since the stroke you can't understand him very well because his thyroid and everything.

"The Court: But you don't have any concerns about him understanding a conversation in English?

"The Witness: No.

"The Court: When the social worker and you were talking to him about whether he thinks there is any Native American ancestry, did he say—what did he say?

"The Witness: At the time, he said no. But you mean growing up? This is why I brought it up. Before, he said his father was Native American from Mexico.

"The Court: But from Mexico?

"The Witness: From Mexico.

"The Court: From Mexico?

"The Witness: Yes.

"The Court: The day of the conversation with the social worker, he confirmed —

"The Witness: No.

"The Court: . . .[H]e does not have native American ancestry?

"The Witness: Correct.

"The Court: I'm satisfied.

"Q by Mr. Lee: Other than your father, is there anyone else on the paternal side that would know about any possible native American ancestry?

"A No."

On November 15, 2019, based on the evidence before it, the juvenile court found that ICWA did not apply in Athena's case.

At Junior's detention hearing on August 18, 2020, Mother and Father both filed Parental Notification of Indian Status

forms indicating they did not have Indian ancestry. The juvenile court found that the ICWA did not apply to Junior.

At Athena's and Junior's section 366.26 hearings on February 14, 2022, the juvenile court reiterated its ICWA findings. Neither parent disputed the juvenile court's findings at the time.

In addition to the facts summarized immediately above, which the Department incorporated from Appellants' briefs, the Department makes two additional points on appeal. First, the record in the current case included evidence from Mother's prior dependency case including that she had denied Indian ancestry and that the dependency investigator in that case had learned that "mother is of Mexican ancestry. Bo[th] of the [maternal grandparents] were born in Mexico and retain their citizenship. The mother is also a Mexican citizen." Second, Father had reported that he did not maintain contact with his one sister, who was a current user of methamphetamine and that his only current family support was from the children's maternal grandmother.

On February 23, 2022, Mother filed a notice of appeal. On April 13, 2022, Father filed a notice of appeal.

DISCUSSION

A. ICWA Inquiry Statutory Framework

An "Indian child" to whom the protections of the ICWA and California's implementing laws (§ 224 et seq.) apply, is defined under federal and California law as an unmarried 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); § 224.1, subds. (a), (b).)

The legislatively-mandated process for determining whether a child is an Indian child has its source in federal law, which establishes minimum standards for such inquiries. "The duty of initial inquiry arises, in part, from federal regulations under ICWA stating that '[s]tate courts must ask each participant in an . . . involuntary child-custody proceeding whether the participant knows or has reason to know that the child is an Indian child' and that '[s]tate courts must instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child.' (25 C.F.R. § 23.107(a) (2020).)"[6] (*In re Benjamin M.* (2021) 70 Cal.App.5th 735, 741.) California law, however, "more broadly imposes on social services agencies and juvenile courts . . . an 'affirmative and continuing duty to inquire' whether a child in the dependency proceeding 'is or may be an Indian child.' (§ 224.2, subd. (a).)" (*Id.* at pp. 741-742.) These requirements include both a broad duty of *initial* inquiry into Indian heritage (see § 224.2, subds. (a)-(c)) and then, if circumstances come to light indicating a "reason to believe" a child is an Indian child, a duty of *further* inquiry (see *id.*, subd. (e)).

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[6] Section 224.2, subdivision (c) requires the juvenile court to "ask each participant present in the hearing whether the participant knows or has reason to know that the child is an Indian child" and to "instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child." (§ 224.2, subd. (c).)

If there is "reason to know"[7] that a child is an Indian child, additional procedures, described in section 224.2, subdivisions (f) and (g), are triggered. Such procedures include notice to Indian tribes to "ensure that a tribe is 'aware of its right to intervene in or, where appropriate, exercise jurisdiction over a child custody proceeding involving an Indian child.' " (*In re Darian R.* (2022) 75 Cal.App.5th 502, 508.)[8]

B. Standard of Review

A juvenile court's ICWA findings are generally reviewed "under the substantial evidence test, which requires us to determine if reasonable, credible evidence of solid value supports

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[7] "There is reason to know a child involved in a proceeding is an Indian child under any of the following circumstances: [¶] (1) A person having an interest in the child, including the child, an officer of the court, a tribe, an Indian organization, a public or private agency, or a member of the child's extended family informs the court that the child is an Indian child. [¶] (2) The residence or domicile of the child, the child's parents, or Indian custodian is on a reservation or in an Alaska Native village. [¶] (3) Any participant in the proceeding, officer of the court, Indian tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child. [¶] (4) The child who is the subject of the proceeding gives the court reason to know that the child is an Indian child. [¶] (5) The court is informed that the child is or has been a ward of a tribal court. [¶] (6) The court is informed that either parent or the child possess an identification card indicating membership or citizenship in an Indian tribe." (§ 224.2, subd. (d).)

[8] Because neither Father nor Mother argues there was a reason to know that Athena or Junior was an Indian child, we need not describe such procedures in detail.

the court's" ICWA finding. (*In re A.M.* (2020) 47 Cal.App.5th 303, 314.) However, in cases such as this, where DCFS concedes that there was error in the initial ICWA inquiry, which calls into question the foundation for the juvenile court's ultimate ICWA finding, our assessment focuses on whether that error was prejudicial. (See *In re Benjamin M.*, *supra*, 70 Cal.App.5th at pp. 743-744.)

C. Harmless Error—General Principles and Analysis

"The usual test for prejudicial state law error is whether, ' "after an examination of the entire cause, including the evidence" ' [citation], we are 'of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' " (*In re S.S.* (2022) 75 Cal.App.5th 575, 581, quoting *People v. Watson* (1956) 46 Cal.2d 818, 836.) "Although an appellant ordinarily has the burden of establishing prejudice [citation], a parent's ability to make this showing based upon the record in failure-to-inquire cases can be problematic 'when the record is inadequate because of the social services agency's failure to document its inquiries.' [Citation.]" (*In re S.S.*, *supra*, at p. 581.)

The Courts of Appeal apply varying analytical frameworks to evaluate whether ICWA initial inquiry errors are prejudicial or harmless. We need not dwell on the full range of approaches; it suffices to note that the cases upon which Father and Mother principally rely[9] sit at one end of a " 'continuum' " and have been classified as falling into the category of cases applying a rule of

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[9] See *In re J.C.* (2022) 77 Cal.App.5th 70, 80-82; *In re Antonio R.* (2022) 76 Cal.App.5th 421, 432-437; *In re H.V.* (2022) 75 Cal.App.5th 433, 438; *In re Y.W.* (2021) 70 Cal.App.5th 542, 556.

" 'automatic reversal.' " (*In re Dezi C.* (2022) 79 Cal.App.5th 769, 777 [listing " 'automatic reversal rule' " cases and cases applying other tests], review granted Sept. 21, 2022, S275578.)

We have declined to adopt this approach; rather, this division of this court has generally considered whether to compel further inquiry on remand by assessing whether there is a non-speculative basis in the record to believe that " 'the probability of obtaining meaningful information is reasonable in the context of ICWA.' " (*In re Darian R.*, *supra*, 75 Cal.App.5th at p. 509, quoting *In re Benjamin M.*, *supra*, 70 Cal.App.5th at p. 744.)[10] Our approach is not "wooden." (*In re A.C.* (2022) 75 Cal.App.5th 1009, 1017). It entails review of the particular circumstances in the record to discern whether "information that was likely to bear meaningfully upon whether the child is an Indian child" would be available through further questioning. (*In re S.S.*, *supra*, 75

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[10] A rule of automatic reversal for ICWA initial inquiry errors may incrementally incentivize compliance with ICWA inquiry rules; however, we join other courts who have rejected it as conflicting with the harmless error rule, as prescribed by our state Constitution. (See *In re Dezi. C.*, *supra*, 79 Cal.App.5th at p. 785; *In re Benjamin M.*, *supra*, 70 Cal.App.5th at pp. 742-743; see also Cal. Const., art VI, § 13 ["miscarriage of justice" required to set aside judgment].) Apart from these doctrinal problems, a rule of per se reversal also "encourages parents to 'game the system,' " which is to say that it "perverts" the normal incentive to raise a perceived error as early as possible to help "ensure that errors can be fixed before the litigation is completed in the trial court." (*In re Dezi C.*, *supra*, 79 Cal.App.5th at p. 784; see also *In re Ezequiel G.* (2022) 81 Cal.App.5th 984, 1003 [automatic reversal rule is "not compelled by the statute, harms the interests of dependent children, and is not in the best interests of Indian communities"].)

Cal.App.5th at p. 582.) Applying these principles here, we find that any error in failing to interview additional extended family members was harmless.

As far as Father's extended family members are concerned, the paternal grandfather is the only one still living with whom Father had any contact, and he was interviewed. The paternal grandmother is deceased and even though the paternal grandfather was not asked about her possible Indian heritage, there is no reason to think that, if the paternal grandfather were questioned again that any additional relevant information would be discovered. For his part, Father was not estranged from his mother and father. He grew up in Beverly Hills with them. His initial report about possible Indian ancestry was through his father, not his mother, and despite growing up under his mother's care, he never gave any indication of having any reason to believe there was any possible Indian history on her side of the family.[11]

The only other paternal relatives are (1) Father's sister, an abuser of methamphetamines, for whom Father lacked current contact information, and (2) four half-brothers, with whom he has no contact. There is also no indication in the record that Father's sister has any greater knowledge than Father about their family history. Nor is there any reason to believe that any of the unidentified half-brothers would have any greater information

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[11] Moreover, the paternal grandfather was suffering from the effects of a stroke when he was interviewed and it is entirely speculative to suggest that, if he were to be interviewed again (this time not about his own family history but about his deceased wife's family) that the interview would yield any information bearing meaningfully on the question of Athena and Junior's potential status as Indian children.

regarding the maternal grandmother's family history (if they were her sons) and certainly no reason to think that they had any greater information about the paternal grandfather (if they were his sons) than was already in the record from Father's own recall and his testimony about DCFS interview of his father discussed, *ante*.[12]

As for the maternal family, Mother and the maternal grandparents were all born in Mexico and remained Mexican citizens. Mother's parents raised her, and she repeatedly denied Indian ancestry. She maintained contact with the maternal grandmother, who, during the pendency of the matter, cared for Mother's older children, and never offered any factual argument to support a reasonable inference that interviewing the maternal grandmother would be likely to reveal information bearing meaningfully on Athena and Junior's potential status as Indian children. Moreover, during the dependency proceedings, the maternal grandmother, supported by Mother and her counsel, repeatedly sought placement of Athena and Junior with her. Thus, they would have had a strong incentive to bring forth any evidence of Indian ancestry for the children to capitalize on the statutory preference for placement of Indian children with extended family members. (See *In re S.S.*, *supra*, 75 Cal.App.5th at p. 582 [referencing 25 U.S.C. § 1915(a) & (b)].) That neither the parents, nor the maternal grandmother proffered any such evidence, or even factual argument about possible Indian ancestry, implies that they were unaware of facts that would bear

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[12] It is also far from clear that Father's stepbrothers would meet the definition of extended family members, which covers a child's "uncle[s]" but is silent about "half-uncles." (25 U.S.C. § 1903(2).)

meaningfully on whether Athena or Junior were Indian children.[13]

DISPOSITION

The juvenile court's order is affirmed.

NOT TO BE PUBLISHED

KELLEY, J.*

We concur:

ROTHSCHILD, P. J.

BENDIX, J.

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[13] Father also contends that the juvenile court "did not comply with section 224.2, subdivision (i)(2)" and the related California Rules of Court, rule 5.481(b)(3)(A) when it found that ICWA did not apply because the court failed to first make a finding that due diligence had been conducted. (See § 224.2, subd. (i)(2); Cal. Rules of Court, rule 5.481(b)(3)(A).) Father has not addressed the applicability of these provisions to the instant matter. Nonetheless, we conclude the juvenile court's implied finding of due diligence is supported adequately by the record, including the court's own questioning of Father and DCFS's attempts to obtain information from paternal grandfather.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.