Children's Law Center of California

"DEPENDENCY LEGAL NEWS"

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NEW DEPENDENCY CASELAW

GAL

In re Z.O.—filed 4/27/2022; Cert. for Part. Publ. 5/24/2022; Fourth Dist., Div. Three
Docket No. G060663; 79 Cal.App.5th 1
Link to case: https://www.courts.ca.gov/opinions/documents/G060663.PDF

[1] WHEN NOTICE GOES TO AN ADDRESS THAT IS KNOWN TO BE OUTDATED, A PARENT DOES NOT FORFEIT THEIR RIGHT TO AN APPEAL; [2] THE OMISSION OF FINDINGS OF COMPETENCY VIOLATED A PARENT'S DUE PROCESS RIGHTS, AND WAS NOT HARMLESS ERROR GIVEN THE LACK OF INFORMATION ON THE PARENT'S CONDITION.

A child welfare investigation began after mother was arrested by police at her hotel room that she shared with Z.O. Mother had destroyed the room to rid it of surveillance systems she believed were placed by the management, and she was arrested after she was found to be in possession of a methamphetamine pipe and admitted to using that morning. A petition was filed, and Z.O. was detained. Mother's appearance for the initial hearing was

waived by counsel, though she was present in lockup. When interviewed by the agency, mother expressed rambling, paranoid thoughts. Shortly after the initial jurisdiction hearing, which was continued due to a change in mother's counsel, mother filed a letter with the court. The juvenile court ordered the letter sealed and set a hearing to determine if a GAL was warranted. A hearing was conducted, and a GAL was appointed for mother. From that point, the GAL and mother's counsel made their appearances for mother, and mother did not attend the hearings. Mother was not offered reunification services because of previous child welfare involvement, and parental rights were terminated at the section 26 hearing. Mother appealed.

Conditionally affirmed and remanded with instructions. The mother did not forfeit her right to appeal the issue because the notice went to mother's last known address, and everyone, including the juvenile court, knew mother did not reside there, mother had only been present for one GAL hearing, and she was not advised that the juvenile court would be sending notices to her former residential address. The juvenile court erred in appointing a GAL without an explicit finding of the mother's incompetence, and the error was not harmless. A GAL must be appointed if the parent does not have the capacity to understand the nature or consequences of the proceeding and to assist counsel in preparing the case. However, before a GAL can be appointed, an informal hearing must be held wherein the parent has an opportunity to be heard. If a GAL is appointed without the parent's consent, there must be a preponderance of the evidence of the parent's incompetence. A psychiatric hospitalization, without any other relevant facts in the record, is not enough to demonstrate the level of incompetence needed to appoint a GAL. The lack of findings violated mother's due process rights, and the error was prejudicial because there was a complete lack of information on mother's condition while the hearings were taking place, making it impossible to know what evidence she could have presented if allowed to appear herself. (KH)

ICWA—WIC 224.2

In re M.E.—published 5/25/22; Third Dist.
Docket No. C094587; 79 Cal.App.5th 73
Link to case: https://www.courts.ca.gov/opinions/documents/C094587.PDF

INFORMATION FROM A PRIOR DEPENDENCY CASE IS NOT ENOUGH TO SUPPORT A NEW ICWA FINDING WHEN THE AGENCY FAILED TO INVESTIGATE NEW INFORMATION PROVIDED BY PARENTS AND FAILED TO INTERVIEW RECENTLY NAMED EXTENDED RELATIVES REGARDING THE ICWA.

A section 300 petition was filed on January 5, 2021. At the initial hearing, mother claimed Indian heritage but did not identify a tribe. She provided the names of three relatives who could provide more information, and the names of two paternal relatives to be assessed for placement. Father reported Cherokee heritage and stated his great-grandfather was "full blooded Cherokee." The court found there was a reason to believe the child was an Indian child and ordered further inquiry. In the Jurisdiction/Disposition report the agency reported that an ICWA investigation had occurred in a prior case in Yuba County, and it was determined that ICWA did not apply. The investigator reviewed filings in Yuba County and found the mother claimed Blackfeet, Cherokee, and Choctaw heritage. In the same report, father stated he did know the tribe his great-grandfather claimed. The Yuba County files indicated father previously identified Cherokee and Blackfeet heritage. Both parents denied being enrolled members of any tribe. At adjudication, the juvenile court found that there was no evidence showing that the children have any Native American heritage that "would qualify them to be tribal members" and therefore ICWA did not apply. The petition was sustained, and parents did not receive reunification services. The section 366.26 report reiterated the same information previously reported, added information from three tribes' responses in the Yuba County case, and then stated there was no further information provided to the worker regarding parents' knowledge of ICWA since the order was made in the Yuba County case. Parental rights were terminated. Mother timely appealed.

Conditionally affirmed and remanded. The agency was obligated to conduct a further inquiry after the parents' initial disclosures at the initial hearing. The agency had names of both maternal and paternal relatives, and even contacted paternal relatives for placement purposes but failed to inquire as to Native American ancestry. The agency's reliance on *In re Austin J.* (2020) 47 Cal.App.5th 870 is unavailing. The narrow reading in *Austin J.* of the type of information sufficient to trigger the duty of further inquiry is at odds with well-established ICWA law. Tribes, not courts or parties, determine whether a person meets the eligibility criteria for enrollment in a tribe, and section 224.2 expressly states that reason to believe includes whenever the court has information "suggesting" that either the parent or child "is a member or may be eligible for membership in an Indian tribe." (WIC 224.2(e)(1).) In addition, the Yuba County records do not relieve the agency of its duty to further inquire, as in that case three of the noticed tribes did not respond and the investigation was conducted in 2017 on only two children. In addition, courts and agencies have an ongoing duty to assess for ICWA and the court in the present case had new information that the Yuba County court did not have. This error was not harmless because the information provided to the court regarding the Yuba County case was inadequate and omitted the fact that Yuba County investigators never asked father about Native American

heritage and never included father's information on the prior notices to the tribes. (SH)

ICWA—WIC 224.2

In re M.B.—published 6/29/22; Second Dist., Div. Seven
Docket No. B312789
Link to case: https://www.courts.ca.gov/opinions/documents/B312789.PDF

THE AGENCY'S FAILURE TO CONDUCT AN ADEQUATE ICWA INVESTIGATION BEFORE THE JUVENILE COURT TERMINATED PARENTAL RIGHTS CANNOT BE REMEDIED BY A SUBSEQUENT INVESTIGATION WHILE THE APPEAL IS PENDING.

The agency filed a petition for M.B., which included an interview by the social worker of mother, who indicated she believed she had Blackfoot ancestry through L.B., M.B.'s maternal great-grandfather. Mother indicated she had no further information about maternal great-grandfather L.B. other than that he lived in Camden, New Jersey. At the detention hearing, the juvenile court ordered the agency to follow up with all maternal relatives and obtain relevant ICWA information from the relatives, including dates of birth. Prior to the Jurisdiction hearing, the agency interviewed mother again, who still could not recall L.B.'s date of birth. The agency proceeded to send out notices to Blackfoot tribes, the Secretary of the Interior, as well as the Bureau of Indian Affairs without L.B.'s date of birth. In a progress hearing held after the juvenile court took jurisdiction, the court found ICWA did not apply after not receiving any responses. Mother appealed the court's finding that ICWA did not apply, but while this first appeal was pending, the juvenile court ordered the agency to conduct a new investigation into M.B.'s Blackfoot ancestry. Subsequently, the Court of Appeal found the juvenile court's order mooted mother's first appeal. The agency's new investigation included an interview with maternal great-grandfather L.B., who denied any Indian ancestry but did not want to disclose his date of birth, as well as other maternal relatives, who denied Indian ancestry as well. The agency did not ask the other maternal relatives if they knew L.B.'s date of birth. The agency then sent out new notices, which still did not include L.B.'s date of birth. The Blackfoot Tribe of Montana responded and stated M.B. was not eligible for enrollment in the tribe. Based on this, the juvenile court found ICWA did not apply. At the section 366.26 hearing, the juvenile court terminated mother's parental rights. Mother appealed, arguing that the agency failed to conduct an adequate ICWA inquiry by failing to follow up with available maternal relatives about L.B.'s date of birth. During the pendency of the appeal, the

agency re-interviewed L.B. as well as other maternal relatives, and then argued that their third investigation rendered mother's appeal moot.

Conditionally affirmed and remanded with instructions. The agency's attempt to conduct further interviews regarding ICWA after the appeal was filed does not render mother's appeal moot. Although this Court took judicial notice of the agency's last-minute information containing the ICWA interviews, that is only an acknowledgement of the existence of the report itself, not of the substantive information contained in the report. Moreover, neither the agency, nor the juvenile court, has the ability to remedy a no-ICWA finding after termination of parental rights occurs as section 366.26, subdivision (i)(8) does not permit the juvenile court to revoke an order terminating parental rights once it is final. Rather than attempting to moot mother's appeal by conducting additional inquiry, "the [agency's] proper course of action was to stipulate to a conditional reversal with directions for full compliance with the inquiry and notice provisions of ICWA and related California law." The agency already implicitly acknowledged that it failed to conduct a proper ICWA inquiry with several maternal relatives regarding their knowledge of the family's Indian heritage and maternal great-grandfather's birth date, and is ordered to do so on remand. (SW)

ICWA

In re E.V.—published 6/30/2022; Fourth Dist., Div. Three
Docket No. G061025
Link to case: https://www.courts.ca.gov/opinions/documents/G061025.PDF

IN ALL CASES WHERE ICWA INQUIRY RULES WERE NOT FOLLOWED, REVERSAL IS REQUIRED, AND POST JUDGMENT EVIDENCE OF ICWA COMPLIANCE IS NOT APPROPRIATE.

E.V. was taken into protective custody due to prenatal drug exposure. Father was incarcerated. The detention report indicated mother and father denied Native American ancestry. The ICWA-010 forms attached to the detention report indicated that mother denied any Native American ancestry and that father couldn't be reached since he was incarcerated. The social worker spoke with numerous relatives regarding placement but made no inquiry into Native American ancestry. E.V. was placed with a maternal great-aunt. The juvenile court deferred making an ICWA finding at the initial hearing. When interviewed for the jurisdiction report, parents denied Native American ancestry, but relatives were not interviewed about the topic. At the jurisdiction/disposition hearing, the petition was sustained, E.V. was removed from the parents' custody, and reunification services were ordered.

The juvenile court made no mention of ICWA, though indicated it was adopting the agency's recommendations which included a recommendation that ICWA did not apply. There was no mention of ICWA when the court conducted the six-month review hearing. For the permanency hearing, the father told the social worker he was not sure about his Native American ancestry, and mother could not be reached. Parental rights were terminated. The minute order indicated that ICWA did not apply, though the transcript showed that the topic was not discussed on the record. Father appealed.

Conditionally reversed and remanded with instructions. Where courts and agencies fail to comply with ICWA provisions, reversal is required. Following the rule and reasoning set forth in *In re A.R.* (2022) 77 Cal.App.5th 197, a clear rule of reversal is required when ICWA notice provisions are not followed, and the parent need not show prejudice from the lack of initial inquiry. Not only is the agency required to inquire of the parents and extended family about Native American ancestry, but the juvenile court has an independent duty to also inquire about Native American ancestry beginning at the parties' first court appearance. The agency's failure to comply with ICWA is presumed prejudicial, and there are no exceptions to the rule for reversal. Post-judgment evidence of ICWA compliance is not properly before the appellate court and must instead be considered by the juvenile court on remand. (KH)

Beneficial Relationship Exception—WIC 366.26(c)(1)(B)(i)

In re M.G.—filed 6/1/22, Cert. for Publ. 7/1/22; Second Dist., Div. Eight Docket No. B313483
Link to case: https://www.courts.ca.gov/opinions/documents/B313483.PDF

IF THE COURT RELIES ON A BONDING STUDY, THAT STUDY MUST ADEQUATELY ASSESS THE EMOTIONAL ATTACHMENT OF THE CHILD TO THE PARENT, NOT MERELY WHETHER THE PARENT CAN ADDRESS THE CHILD'S PARTICULAR NEEDS.

In December 2017, M.G. was detained from parents due to their inability to adequately provide for his care. M.G. is medically fragile, eligible for Regional Center services, and is fed though a G-tube. Parents are Regional Center consumers and father's long-time in-home aid was primarily caring for M.G. The family was receiving voluntary services when it was reported that mother punched the in-home aid, Vilma, while she was placing M.G. in his car seat. During a hospital stay for M.G., parents told staff they hit each other. Mother was diagnosed with bipolar disorder and schizophrenia, mild intellectual disability, and autism. Father was also delayed and suffered from depression and anger management issues. M.G. was placed in a medical

foster home. Regional Center staff reported that parents needed support taking care of M.G. Parents maintained regular monitored visitation. Both parents pled no contest and received reunification services. At the six-month review, visitation had remained regular and appropriate, both parents were engaged in their programs, and services were extended. At the twelve-month review hearing, parents still maintained visits and mother played games with M.G. and taught him how to stack items. During visits both parents needed some redirection about how to interact with M.G. and neither parent could operate the g-tube. The juvenile court continued reunification services due to parents' compliance. Parents continued to visit, and were observed to appropriately play with, redirect, and soothe M.G. In January 2020, after 24 months of reunification services, the court terminated services, set a .26, and ordered a bonding study, finding that no amount of additional services would allow the parents to be able to care for M.G.'s significant needs. Parents continued to visit regularly and engage with M.G. but visits were changed to virtual only and remained that way for the year leading up to the final .26 hearing. The bonding study, not completed until a year after it was ordered, revealed that M.G. was comfortable with the parents via video but that there was "minimally positive emotional interdependence" between M.G. and the parents. The juvenile court terminated parental rights stating that based on the bonding study, the parents "have not established a bond with the child such that the parental role can be viewed by this court in a positive manner." Parents timely appealed.

Reversed. The juvenile court erred in relying on a bonding study that provided little evidence of whether a bond between parents and M.G. existed and instead commented repeatedly on M.G.'s particular needs and parents' ability to provide for those needs. The expert's report did not describe the interaction between the parents and M.G., nor did it assess a potential emotional bond in the context of the known disabilities of all involved. In addition, the study included a direct comparison between the two households' ability to provide for M.G., which is an improper consideration. Thus, substantial evidence did not exist to support the court's conclusion that M.G. had no "substantial, positive, emotional attachment to the parents." As to the third prong, the Court need not reach a conclusion but on remand, whether the parents can fulfill parental roles is not a relevant factor under the *Caden C.* analysis. (SH)

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Beneficial Relationship Exception—WIC 366.26(c)(1)(B)(i); ICWA

In re M.M.—published 7/12/22; Second Dist., Div. Eight
Docket No. B315997
Link to Case: https://www.courts.ca.gov/opinions/documents/B315997.PDF

[1] A PARENT IS NOT ENTITLED TO A BONDING STUDY ASSESSING THE EXISTENCE OF A BENEFICIAL PARENTAL RELATIONSHIP UNDER SECTION 366.26, SUBDIVISION (c)(1)(B)(i), IF THE PARENT HAS NOT MAINTAINED CONSISTENT VISITATION. [2] THE AGENCY'S FAILURE TO COMPLY WITH THEIR DUTY OF INITIAL INQUIRY IS HARMLESS IF NO EVIDENCE SUGGESTS THE CHILD IS AN INDIAN CHILD.

The child was removed from her mother and suitably placed with a relative. During the reunification period, mother's visitation was sporadic and inconsistent. After the termination of reunification services, mother's visits continued to be inconsistent. Mother was also chronically late for visits she would attend. The Department's section 366.26 report did not discuss the bond between mother and the child. However, earlier reports noted that soon after the child was removed, she wanted to be returned to mother and they shared a bond and attachment with one another. At the section 366.26 hearing, Mother's counsel requested a bonding study due to the inadequacies of the submitted .26 report. She also argued the parental benefit exception under section 366.26, subdivision (c)(1)(B)(i), was applicable. The juvenile court denied mother's request for a bonding study and terminated parental rights. Mother timely appealed. For the first time on appeal, mother also argued the agency failed to satisfy its initial inquiry under ICWA. There was no evidence in the record that the agency asked the paternal aunt, with whom the child was placed, or the maternal grandmother, with whom the agency had contact, about their Indian heritage.

Affirmed. [1] Mother did not satisfy the first prong of parental benefit exception; her visits were inconsistent and there was ample evidence from which the court could make such a conclusion. Although the .26 report did not squarely address the bond between mother and the child, previous reports noted her poor visitation attendance. Further, mother was not entitled to a bonding study because mother had not maintained regular visitation, so the parental-bond exception was inapplicable. [2] The agency's failure to comply with their duty of initial inquiry was harmless. No evidence suggested the child may have Indian heritage. The paternal aunt and maternal grandmother did not suggest or provide any information indicating the child may be an Indian child and the parents denied knowledge of any Indian heritage. Justice Wiley lodged a strong dissent in regard to the

majority's opinion regarding ICWA compliance and believed the agency's failure to inquire with the paternal aunt and maternal grandmother was prejudicial, not harmless. (MO)