In re A.C., 65 Cal. App. 5th 1060, 280 Cal. Rptr. 3d 526 (4th Dist. 2021)

- **Holding:** Conditional remand was not required under the Indian Child Welfare Act or its state counterpart when the county department and juvenile court failed to inquire as to father's Indian ancestry but where father never contended that he possessed such ancestry.
- **Summary:** The juvenile court terminated D.M.'s parental rights in 2020. Prior to the termination, there had been confusion over the effect of the mother's Indian ancestry on the child's Indian status and whether D.M. was the involved child's father. As the court of appeal's majority opinion explained:

> The issue arose because the mother plainly did have Indian ancestry—she was an enrolled member of a federally recognized Indian tribe; an older daughter had been removed from her custody and transferred to the jurisdiction of the tribe. Apparently no one thought it was worth asking whether the father, too, might have Indian ancestry. When the mother's tribe surprised everyone by reporting that the child was not a member and not eligible for membership, the juvenile court found—without any further inquiry regarding the father—that ICWA did not apply.

The county department thus did not dispute that error had occurred below. It instead contended that the father failed to establish that the error was prejudicial. A majority of the court of appeal's panel concurred because "[t]he father has not claimed—in the juvenile court, in his opening brief, in his reply brief, or at oral argument—that he has any Indian ancestry."

In reaching this conclusion, the majority relied on fourth district precedent holding "'any failure to comply with a higher state standard, above and beyond what ... ICWA itself requires, must be held harmless unless the appellant can show a reasonable probability that he or she would have enjoyed a more favorable result in the absence of the error.'" It viewed this rule as "mean[ing] a parent asserting failure to inquire must show—at a minimum—that, if asked, he or she would, in good faith, have claimed some kind of Indian ancestry." In response to the father's argument that "a parent will not necessarily be aware of his or her Indian ancestry" and thus that "we cannot know for certain whether the [county agency's failure to investigate] did or did not prevent it from discovering Indian ancestry on the father's side[,]" the majority stated that "[t]he flaw in this argument is that 'an appellant has the burden of producing an adequate record that demonstrates reversible error.'" The father's next argument—that "a 'requirement that the appellant must submit evidence *outside the record* is a substantial departure from normal appellate procedure'"—was no more persuasive in the context of an alleged ICWA violation:

> We agree. However, it is a departure that favors him. Ordinarily, he would have to show prejudice based on the record, which he cannot do. In a case in which a parent is claiming the child has Indian ancestry, but the social services agency failed to carry out its duty of inquiry, we make an exception. We do so because, for the purpose of determining whether ICWA applies, California has chosen to cast the net widely. It has placed "an affirmative and continuing duty" on the juvenile court and the social services agency "to inquire whether a child ... is or may be an Indian child."

In sum, "[i]f the father did claim Indian ancestry, we would reverse, but only because the Department failed in its duty of inquiry, which ... is distinct from the substantive merits of the trial court's ruling. We would not act as trier of fact. ... We would simply allow the facts to be developed below."

One panel member dissented. The dissent reasoned that "the majority opinion put parents' appellate counsel in a strange and untenable position. Appellate attorneys ordinarily do not, need not, and are not paid to conduct any investigation of facts outside the record." It added:

> But in a case like this one, [*In re Rebecca R.*, 143 Cal. App. 4th 1426, 49 Cal. Rptr. 3d 951 (4th Dist. 2006)] and the majority opinion require Father's counsel to interview Father about his Native American ancestry and then, in defiance of [*In re Zeth S.*, 31 Cal. 4th 396, 73 P.3d 541 (2003)], provide the information to the Court of Appeal as a basis for reversal. And what if counsel is unable to interview Father in time? Parents in dependency cases are sometimes homeless or otherwise hard to find. If counsel cannot reach Father, must counsel interview paternal relatives? Moreover, a parent appealing from the termination of parental rights can assert ICWA error as to a nonappealing parent. ... Must counsel for the appealing parent interview the nonappealing parent? Just how much of the trial court's and CFS's jobs does the majority opinion reassign to appellate counsel?

- **Relevant (2020) Deskbook Section:** 13:8 n.1