Indian Child Welfare Act Legal Update 2024

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Speaker: Hon. Shawna Schwarz, Santa Clara County Superior Court
Kenneth D. & Dezi C. substantive information provided by Deputy County Counsel, Braeden Sullivan

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Ann Gilmour: Hey. Good afternoon, everyone. My name is Ann Gilmour, and I'm an attorney here with the Judicial Council of California's Tribal/ State Programs Unit. Thank you for joining us for today's webinar ICWA Legal Update with our distinguished speaker, Judge Shawna Schwarz, supervising Judge of the Dependency Court for the Superior Court of California County of Santa Clara. By way of housekeeping, you will all be muted throughout the presentation. If you have questions, please use the question, and answer function. I'll monitor that throughout the presentation, and we'll try to answer questions at the end of the presentation as time permits. The materials, including an outline of Judge Schwartz's presentation will be emailed to all registered participants following the presentation along with a link to the post-test and the evaluation for today's webinar. And if you want to receive educational credits, you must complete both of those. Finally, I wanted to let everyone know that this is the 1st in a series of webinars, and the second one will be held next week. December 19th It is “Indian Child Welfare Act, Judicial best Practices, Tips Tips, and Tricks for Avoiding ICWA Inquiry Reversals”. Judge Schwartz will be moderating that Webinar, along with our other faculty, Justice Terry Cody, Associate Justice of the Court of Appeal for the Second Appellate District Division, 6, Judge Devon Lomayesva, Judge of the Superior Court of California, County of San Diego, and Judge Kimberly Merrifield, Judge of the Superior Court of California, County of Butte and I will right now drop the link to that. To register for that in the chat and I will now turn it over to Judge Schwarz.

Judge Shawna Schwarz: Hi, thank you. Welcome everybody. I can't see anyone. It always makes this really weird, but I guess this is life these days. So, let's go and get started. This is an ICWA legal update for 2024.

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Judge Shawna Schwarz: And here's what we're going to talk about today. First of all, I want to give a little bit of backdrop. So, we have some context for talking about kind of the cases that have made a pretty big difference for us this year. Talk about the issues that have bubbled up over the last couple of years that many of us have been kind of wrestling with specifically talk about how the recent case law and legislation actually addresses some of those issues, and that's a picture of the Supreme Court because we've got a couple of Supreme Court cases which are

sort of a big deal. And then I want to sum it up by basically talking about what are the takeaways from from the case law and the legislation.

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So, in terms of the backdrop, you know, there's a huge change a few years ago in how we accomplish ICWA notice. Some of you who've been around for more than you know 5 years. Remember the old days, and how we used to do it back in the day, and this is a huge broad-brush stroke here, very much of a summary, but what would happen is, folks would come to court, and we'd say, "Do you have any Native American heritage? We do our inquiry of the folks who are in court in particular, the parents, and if parents says no, I don't have any Native American heritage, and they filled out the form. We said, great, ICWA does not apply. We were kind of done. If they said, yes, I have Native American heritage, then the social worker went out and gathered more information because the social worker has to fill out these huge forms, these big questionnaires, send them off to all the tribes, every possible tribe send them out, and then we would wait. Some of you remember those green return receipts? We would literally wait for those green receipts, and they would be taped to pages and filed, and we couldn't go forward until we had those, for you know that notice had been done 10 days in advance, and then we would also wait for letters from the tribe. So, once we got letters back from the tribe, and we had all of our green receipts we could often find, ICWA did not apply based on that information, or if the tribe came back and said, yes, this person is eligible for membership or a member, same thing happens as what we have today. ICWA applies and we have different standards. We have specific findings transfers a possibility. The tribe can intervene. Placement preferences attach, tribal customary adoption becomes an issue. That's sort of how we used to do it. And what would happen is all the appeals came from the notice, and we did tons of notice. One time, I actually, I'm in Santa Clara County. I tend to keep track of things in my cases. Over 1/3 of our cases, we would send notice to tribes and the notice again, big, thick questionnaires with lots of information. So that's how it used to be done, and it was so cumbersome, and and people really struggled with it, and then we had a change in the law. Starting in January of 2019, AB 3176 was passed.

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So, what happened in with AB 3176, is it changed how we do the inquiry. The idea was to to get the tribes information sooner in the process. Get them involved sooner. And again, this is a and some of you may have already seen kind of this very rudimentary flow chart about how it works, but basically, when now we have this thing of initial inquiry further inquiry. So, if initial inquiry makes us think that there's some reason to believe, then we do further inquiry and only after the further inquiry, and we find out that the child is actually, we think, the child, we have reason to know the child's an Indian child, then we do notice. All that stuff that we used to do way up front in the previous process, now is something that we do at the back end. So again, real quickly, what happens is, there's a report of child abuse or neglect, social worker goes out and investigates the referral, inquires of parents, guardians, extended family, etc, although there's some question about under what circumstances they do that, which we will get to a little bit later. When it comes to court, the court has the petition, the court talks to the people in court, including asking the judge must inquire of all participants about whether the child, whether they have

reason to believe the child is an Indian child, and the judge has to tell everybody. Don't forget. Let us know if you get additional information. So based on the information we have then, and that's from the social worker report, and what we learn in court, the judge has to make some findings. There's no reason to believe the child is an Indian child. There's reason to believe there's reason to know, or we have a known Indian child. Here in Santa Clara County, that does not happen often, but interestingly, it happened to me just this morning. We have a known Indian child, and we know that at the detention hearing. So, when we have reason to know, or a known Indian child, ICWA applies, we're going to do formal notice. We treat that child as an Indian child from from the very beginning. The bulk of our cases, though, we have a reason to believe, and that's where people come into court and say, Well, I think so. I think somebody in my family talked about, you know, living on a Cherokee reservation, or you know, more and more these days. We're getting things like, oh, I did a DNA test, and it shows I'm in I have Native American blood, but if we have reason to believe, then the court orders further inquiry, and we say to the department, go, ask everybody else, talk to the relatives, find out more information, parent, give that social worker contact information. And after further inquiry, if we have reason to know, ICWA applies. Now, if we have no reason to know, after adequate inquiry and due diligence, then we can find ICWA does not apply, I will say, though, the reality is, when you see this bubble up here, saying no reason to believe it doesn't actually end there. Again, I had a case this morning. It's like there's no reason to believe., but, social worker, I want you to still ask other relatives. When you find those relatives, make sure you ask them. So that is now our process. Now the point. Well one of the outcomes of this change in how we do notice was supposed to reduce the number of ICWA, appeals. So, is that really what happened? Because now, instead of seeing appeals at the notice stage. We're seeing appeals that have to do with the inquiry, and mostly it's the initial inquiry, but basically, it's the inquiry stage, because we don't send out formal notice the way that we used to. We've sort of front front loaded the process.

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So, what's happening on the appellate front and my apologies. I could not get this slide to animate how I wanted it to, but basically, I went on Lexus and did a search looking at ICWA cases. I did not read every case. I did not, you know, look at every case to figure out what it said. I just wanted to look at raw numbers, and that's what's really important here. So, from 2010 to 2019, you see that we had a pretty stable number of cases. The blue is the unpublished for the total number of cases, and the red is published cases. 2019 is when AB 3176 passed, when it became law, and that's where we really changed things, and the hope then, of course, was like, oh, maybe we won't see as many appeals. Well, what happened, you know it takes us a couple of years to to grow into the new process, and but you see that from 2010 to 2021, the number of appeals was pretty similar. And then what happened? Some of you may remember, if you try to pay attention to case law, if you try to keep up on case law, it was impossible in 2022. We had 581 cases, 41 of them were published. And then, if you see again 2023, almost 600 cases each year. Now, if it's not your district, you're not paying attention to what's happening in those other districts, but I will just tell you I you know I chat once in a while with some of the appellate judicial attorneys, and they are struggling. I mean, somebody's got to do this work, and that's who it is. So, we're hearing from them, from the appellate courts, basically about what we're

doing wrong frankly, because look at how many appeals we have now. They did go down in 2024, which is nice. So maybe we're starting to get it, and also with some of the case law that we're going to talk about a little later. There, you know, were some splits of opinion, and those have now been pretty much resolved. So hopefully we will see those, those, the number of appeals reduced. So, it's been kind of fun keeping up on on the ICWA case law the last few years.

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Okay, so what are the issues that have bubbled up? And when I was gonna do this slide, I'm thinking. Oh, like little bubbles. And then I thought, no bubbling lava is probably a more a more relevant motif here. So the issues that bubbled up over the last few years, and if if you've seen me done this, do this presentation before, you've you've probably seen this slide, but some of the issues have included: Can you cure the failure of the initial inquiry by engaging in a later inquiry? And that answer actually is, yes, every appellate district that's ruled on it has said, yes. Can you supplement the record with the post appellate post appeal evidence? And there's been a split in authority about that. What about this? Do you need a claim? Does the parent actually have to on appeal claim that they have Native American heritage or can they just appeal even if they they don't have to to say whether they're a native or not? There's a split there. What about when folks are when the court or the department does not ask the extended family about their heritage.? Is that reversible per se? Or how is that assessed? And as I tried to point out on an earlier little flow chart. All, I mean, so many of these appeals have to do with the inquiry part of the the phase of the process, and then that idea about asking relatives does that depend on how the mechanism by which the child was removed? So, a couple of those are not issues, but these 3 issues, turns out, these were addressed just this year in various ways. And so, this is what we're going to talk about when we talk about kind of the guidance that we've gotten this year. Before I get to the actual guidance, I sort of want to set up a little bit more what what each of these issues mean.

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So, in terms of supplementing the record, and I'm going to go into the facts of the case a little bit later, but Kenneth D is the case that we see coming from the Supreme Court., and basically what Kenneth D. wants to know is, okay, you you did, ICWA at the trial level. You did it wrong. Now, there's an appeal, and you tried to fix it. Can you say, hey, Appellate Court, here look at this. I fixed it, and the child's not an Indian child. And why does this matter? Well, you all know I mean anytime there's an appeal, it causes significant delays, and for our children in Dependency Court those are the kids you really want to get the permanency sooner rather than later, and delays do not work in their favor, so that's on one end, and then but then you weigh it against some of the other arguments that folks are making, which is you use CCP 909 sparingly. We'll talk about CCP 909 in just a couple of minutes in more detail. You're not supposed to use that very often, and to do so, you're supposed to have exceptional circumstances. There's not a big old exception, I mean, it's not like we can say, yeah, but we're Dependency Court. Look at our issues like, give us, give us a little leeway. There's no exception for Dependency Court. And, in fact, what folks should be doing is stipulating to a conditional reversal. So, those are sort of the arguments on both sides.

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Okay, what about? And we're gonna come back to that when we when we talk about kind of the the cases that we're seeing this year that have answered some of these questions. Okay, the next issue that I mentioned, which is kind of a big split of opinion, is if the agency in the court fail to ask extended relatives about their heritage, is that reversible per se? Or is there some other test that should be used? So, most appeals have to do with the failure of inquiry. If we were doing it right in the trial court every single time, we wouldn't have these sorts of appeals, but we're not always doing it right. So, we're seeing appeals that have to do with the failure of inquiry. The most common problem. If you look at all of the cases that have to do with this topic is failing to actually ask extended family members who are like available and present and actually there, and everybody agrees it's required nobody questions that it's very clear under the law. The issue is, what is the consequence of the failure?

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So, what happens if we do fail to do that inquiry, and I'm going to show a slide here that I've used in other settings. But just to kind of set it up because the appellate courts, and you know, look at all the appellate courts in the state, and you saw the number of appeals so many of them were getting this very appeal, this very issue on appeal, and so the appellate courts were trying to figure out, well, how do we, you know, trial courts making mistakes? What do we do about that? How do we? How do we address it? And so, the Appellate Court came up with some different approaches to evaluating whether the error that is being made by the trial court is prejudicial, or is it harmless? And so there were a few different tests. So, if the initial inquiry is deficient on the one end is a presumptive affirmance rule, basically saying, Look, even if there's no inquiry, it's harmless error. unless the parent basically says, hey, I have Indian ancestry on appeal like, if the parent says that that's a different issue. But we should have a harmless error rule. These cases should be presumptively affirmed, because, you know, we don't want these delays for the kids. The other end of the spectrum automatic reversal. Nope, do it right. Don't screw up, do it right every time from the beginning, and if you do it wrong, you're going to get reversed automatically. And then, of course, a couple of courts came up with some different options in between. The Benjamin M. case came up with their own test readily obtainable information rule. Basically, the error is harmless, unless the record shows there was information that was easy to obtain that would bear meaningfully upon the issue. So, if there's some relevant information that was easy to get, then it's not harmless error, and that has to be in the record, but otherwise it should be harmless error. And then we get the reason to believe rule which was the Dezi C. case which we'll talk about, and Kenneth D. also followed that one, which basically says, that the error is harmless unless the record has information suggesting that there's reason to believe that the absence of inquiry was prejudice prejudicial. So, there has to be some evidence to show that the absence caused harm. The absence of the inquiry caused harm to the family. So, we have all these rules, and, interestingly, if some of the cases you read, they're like there are 5 rules, and I'm

like, oh, my gosh! What's the 5th rule? I think I missed out on the 5th one, but in any event, this is sort of the main landscape, and it kind of depends on where you are in the state, like what rule is being used.

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So, I actually and I at some point, I kind of lost count of this because it just, you know, there were so many of these cases, but it was actually possible for a while to sort of plot which district was using what you know, what rule. So, 3rd District was using the reason to believe leave rule. The 5th district was using substantial evidence rule, you know, the second, the second district, depending on it, depended on what division you were in the 4th District also had some different options. So, I'm hoping I will not need to update this chart anymore, this graphic, because we've got some case law that is now telling us what the right answer is, and we're going to get to that in just a moment.

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Okay, so here's another issue where there was a lot of activity in 2024, 2023, and 2024, and that is in the very beginning. Does the social worker even have to ask the relative? Well, the law says they do, but the laws also says they only have to ask them in certain circumstances. Now I'll tell you, I was doing a presentation to some appellate judicial attorneys in, I think it was 2022 and we're talking about, you know, different appellate cases, and one of them raised their hand and said, but don't you think the code actually says that the the social worker doesn't even have to ask if it's a removal by a you know, by a protective custody warrant, and I'm like, I have never even heard that issue. And then shortly thereafter, it was all the rage. It's all over, you know, we saw a lot of different cases talking about that. So, basically, if you look at 224.2 b. It distinguishes between a removal done under 306 of the code Welfare and Institutions code, and that's the removal emergency removal by the social worker, and a 340 removal, which is where the court signs a protective custody warrant. Okay, so if you look at, if you read 224.2 b. It distinguishes, makes a difference here, and says, if the child is removed under 306, then the social worker has to do all of this inquiry. So there I was in 2022.

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I never even thought this was an issue, and then, all of a sudden it kind of explodes, and again, if you're trying to pay attention, or if you're paying attention to the ICWA case law in 2020, whatever it was. 2023. That's when we had, like 40 published ICWA cases. Literally, it was almost one every other week. It was so impossible to keep keep up with them. So basically, we had the the dichotomy here of the expanded duty of the inquiry applies only if the kid's removed by the social worker. So, if they're removed by warrant no versus it applies to all kids, it doesn't matter how they were removed. And so sort of the 1st sling here was Robert F., which was a 4th District Appellate Court Division. 2 said, you don't even need to do that. It doesn't matter if it's a warrant removal by warrant. Then you don't have to even ask the other folks. So, Robert, that's what Robert F. said. Ja.O. is like, we agree. Notice it's and the 4th 2 means 4th District, Second Division, and then Delia D. oh, my gosh! Same district, same division, said nuh, it applies to all kids. It does not matter how the kid was removed. And then the colleagues of the 4th District

Division 2 came back with Andres R. and said 3 to 3 to one we win and then everybody else in the state starts weighing in. So, In re: V.C. Was now the 1st District Division 2 says, no, we think you need to do the the inquiry, no matter what the removal mechanism was. Jerry R., the 5th district weighed in C.L., the 3rd district weighed in L.B., now we've got the 4th this, the 1st District Division, 4, Samantha, F., Oh, 4th District Division, 2 and then we have In re: D.M. 4th District Division 2. So, people in the 4th District Division 2, I I'm not sure how you all practiced, because it sort of depended, I guess, on which appellate justices were deciding a case. So obviously, we have this split of opinion here, and we're going to come back to this, but, In re: Ja.O. has made its way up to the Supreme Court.

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So again, when you have a split like this, it's kind of fun to plot it out to see like what's happening in a graphic way. So, the question is to 224.2, inquiry of extended relatives does it apply to all kids, even if the kid is removed by warrant, and here's how it looks on a map. 1st, 3rd and 5th District say, yes, it applies to all kids. 6th district did not weigh in, Second District did not weigh in, and then get this 4th District Division 3 and 4th District Division 1 did not weigh in, and I think you all realize that 4th district is a geographically based right? So, Orange County is Division 3. Division 1 is San Diego and Imperial, and then, but what where it really got interesting is the 4th District Division 2, which in my previous slide you probably saw that's where they were having some differences of opinion. Those must have been some fun conversations around the lunch table at that Appellate Court. 4th District Division 2 had 4 cases that said, no, you don't have to give this sort. You don't have to do this inquiry, if it's a removal by warrant, and then you have a couple of cases that said, yes, you do. So this, and so this made its way up to the Supreme Court, which we'll talk about in just a moment, but also, we're going to talk about how AB 81 may have resolved that issue. Okay, so those that's a part of the presentation where I talk about just what the issues are. Now, I want to delve into what guidance we've gotten from the not only from AB 81, but also from the Supreme court.

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So, let's talk 1st about Kenneth D. Kenneth D., and I mentioned it previously, that's the issue about if you can supplement the record with post appeal evidence, and the sole question, Kenneth D. Says, sole question before the Appellate Court is before the Supreme Court is, whether the Court of Appeal properly considered the evidence, and concluding that ICWA error was harmless. So, let's talk about what happened in this case, and, by the way, the answer is, no, they did not. That was not proper. So now you know the answer. but let me go ahead and tell you how they got there. Okay, so what happens in Kenneth D. On the trial court level is, we have little Kenneth, who was detained just after birth, and there were 3 men who could have been the father. So, all 3, I guess, were DNA tested did DNA swabs, and it turns out T.D., who signed the VDOP the voluntary declaration of paternity. So, he was a presumed father, but he turns out he was not the biological father. B.F., also tested, was not the biological father. J.T. was the winner. He tested, and it turns out he is the biological father. So, what happened is T.D., who's presumed, says, hey, my family has Cherokee heritage, and the department followed through on that. B.F. is out of it. I should have put a big red X because he's not the bio dad. So, I assume he was out of

the process, but then we have J.T., who showed up at detention, who got his order for parenting for DNA testing, but while he was in court, the court did not even ask him about his heritage. By the time the DNA results came back they couldn't find him anymore, and the department couldn't find him, but he was there for the 6-month review. He came for the 6-month Review, where the court terminated services and set a .26 hearing, but when he was there at the 6-month review, the court did not ask him. So basically, JT, and his entire family were never asked about their heritage. They were never asked about the Indian Child Welfare Act. So fast forward, the court gets to the 366.26 hearing, and the court terminated parental rights, and at that hearing never mentioned ICWA. It never even came up. So, J.T. appeals, remember, he's the bio dad. He appeals, and the issue on appeal. Is that the fair to comply with the inquiry and notice provisions of ICWA prejudiced him. Basically, that he, you know he's the department, did not even ask him, and he is biological, father. They didn't ask him or his family about ICWA.

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So, here we are now at the Court of Appeal, and J.T. files an opening brief saying, Hey! Inadequate inquiry, and once he filed the brief, the department's like oops, and so the department, let's see, then went out and asked J.T., J.T.'s mom about their heritage. They contacted the BIA about the answers that J.T.'s mom provided and based on that information, because I think, she said, she may have had. I think she's 1 of these folks who did a DNA test, and said she has Native American heritage, but said, my whole family is from Mexico. So, that's where my native blood comes from. So, the BIA said, yeah, she said, you know she's Mexican. Yeah, it's the child's anon-Indian child. So, the department drafts a memo, saying, there's no reason to know this child is an Indian child and then they filed that with the with the Juvenile Court, and said, hey court, here you go. Kids, little J.T. is not an Indian child. So, what happens, though, is, once it gets to the Appellate Court before, and this this is the department, before they even filed an opening brief, they filed a motion with the Appellate Court to augment the record, and they filed with it, that memo, saying, like the child, is not an Indian child, and so the memo contained information about all the stuff that the agency did post judgment in terms of their ICWA efforts, and concluded, there's no reason to know, and wanted the court to affirm that ICWA does not apply. So, it gets to the Appellate Court and the Appellate Court's like, hmm okay, we will grant your motion to augment. We'll consider the updated information, even though there was an abject failure of the department and the court to inquire of J.T. So, they acknowledged that the court and the department kind of screwed up, but said, that's all right, we're going to go ahead and augment the record, and what they found was the error in the initial inquiry was harmless in light of that augmented record. J.T. says, I think the Supreme Court should take a look at this, because I don't think that they should have looked, they should have considered what the department did after the Juvenile Court made its judgment.

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So, when we get to the Supreme Court, J.T. says, Court of Appeals should not have considered that that evidence, and the department says, you know the failure to inquire, and they acknowledge they failed to inquire. It was cured, though, by a later inquiry, and that later inquiry was conclusive in terms of proving that there was no heritage, and if you send it back to the

Juvenile Court, it's just futile, and it's a waste of time, right? Because we already know the answer. So don't make us go back there to get the answer. Well, Justice Corrigan had a few things to say about this, and first of all she went over the standard of review, and she acknowledges that there's a difference of opinion across the state about how to review this, what standard to use? And she said, but we're not even going to get there because everybody concedes the initial inquiry was inadequate. So, no matter what standard you use, ICWA, finding was not supported. Second thing that the opinion says is that, the Appellate Court, reviewing the Trial Court's judgment, the Appellate Court is supposed to review the Trial Court's judgment that that existed at the time of the ruling, because the trial court is the one who's in the best position to determine credibility, to make those kind of judgment calls about the factual issues. And so, it's the trial court that should have the complete record to rely on the post judgment report, the Appellate Court would need to treat the agency's assertions as undisputed. And here what Justice Corrigan pointed out was you have this whole thing with grandma, saying she had Indian, you know, Indian heritage based on the DNA test. You've got the BIA saying well, but she said, she's from Mexico. So, but there are factual issues here, and somebody could have disputed that, but by going straight to the Appellate Court, you totally bypassed any opportunity for anybody to dispute that information, and that dispute is supposed to happen on the Trial Court level. It's the Juvenile Court that is supposed to do the fact finding, review the record, consider additional evidence, etc., and assess and weigh the credibility.

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So, some of the arguments that the Department brought up, I think, just need to be highlighted real quick. We all know about the Josiah Z. case which says, he, sometimes the Appellate Court can can consider post judgment evidence, but here the Supreme Court said, the reasoning in that case doesn't even apply here totally different basis for that. What this case does, Kenneth D., is it puts the Appellate Court in the position of usurping, taking over the whole fact, finding role that is supposed to be the Juvenile Court. The other argument was, what about CCP 909, which I mentioned earlier, and remember that allows reviewing courts to take additional evidence under some cases. And what the court said here is, you're supposed to exercise that sparingly and in exceptional circumstances, and then in what I thought was kind of an interesting little thing, ICWA errors are not rare, so they are not exceptional circumstances. So, the Appellate Courts or the Supreme Court at that point said, no, no CCP 09, to get around this, and then there was the argument of judicial notice right, and which says, hey, that allows the court to augment the appellate record. The court said, look, that has to do with materials that are already in the record, not that get created after the trial court already renders its judgment. Judicial, notice of evidence is not, and that's supposed to happen again. The judicial notice in exceptional circumstances. This is not exceptional, and the memo is not an order of finding right, because when you take judicial notice, you're taking judicial notice of orders and findings, not necessarily the truth contained, there in reports and things like that. So, the assertion of fact that was in the memo, that nobody had an opportunity to respond to that is not the proper subject of a judicial notice.

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Okay, so well, let's talk a little more about Kenneth D., one last thing here. Okay, but wouldn't, allowing the evidence of that post-judgment ICWA inquiry. Right? Because I mean, that happens. I've seen that happen right? We do the .26, and you know the department comes back and says, oops, we we messed up. We need to go back and figure out and do ICWA right, but the court's already, you know, done its .26 hearing, and it's already terminated parental rights. So, how do you fix that in these cases? But if you just let that in, if you let that that evidence come in post judgment, it would where we fix it right, because we fix it after the fact, it promotes the state's interest in expediting these proceedings and finalizing these proceedings, which are so important to kids right? Because we're talking about getting the permanency sooner rather than later, and it just kind of makes sense to do it this way. And the Supreme Court said, no. That is, it's not going to result in finality of these proceedings any sooner, because don't forget the tribes have a right to intervene, and they could come in and look at that and say you did this wrong, and ask that everything be overturned for failure to comply, and so, when you have this lack of timely and proper inquiry, it undermines the expeditiousness, the expeditious resolution of these cases, and it calls into doubt the finality of the court orders. So, the Supreme Court was not having it. So finally, kind of one last statement, and what we take away from this, what we learn from this is where the Juvenile Court finds that ICWA does not apply, but it's based on an inquiry that was not adequate. The Appellate Court, if there are exceptional circumstances, they can look at that evidence, but absent exceptional circumstances may not consider evidence that was uncovered after the court already made its judgment. So, you got to do it right the first time, and if you are going to do it right after the fact, the way to deal with that is, is by a conditional reversal or stipulating to a conditional reversal to get it moving sooner rather than later. So, that is Kenneth D. So, if you thought maybe Kenneth D. was, gonna allow us to sort of have a little wiggle room, you were wrong. There's no wiggle room. I think what we learned from that is kind of do it right from the start.

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Let's talk about Dezi C., and how we doing on time? Okay, Dezi. C was the whole thing about like, what test do you use to figure out error now? It would be good if we didn't have error in the first place, but that is not what's happening. So, Dezi. C says, like, if you fail to ask the family, is that reversible per se, and the task the Supreme Court has is to determine if the Agency's failure to conduct that inquiry under the California's heightened ICWA requirements, is that reversible error? Short answer, yes. We're going to come back to these heightened requirements that we have here in California. So, let's talk about Dezi C., and kind of how it made its way to the Supreme Court. First, we've got Dezi and Joshua, and you know Joshua was just as big a part of the case as Dezi was, but her name is first, she's older, so she's the one who is now famous in California for having a case named after her. So, Dezi was 3, Josh was about 1, and the parents were in the home with the kids, using drugs, and there was domestic violence. Kids get removed, parents come to court, and at the initial hearing at the detention hearing, they both filled out the ICWA 020 forms and said, I don't have any Native American heritage and the court actually asked the parents. Parents said, no, no Native American heritage. Here's my ICWA 020 form. The

court found this is not an ICWA case, but told the parents, hey, give the names you have to give your relatives names to the social worker, but did not say why. Fast forward, I'm not going to talk about what happened at the intervening hearings, but fast forward to the .26, hearing. The the Juvenile Court terminates parental rights, does not even mention ICWA. Now, throughout dependency of this case, the department the social worker spoke to both sets of grandparents, the parents, the siblings, and dad's cousin. Never asked about ICWA. The paternal grandparents were on track to adopt the kids, and one of the cousins and the grandparents, maternal grandparents had even been to court. They had never been asked, though, so mom appeals.

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So, Mom basically says on appeal that the department's failure to comply with ICWA and Cal. ICWA to inquire of those extended family members that that's error. Okay, so what happens when it gets to the Appellate Court? So, the Appellate Court says, you know it's undisputed the department that their inquiry was deficient. We know that. The question is, did that deficiency, did that defective inquiry basically invalidate the Juvenile Court's finding that ICWA does not apply? So, Juvenile Court relied on information that was not sufficient, made a finding the fact that it was a not a very good inquiry that, in fact, that it was totally deficient. Does that undermine the Juvenile Court's finding? So, Dezi C. Court says, well, and this is the Appellate Court. We're going to write a decision here, and we acknowledge that right now there are 3 rules to assess the defective initial inquiry whether it's harmless. Remember, I showed you that the graphic, where we had reversible per se, harmless per se, and the rules in between. So, this court Dezi C. starts by saying, there are 3 rules to determine this, to answer this question. We don't like any of those 3, so we are coming up with our own rule, and I had mentioned that during that graphic the defect is harmless unless the record contains information suggesting a reason to believe the child may be an Indian child. So, it's harmless unless you have evidence that the kid may be an Indian child, and so they go on to say where there's no doubt that the inquiry is erroneous. You have to assess whether it's reasonably probable that the Juvenile Court would have made the same finding, even if it had been done right. So, you're going to get to the same outcome, and if so, then, you know, then we're not going to reverse. So, mom, basically, petitions for review Supreme Court grants review.

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So, I want to digress for just a moment and talk about what is this Cal. ICWA? What are these heightened standards? What are these heightened ICWA requirements? We don't have time to go into the historical kind of part of this, but back in 2007, California passed the Cal. ICWA laws. Basically, and the point was, California was struggling to comply with ICWA. We were not doing a great job as a state, and this was an attempt basically to say, look, we want our state law to really complement the Federal Indian Child Welfare Act to enhance the protections. We want to do this right. We want to make sure that we have everything in place, and some of the some of the differences are things like broader inquiry obligations. So, there's a more rigorous affirmative continuing duty to inquire of the relatives. So, it's broader than the Federal law. The threshold for applicability. We're supposed to investigate sooner, earlier in the proceedings, stricter requirements to document things, additional safeguards, because we have different demographics

in our state, and the Cal. ICWA recognizes that, and then also requires more intense efforts to engage the tribes and to show respect for their decisions. So, in light of Cal. ICWA, the Dezi C. court, the Dezi C. Supreme Court, is now going to kind of tell us where we go from here.

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So, when it comes to the initial inquiry requirements, basically, when the petition is filed court and the county, the court and the agency have this affirmative continuing duty to ask if the child is or may be an Indian child, and who do they have to ask? So, when the child is in protective custody, they list out child parents, Indian custodian guardians, those are legal guardians, extended family members, others who have an interest, and the person who reported the child abuse in the first place, and that's when the kid is first to protective custody, the department is supposed to do that. The court is supposed to ask all participants at their first court hearing they're supposed to. The court is supposed to ask the people when they come to court, and one of the things we're going to talk about next week, when we have our panel of judges, is like as a judge, how do you even know it's this guy's first appearance? How do you know? I mean, how are you keeping track of that? And that's something we're going to, that's not for today, but we're going to talk about some strategies for that next week, and then also Dezi C. kind of lays out for us that we're adopting this idea of extended relatives that that's in the Federal law, and it includes grandparents, siblings, in-laws, aunts, uncles, nieces, nephews, first and second cousins and step parents, which we will come back to in just a moment.

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So, again, regarding the adequate initial inquiry, for it to be adequate, it has to go beyond just asking the parents and extended family members. I mean back in the, if you remember, back in the old days before the law changed, I don't think we were asking this many people, but now we have to ask these extended family members, and the reason for that is, by doing that we're more likely to learn if a child has Indian heritage, and it maximizes the chances that the tribes and the Indian children are actually identified. Obviously, we have parents in our courts who are there usually because they have some challenges, so they may not be the best people to know about some of their heritage, which is why we are supposed to be inquiring of other folks who may have more knowledge. So, the question is, then, okay. So, if we don't ask every single family member, does that mean the inquiry is automatically inadequate? And the answer is, no. One of the things that Dezi C. does is, it says you have to ask the people who are reasonably available to help the agency with its investigation, and those are the people who have to be asked the people who are reasonably available, and that's, I believe, new language in this Dezi C. Supreme Court opinion, which is, I think, kind of helpful, because it sort of puts a little bit of of kind of boundaries on on how far out we have to go.

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So, who assesses the adequacy of that inquiry? And Dezi C. is pretty clear with us, basically, the Juvenile Court. We have broad discretion to determine if the inquiry was adequate and proper, and if it was duly diligent, but for our discretion to be respected, we have to make a record. We've got to say things on the record. We've got to make sure that our thinking is clear. So,

though we have that broad discretion, if you are not saying things out loud. If you are doing something that's kind of implied, your discretion is really going to shrink as a judge. So, that's what the Juvenile court is supposed to do, then the Appellate Court it's supposed to review whether our findings are supported by sufficient evidence and documented in the record. So, the Juvenile Court is supposed to inquire or find that the inquiry was adequate and proper, that ICWA does not apply, and then the Appellate Court will then look at what we've done, and see if if our findings are supported by the evidence. And how do we fix this if we haven't? Is this idea of a conditional reversal with directions going back to the Juvenile Court. So, I don't know if you noticed in the in the Kenneth D. case, and now we're hearing in Dezi C. they're like Juvenile Court, this is all on you. This is where it should be happening.

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A couple of other issues in Dezi C. That I want to highlight real quickly is, there's a question. Does the parent actually have to show that there's reason to believe the ICWA determination would be different with a proper initial inquiry? So, on appeal, do they have to say? Look, you know, if they had, if somebody had done the inquiry properly, we'd have all this information, this other information, and the Supreme Court says, no, the duty of inquiry belongs to the agency, not the parents. So, this is all on the agency and the court frankly. Parents do not need to make a showing that additional evidence would indicate that the child would establish the child as an Indian child. The other question that was, I thought, sort of interesting is one of the the appellate attorneys said, oh, man, it's gonna result in gamesmanship, right that parents are going to withhold information. They're going to cause delays on purpose, and the Supreme Court said nobody would ever do that. First of all, we condemn the practice, and there's no incentive for parents to delay for the sake of delay, and the court presumes that counsel who represents parents will raise non frivolous claims only. So, you're not supposed to appeal stuff if it is a frivolous claim, and because they can be sanctioned if they knowingly or willfully conceal or falsify material facts concerning whether the child is an Indian child, or if they counsel somebody to do so. So, hopefully, folks are realizing that they ought not be, you know, hiding information just for the sake of delay. So that's what I have on Dezi C.

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Now I want to talk about how we're doing on time. AB 81. So, Ab. 81 was approved September 27, of 2024, and it was to take effect immediately. So, it's the law now. It enhances the protections that we see for the Native American, American Indian children and families. Again, it strengthens ICWA. It kind of aligns with the Federal law but strengthens ICWA here in California. It builds on that framework that we see in the Federal from the Federal law, and you know one of the points is to show California's commitment to protecting native rights. Does it resolve that issue? That third issue I mentioned about the removal mechanism? Well, we'll get to that in just a minute, because maybe it does. So, remember that issue. The whole 4th district, 4th Appellate District Division 2 kind of dispute. That whether that initial inquiry must be done by the department depends on whether the child was removed by a social worker in the field, or whether it was a removal by a protective custody warrant. So, that was so Ja.O. and I mentioned that kind of in the slide that was showing the the lineup of the cases. In re: JaO. is the case, and it

follows the the Robert F. line of cases. And again, the question is that inquiry under 224.2 b of extended relatives does it apply only to kids who are removed by 306, which is the social worker authority to remove, or does it also apply to kids who are removed by way of a warrant which is 340 under the code. So interesting, what happened is the Supreme Court granted review of In re: Ja.O on July of 2020, in July of 2023, and the information that I saw online was that it was supposed to have been decided. It was fully briefed and was supposed to be heard by the court in March of 2024, but then, all of a sudden, we get AB 81, and so now the Supreme Court has directed the parties to brief, the issue of the impact of AB 81 on this particular issue, if any impact at all. So basically, we're waiting for decision on whether the Supreme Court says, AB 81 answers this split in opinion regarding the mechanism of removal.

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So, what AB 81 says about this, though I mean it looks clear to me that it does, but you know I'm not reading the briefs, and or, you know, kind of making any arguments about it, but basically, AB 81 says, if there's removal under 307, which is by the probation department, or 306, a 1 or a 2, which is the social worker, or by warrant, if a kid is removed any of those ways, then the department does have a duty to inquire of the whole list of those people, and I have to ask whether the child is an Indian child may be an Indian child, and where the child and the parents are domiciled. Okay, so we have 7 min to talk about, what are the takeaways from the cases that we've seen so far?

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And specifically, Kenneth D., Dezi C., and then, AB 81, and if we have time, I'm going to throw in a few other cases that have come down the last couple of years, where I swear the Appellate Court is talking directly to us. Then they're telling us like what they want us to do, and why they may not be all that excited about what we're doing so far. So, you know, some folks, I think when they think about Kenneth D. and Dezi C., because we're all like waiting like, please Supreme Court, fix this for us. Tell us how to do this right. Some folks have expressed some disappointment. I feel like maybe the it's not that they were not the best ICWA appeals that people didn't really have any sort of good faith belief that the children were Indian children, that, you know, they knew they weren't Indian children, but these were filed because the inquiries were bad. It was on the procedural issues., and, by the way, those two cases did not. It's not like, oh, wow! The kid, you know Kenneth D. is an Indian child. That's not what was discovered, and so we were really only learning about the process, basically, and what we're supposed to be doing. So, the question is, do these cases move the needle at all? Or are we kind of stuck with where we are basically?

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I will say, so there's a little bit of there is a glimmer of hope, and Dezi C. defines the universe of extended family members, which is helpful, and there's this language in there that is also helpful, which is that the agency does not have to cast about to find every relative. Here's who matters people who are reasonably available to help the agency. Now, obviously, we have an obligation to try to ascertain those folks who are reasonably available, and you know, sometimes I mean, I

had someone in court today who said or was it yesterday? Like, yeah, I'm not going to tell you the information about my family, because I don't think the Indian Child Welfare Act is all that important, and I don't want you reaching out to my family. We're not that close, and I don't want them knowing what's happening in my life. So, we have to take efforts, make efforts to figure out who is reasonably available who could be helpful, but it is the family members, and these are the family members, and I've mentioned this in a prior slide, this is the definition of extended family, grandparent, aunt or uncle, brother or sister, brother-in-law, sister-in-law, niece or nephew, first or second cousin or a step-parent, that's who is those are the folks we're supposed to ask. So, come on. Is this really that hard? The Dezi C. makes clear that no, like, why are we complaining so much? It's really not that hard. Like, the department has to investigate the circumstances under underlying the the petitions, anyway. Right? They've got a, the removal. They've got to go out and talk to family members to investigate, and and by law they have to identify and locate those extended family members. Right? They've got to figure out if they could be placement. So how hard is it? Just ask about the Indian ancestry while you're talking to them about the other stuff and Dezi C. even says, you know some courts have characterized this duty of inquiry as slight and swift, and the way to remember which case it is is In re: S.S., I mean, it's the slight and swift case which literally the appellate justice just, said omg, what is wrong with you guys? It's not that hard like you're already talking to the family member. Just ask them about this other issue. The work should be slight and swift, and also requiring the courts and the agencies to do the equal inquiry right. It does not add measurably to the burden on the agencies and the courts. That is the perspective of well, it used to be just the Appellate Courts, and now it's the Supreme Court who pretty much thinks that we should quit our belly aching about this, and just get down to business and do what we need to do.

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Okay, other takeaways. Obviously, that's a record. It's all about the record, right? It's about making findings that are grounded in the record. And that means saying things out loud, having things documented. If you are not making actual findings supported in the record, you are not going to be given deference. So, we talked about the court had the Trial Court, the Juvenile Court has a lot of discretion about these findings. Your discretion is not going to be respected or given any deference. If you are making implied findings. If you're not saying things on the record, and if they are not grounded in documentation, that is in the record. So, for example, and we'll talk more next week about how to do this, so that it makes sense, but you know, judges have to say, here are the efforts, and here's why they are reasonable. So, the extent of the inquiry, it's fact specific. It can be different in each case, but we're looking for kids who are plausibly Indian children. Okay? And here's I think, where where sometimes we fall down like after you've done all of this throughout the life of the case, you have to do it again at the .26, hearing right? You have to do it again, and I think people are forgetting that. It appears in some of these cases that folks have forgotten that.

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So, there are 3 cases I want to talk about just real quickly and these are older cases 2022 and 2023, or ones of 2024, which basically the Appellate Court is talking to us directly. In re: K.T.,

which is the 4th District Division, 2 out of San Bernardino, you know, when the Appellate Court starts by saying we publish our opinion, not because the errors that occurred are novel, but because they are too common, you know that you're in trouble, and they went on to basically say, you know, it's so concerning given the court's admonishment from nearly 10 years ago that we were well past the state of growing weary of appeals which the only error is the agency's failure to comply with ICWA. This was in 2022, and that was the year that we had, you know, 4,000 appeals, not quite 4,000, but it felt like it. You know there were close to 600 ICWA appeals. So, I think the frustration and fatigue is certainly coming out in this message from the Appellate Court.

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Another one, which I think is, and also out of 2022, which was kind of a bad year coming out of Los Angeles County, Ezekiel G. The Appellate Court tells us, identification of children of Indian children is critical to implementing ICWA like you have to identify them early. So, the statute must be interpreted in a way that requires everybody to participate in this. The agency, the parents, all attorneys, the court, everybody has a role in this to work together, to to determine to help figure out if kids are Indian children. Now the court does say, or the Appellate Court, Ezekiel, says the child protective agencies and Juvenile Courts do have a key role in playing in making this determination, but they do highlight that everybody has a role here. It's not just the court. It's not just the agency the attorneys and parents all have a role in helping us figure out early on.

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If a child is an Indian child, and then, just from this year, H.A. v. Superior Court, which is, I think, it was a San Joaquin County, 3rd District Court of Appeal, and this is a lot of words on this slide, but basically, this court also is just frustrated that they keep saying time and time again, keep telling the court how to do this right, and they're not being listened to, basically, and the court goes on to say, we're compelled to comment on the emissions of both the parties and the Juvenile Court, and to provide some direction to all involved, and so, what this appellate court is telling us is again, everybody has a role. Parents counsel, minors counsel, raise the adequacy of the inquiry to the juvenile court, tell us that non-forfeiture rule does not let you just sit by idly and not say anything, and you should promptly bring ICWA issues to the court's attention so that we can fix them. The agency again, you don't have to cast about to find relatives, but you do have an affirmative and continuing duty, and include all of the information and reports. Discussion of the efforts to locate an interview, diligently discharge duty, do not rely on an unsupported opinion, and for the court, do your job timely, perform the duties, make findings about the applicability. Do a meaningful analysis on the record and and engage in meaningful consideration. Don't adopt recommendations without comment. Again, we are going to talk next week about our like gosh! I feel like, if this were easy we'd already be doing it, but we will talk next week about some of the challenges, and how maybe to overcome some of those challenges.

Last Slide

So good luck to all of you. And I want to thank you specifically Ann Gilmour, from the CFCC for helping get this off the ground, and then Braden Sullivan, a county counsel out of Deputy

County Council, out of our county, did some case law analysis, and I relied on some of his stuff in what I've provided for you. That's it. Thank you.

Ann Gilmour: Hold on. We had quite a lot of questions in the chat, and I just want to acknowledge that I want to acknowledge Tamara Honrado's comment about the definition of extended family can be modified by the tribals, law and custom. Although I don't know how we do that when when a tribe hasn't yet been identified. But and I, there were also a number of questions about the problem. What do you do when there was an initial claim of Indian ancestry, and then you do your further inquiry, and all of the other folks that you talk to say, no, no, no! And what do we do with that? And I don't know whether you have some comments on that right now, Judge Schwartz, or whether I think, I'm going to provide all of you next week with this transcript, so we can maybe address some of the issues there, but I did want to acknowledge that there were a lot.

Judge Shawna Schwarz: Yeah, you know.

Ann Gilmour: Questions and comments.

Judge Shawna Schwarz: I think that's something we should talk about next week, because we're specifically going to be talking about like the nuts and bolts of the stuff we see on a day-to-day basis, and and hear from other judges about how they they have addressed those issues. So that's a good one if you make a note of that, and so we can address that next week. Plus, we're kind of past time, I think.

Ann Gilmour: Will do. All right, I will again put in the chat how to sign up for next week's webinar, and thank you very much, Judge Schwartz, and thank you everybody for. Yes, there's an evaluation form. It'll be sent out following the presentation. Thank you all.

Judge Shawna Schwarz: Okay, thank you. Bye-bye.

Ann Gilmour: Bye.