



# CHILD WELFARE LAW 2021 Updates

August 27, 2021

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# Disclaimer

- This presentation was prepared by Patrick Pascual in his personal capacity. The views and opinions expressed in this presentation are presenter's own, and do not reflect the views and opinions of the State of Hawai'i , Department of the Attorney General, Family Law Division ("FLD").
- This presentation is not intended to be a substitute for your diligent review of the statutes, court rules and appellate cases discussed during this presentation. **YOU NEED TO READ THE APPELLATE CASES, STATUTES and COURT RULES.**





# Hawai'i Appellate Decisions

# Right to Counsel

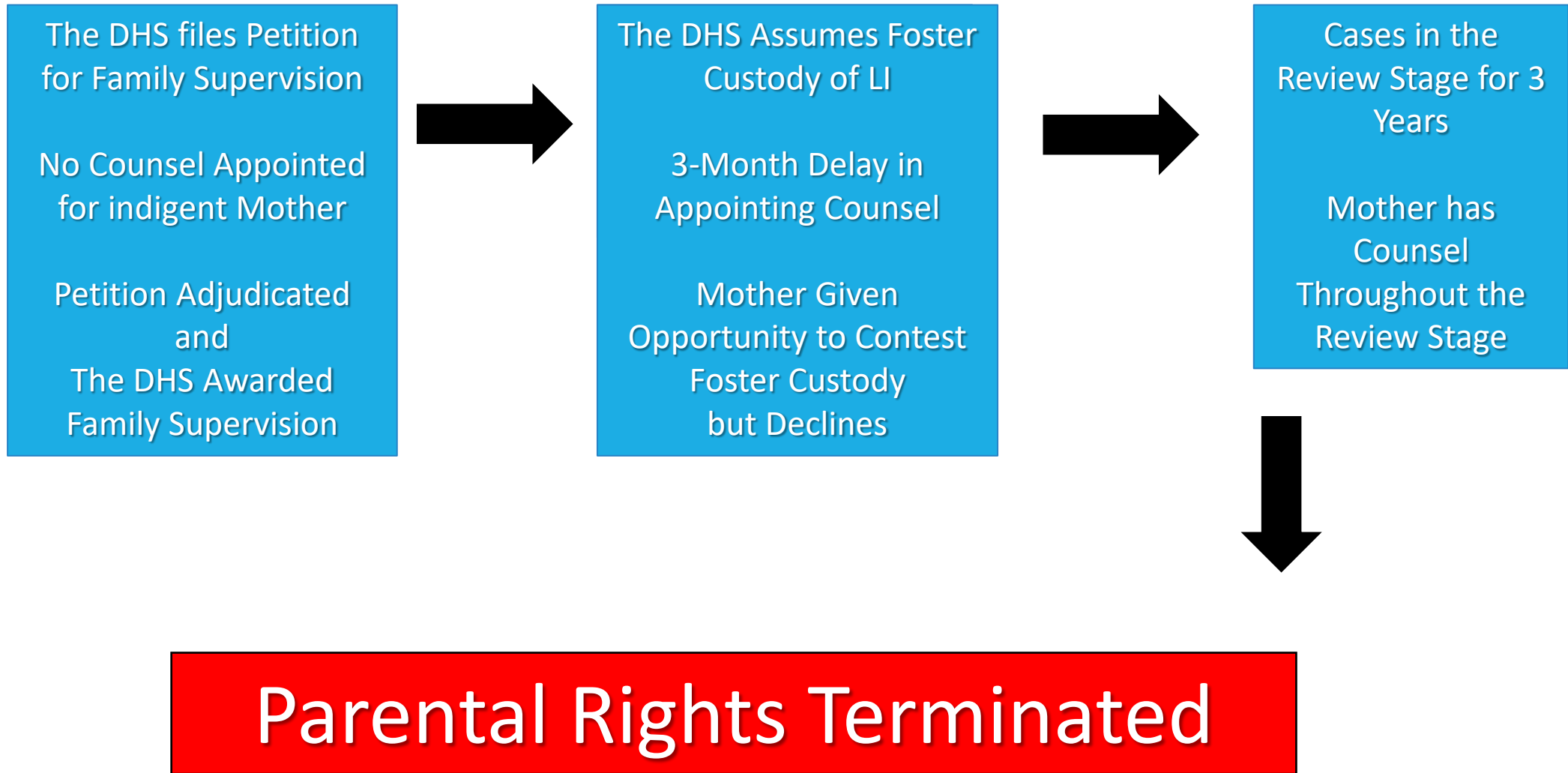


# *In re LI and HDK,*

149 Hawai'i 118, 482 P.3d 1079 (2021)

<https://www.courts.state.hi.us/wp-content/uploads/2021/03/SCWC-18-0000773.pdf>





## *In re LI and HDK*

- The ICA affirmed
- The Hawai'i Supreme Court reversed the family court's order terminating parental rights:
  - The family court abused its discretion, under HRS § 587A-17(a), by failing to appoint counsel for an indigent parent when the DHS filed its petition for family supervision.
  - The family court's failure to appoint counsel for an indigent parent in a Child Protective Act, HRS Chapter 587A proceeding when the DHS files a petition for family supervision is "structural error," and the denial of the parent's right to Due Process in violation of the Due Process Clause of the Hawai'i State Constitution, article I, section 5.
  - All orders are *vacatur* (vacated) because of the structural error.
  - Did not rule that HRS § 587A-17 was unconstitutional.

# *In re J.M. and Z.M.,*

\_\_\_ Hawai'i \_\_\_, \_\_\_ P.3d \_\_\_,

No. CAAP-20-0000748,

2021 WL 3177718 (App. Jul. 27, 2021)

<https://www.courts.state.hi.us/wp-content/uploads/2021/07/CAAP-20-0000748.pdf>





Father Fails to Appear at the Start of the Termination of Parental Rights Hearing/Trial.  
Court Enters Default Against Father.  
Court-Appointed Counsel Discharged.



Father Appears at the Further Trial.  
Court Informs Father that he is in Default, and that his Counsel was Discharged.  
Court Instructs Father to File a Motion to Set Aside Default.  
Father Allowed to Observe the Trial, but not Allowed to Participate.



Court Re-Appoints Father's Counsel.  
Counsel Immediately Files Motion to Set Aside Default, and later files other Post-Trial Motions.



Court Enters Decision and Order Terminating Parental Rights.



Motion to Set Aside Default and Post-Trial Motions Denied.

## *In re J.M and Z.M.*

- The ICA reversed and vacated the order terminating parental rights in its entirety.
  - Based on *In re LI and HDK*, the family court's order discharging Father's counsel during the termination of parental rights proceeding and prior to the family court's order terminating Father's parental rights violated Due Process and was structural error.
  - When there is structural error, there is requirement to show that the error (by failing to appoint counsel) was harmful/prejudicial (not harmless error).
  - Due Process requires that counsel be appointed throughout a child welfare proceeding because there is always possibility that parental rights may be terminated.
  - On remand, the case starts at the point where the structural error occurred.
  - Is it structural error whenever the court discharges counsel after entering a default against the parent?

# History of the Due Process Right to Counsel

- *Lassiter v. North Carolina*, 452 U.S. 18 (1981) (Violation of right to counsel is determined on a case-by-case basis, using the three-part *Matthews v. Eldridge* test)
- *In re A Children*, 119 Hawai'i 28, 193 P.3d 1228 (App. 2008) (Based on *Lassiter*, parent was denied Due Process by the failure to appoint counsel until the eve of the TPR trial; criticism of the CPA that appointment of counsel under HRS § 587-34(a) [repealed] for indigent parents was discretionary; invited DHS, the Department of the Attorney General and the Legislature to re-examine the discretionary nature of HRS § 587-34(a) [now codified as HRS § 587A-17(a)] ).
- *In re R.G.B.*, 123 Hawai'i 1, 229 P.3d 1066 (2010) (In TPR proceedings, parents have the Due Process right to effective assistance of counsel; different from criminal standard).
- *In re T.M.*, 131 Hawai'i 419, 319 P.3d 338 (2014) (Parental rights are substantially affected, in violation of the Due Process clause of the Hawai'i State Constitution, article I, section 5, when counsel for indigent parents are not appointed when the DHS files a petition for temporary foster custody or foster custody: Bright Line Rule).
- *In re L.I. and H.D.K.*, 149 Hawai'i 118, 482 P.3d 1079 (2021) (Parental rights are substantially affected when counsel for indigent parents are not appointed when the DHS files a petition for family supervision: Bright Line Rule; structural error not to appoint counsel).
- *In re J.M. and Z.M.*, \_\_\_ Hawai'i \_\_\_, \_\_\_ P.3d \_\_\_, No. CAAP-20-0000748, 2021 WL 3177719 (App. Jul. 27, 2021) (Court discharge of court-appointed counsel for an indigent parent after the parent was defaulted during the termination of parental rights proceeding was a violation of Due Process and structural error).

# Due Process Right to Counsel: Possible Pending Issues

- Counsel for parents in guardianship proceedings where the guardianship petition was filed pursuant to the permanency goal of guardianship and/or a permanent plan, with the goal of guardianship, in an HRS Chapter 587A proceeding.
- Counsel for the guardian in a petition to remove the guardian where the guardian was given the opportunity to reunify in an HRS Chapter 587A proceeding but was not successful.
- On the national level, providing counsel for parents at the start of the state CWS involvement (investigation stage). ABA Center on Children and the Law, and National Council of Juvenile and Family Court Judges. Action Alert. [Supporting Early Legal Advocacy before Court Involvement in Child Welfare Cases](#). (March 2021).  
[https://www.americanbar.org/content/dam/aba/administrative/child\\_law/early-legal-advocacy.pdf](https://www.americanbar.org/content/dam/aba/administrative/child_law/early-legal-advocacy.pdf)
- S. 1927: CAPTA Reauthorization Act of 2021 would require the appointment of counsel for children (“attorney ad litem”) to advocate for the child’s wishes, in addition to the appointment of a guardian ad litem.



# *JD v. PD,*

149 Hawai'i 92, 482 P.3d 555 (App. 2021)

<https://www.courts.state.hi.us/wp-content/uploads/2021/02/CAAP-20-0000023.pdf>



## HRS § 586-10.5

**Reports by the department of human services, court responsibilities.** In cases where there are allegations of domestic abuse involving a family or household member who is a minor or an incapacitated person as defined in section 560:5-102, the employee or appropriate nonjudicial agency designated by the family court to assist the petitioner shall report the matter to the department of human services, as required under chapters 350 and 587A, and shall further notify the department of the granting of the temporary restraining order and of the hearing date. The department of human services shall provide the family court with a written report on the disposition of the referral. The court shall file the report and mail it to the petitioner and respondent at least two working days before the hearing date, if possible. If circumstances prevent the mailing of the report as required in this section, the court shall provide copies of the report to the petitioner and respondent at the hearing. The report shall be noted in the order dismissing the petition or granting the restraining order. (Emphasis added by the court.) (Highlight added.)

## *JD v. PD*

- The family court issued an order of protection, even though the DHS reports did not contain the DHS' disposition.
- The ICA reversed:
  - HRS § 586-10.5 requires the DHS report to contain the DHS' disposition before the family court makes its decision on whether to issue an order of protection.
  - The disposition is the result of the DHS' investigation and assessment regarding the DHS' confirmation of harm and/or threatened harm.

# *Matter of J.K.*

\_\_\_\_ Hawai'i \_\_\_\_, \_\_\_\_ P.3d \_\_\_\_,

No. CAAP-17-0000922,

2021 WL 2373811

(App. Jun. 10, 2021)

<https://www.courts.state.hi.us/wp-content/uploads/2021/06/CAAP-17-0000922.pdf>

## III. Standards of review

### A. Statutory interpretation

Statutory interpretation is a question of law reviewable de novo. In reviewing questions of statutory interpretation, we are guided by the following principles:

First, the fundamental starting point for statutory-interpretation is the language of the statute itself. Second, where the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning. Third,



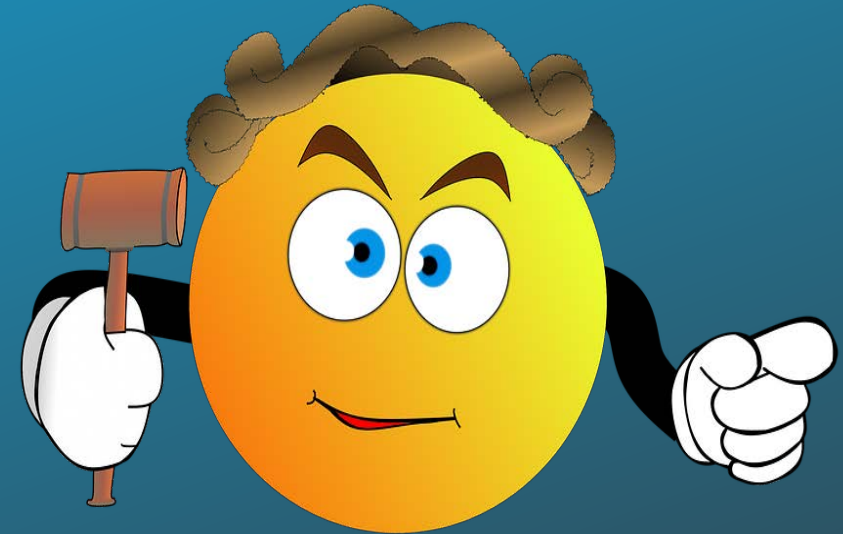
## Appellate Standard of Review: Findings of Fact Made by Clear and Convincing Evidence

**Highly Probable Appellate Standard of Review:** “the record as a whole contains substantial evidence from which a *reasonable factfinder* could have found it *highly probable* that the fact was true. In conducting its review, the court must view the record in the light most favorable to the prevailing party below and give appropriate deference to how the trier of fact may have evaluated the credibility of witnesses, resolved conflicts in the evidence, and drawn reasonable inferences from the evidence.” (Emphasis in the original.) *citing Conservatorship of O.B.*, 9 Cal.5th 989, 1011–12, 470 P.3d 41, 55 (2020).

# WW v. DS

149 Hawai'i 123, 482 P.3d 1084, (2021)

<https://www.courts.state.hi.us/wp-content/uploads/2021/03/SCWC-18-0000361.pdf>



## *WW v. DS*

- In a highly contested child custody trial, the family court judge called a recess during the trial to talk to the attorneys that started settlement negotiations.
- At one point, the trial judge spoke to the father alone in chambers without the consent of counsel.
- The trial judge suggested that the parties settle using the mother's proposed order.
- The trial judge approved the settlement.
- Father later disagreed with the terms of the written settlement agreement, as not reflecting his agreement.
- The family court denied the father's pro se motion for reconsideration.

## *WW v. DS*

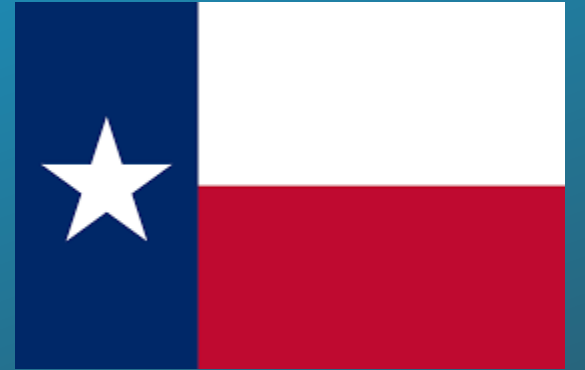
- ICA affirmed.
- Hawai'i Supreme Court reversed.
  - The family court committed plain error by speaking to the appellant alone in chambers without the prior consent of his counsel on the record.
  - The family court committed plain error by initiating settlement negotiations (during trial) and strongly recommending (coercing) father to agree to specific terms on a contested issue.
  - The settlement judge should not be the trial judge.



# *MJ v. CR*

\_\_\_ Hawai'i \_\_\_, \_\_\_ P.3d \_\_\_,  
No. CAAP-17-0000696, 2021 WL 2679556  
(Haw. App. Jun. 30, 2021)

<https://www.courts.state.hi.us/wp-content/uploads/2021/06/CAAP-17-0000696.pdf>



## *In Personam* (Personal) Jurisdiction

- The family court had subject matter jurisdiction over the Texas parent to enter the initial custody order under the UCCJEA.
- The family court did not have personal jurisdiction over the Texas parent regarding paternity and child support matters under the UIFSA.
- The State of Hawai'i did not have personal jurisdiction of the Texas parent because he did not have sufficient contacts with the State of Hawai'i.
- The Texas parent did not consent to the State of Hawaii's jurisdiction by litigating the contested issues after the family court denied his HFCR Rule 12(b)(4) motion to dismiss for lack of personal jurisdiction. The issue was preserved for appeal.

# Federal Appellate Decisions



*Fulton v.  
City of Philadelphia,*

\_\_\_\_ U.S. \_\_\_\_, No. 12-123,  
2021 WL 2459253 (Jun. 17, 2021)

[https://www.supremecourt.gov/opinions/20pdf/  
19-123\\_g3bi.pdf](https://www.supremecourt.gov/opinions/20pdf/19-123_g3bi.pdf)





# *Fulton v. City of Philadelphia*





- Pennsylvania law authorizes state-licensed private agencies to license/certify foster homes.
- The City of Philadelphia Department of Human Services has contracts with 20(+) state-licensed Private Foster Care Licensing Agencies
- The contract with the private agencies stated:
  - Provider shall not reject a child or family including, but not limited to, . . . Prospective foster or adoptive parents, for Services based upon . . . their . . . sexual orientation . . . unless an exception is granted by the Commissioner or the Commissioner's designee in his/her sole discretion. (Emphasis added).
- The Department stopped all referrals to CSS and stated it would not renew its contract.



- Catholic Social Services (“CSS”) of the Roman Catholic Archdiocese of Philadelphia is one of 20 (+) Private Foster Care Licensing Agencies Contracted by the City of Philadelphia Department of Human Services to license foster homes and to place children in foster care.
- CSS would not license and place children in the homes of unmarried couples and (married and unmarried) LGBTQ couples based on its religious belief that marriage is a sacred bond between a woman and a man. Unmarried couples and LGBTQ couples were referred to another contracted Private Foster Care Licensing Agency.
- CSS would place LGBTQ youth and would license a single LGBTQ person.

No. 19-123

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**In the Supreme Court of the United States**

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SHARONELL FULTON, ET AL.,  
*Petitioners,*

v.

CITY OF PHILADELPHIA, ET AL.,  
*Respondents.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE THIRD CIRCUIT

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**BRIEF OF MASSACHUSETTS,  
CALIFORNIA, COLORADO, CONNECTICUT,  
DELAWARE, THE DISTRICT OF COLUMBIA,  
HAWAII, ILLINOIS, MAINE, MARYLAND,  
MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY,  
NEW MEXICO, NEW YORK, NORTH CAROLINA,  
OREGON, RHODE ISLAND, VERMONT, VIRGINIA,  
WASHINGTON, AND WISCONSIN AS AMICI  
CURIAE IN SUPPORT OF RESPONDENTS**

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- Hawai'i was part of coalition of states that filed an amicus brief, drafted by Massachusetts, in support of the City of Philadelphia.
- [https://www.supremecourt.gov/DocketPDF/19/19-123/150773/20200820140356508\\_19-123%20Brief%20of%20Massachusetts%20et%20al.%20as%20amici%20curiae.pdf](https://www.supremecourt.gov/DocketPDF/19/19-123/150773/20200820140356508_19-123%20Brief%20of%20Massachusetts%20et%20al.%20as%20amici%20curiae.pdf)





- The Supreme Court reversed the lower courts' denial of the CSS' suit against the City of Philadelphia ("City") asking to halt the freeze on referrals to CSS, and to prevent the non-renewal of its contract.
- Decision based solely on the language of the contract that gave the City the discretion to grant exceptions to the non-discrimination clause.
- The City did not show a compelling state interest in denying CSS an exception for its religious exercise.



# *Brackeen v. Haaland,*

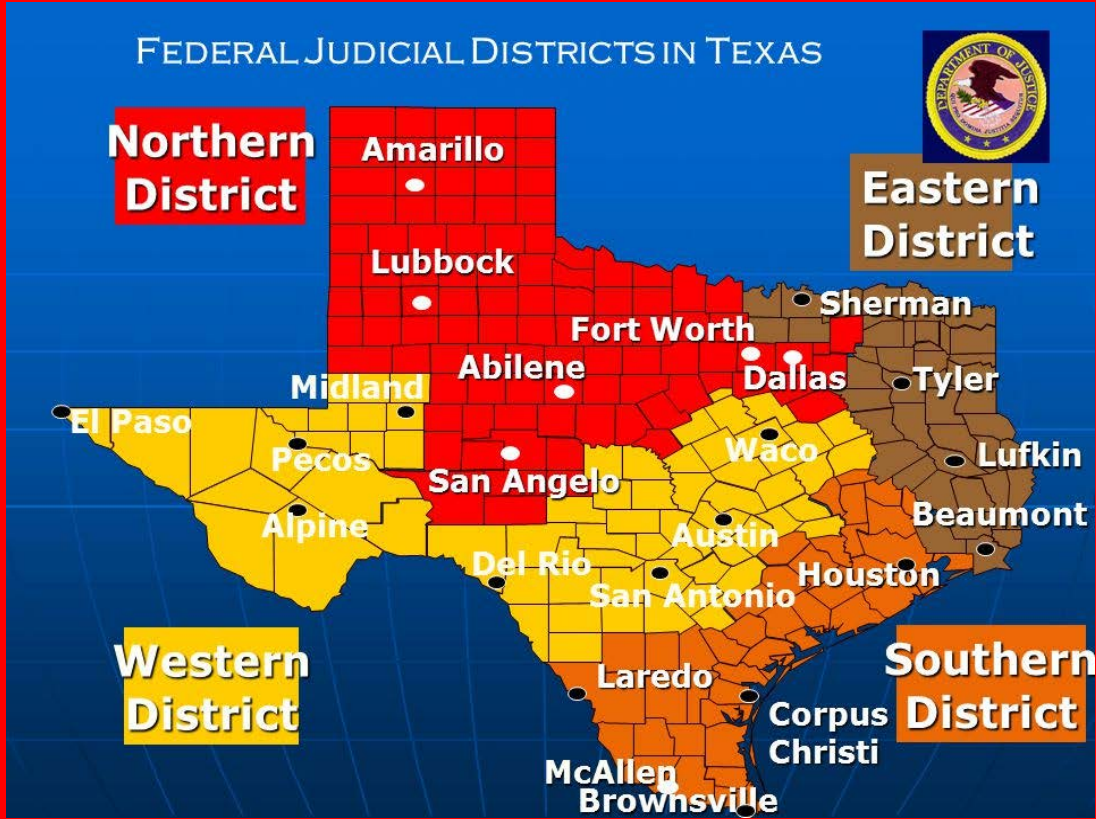
994 F.3d 249 (5<sup>th</sup> Cir. 2021)

[https://www.ca5.uscourts.gov/opinions/pub/18/  
18-11479-CV2.pdf](https://www.ca5.uscourts.gov/opinions/pub/18/18-11479-CV2.pdf)



# CONSTITUTIONALITY OF THE INDIAN CHILD WELFARE ACT (“ICWA”) 25 U.S.C. §§ 1901 *et seq.*

- Denial of Equal Protection.
- Unlawfully Preempts State Law in Violation of the Supremacy Clause..
- Violation of the 10<sup>th</sup> Amendment Anti-Commandeering Clause.
- The BIA ICWA Rules and Regulations Violated the Federal Administrative Procedures Act and is not Binding on the States.







# U.S. 5<sup>th</sup> Circuit Court of Appeals Ruling

- Congress had the Article I authority to enact ICWA.
- Equal Protection:
  - ICWA's "Indian Child" classification does not violate equal protection.
  - Affirmed, without precedential effect, the district's ruling that the § 1915(a)(3) adoptive placement preference for "other Indian families, and the § 1915(b)(iii) foster care placement preference for licensed Indian foster homes violated equal protection.

# U.S. 5<sup>th</sup> Circuit Court of Appeals Ruling

- Anti-Commandeering:

- The following provisions unconstitutionally commandeer state actors: the § 1912 “active efforts” requirement for court-ordered foster custody and termination of parental rights; the § 1912(e) and (f) “qualified expert witness” requirement; and the § 1915(e) record keeping requirement.
- Affirmed, without precedential effect, the district’s ruling that the following provisions unconstitutionally commandeer state actors: the § 1915(a) – (b) placement preferences to the extent they direct state action by state agencies; the § 1912(a) notice requirement; and the § 1951(a) state court record keeping requirement.



# U.S. 5<sup>th</sup> Circuit Court of Appeals Ruling

- Preemption:

- The following provisions granting certain private rights in state child custody proceedings validly preempt state law and do not commandeer the state agencies: the § 1911(c) right to intervene; the § 1912(b) right to appointed counsel; the § 1912(c) right to examine documents; the § 1913(a) right to an explanation of consent; the § 1913(b), (c) and (d) right to withdraw consent; the § 1914 right to seek invalidation; the § 1916(a) right to seek return of custody, and the § 1916 right to obtain tribal information.
- The following provisions granting certain private rights in state child custody proceedings validly preempt state law and do not commandeer the state courts (as opposed to state agencies): the § 1915(a) and (b) placement preferences; and the § 1912 (foster) placement and termination of parental rights standards.

# U.S. 5<sup>th</sup> Circuit Court of Appeals Ruling

- Non-Delegation Doctrine:
  - The § 1915(c) right of Indian tribes to establish an order of adoptive and foster placement preferences that is different than the order set forth in § 1915(a) and (b) does not violate the “non-delegation” doctrine.
- BIA ICWA Administrative Rules:
  - The BIA did not violate the APA by stating that the rules are binding on state courts.
  - The comparable provisions in the rules to the ICWA provisions that were ruled to be unconstitutional are also unconstitutional.
  - The 25 C.F.R § 23.132(b) requiring “clear and convincing evidence” for the state court to deviate from the § 1915 placement preferences violated the APA.

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# Hawai'i Legislation

2021 Session

# Act 23

## HRS § 346-17.6

- HRS § 346-17.6 authorizes a minor to consent to a no cost emergency shelter.
- Amendment expands the definition of the “provider” of the “no cost emergency shelter” to include an organization that is not a DHS authorized child placing organization or child caring institution, as long as the provider meets certain conditions.
- [https://www.capitol.hawaii.gov/session2021/bills/GM1123\\_.PDF](https://www.capitol.hawaii.gov/session2021/bills/GM1123_.PDF)



# Act 26

## HRS § 350-3

- Amends the reporting immunity provisions of HRS § 350-3 to conform with Victims of Child Abuse Act Reauthorization Act (P.L. 115-424) amendments to the Child Abuse Prevention and Treatment Act (“CAPTA”).
- HRS § 350-3 provides immunity from civil and criminal liability to persons acting participating in good faith in the making of a child abuse and neglect report.
- The amendment provides immunity to “persons who otherwise provide information and assistance, including medical evaluations or consultation, in connection with to a report, investigation, or legal intervention pursuant to a good faith report of child abuse or neglect.”
- [https://www.capitol.hawaii.gov/session2021/bills/GM1126\\_.PDF](https://www.capitol.hawaii.gov/session2021/bills/GM1126_.PDF)

# Act 27

## HRS Chapter 586

- Amends HRS Chapter 586, Domestic Abuse Protective Orders.
- Addresses restraining/protective orders that also protects minors but expires after the minor's eighteenth birthday.
- Authorizes the family court to extend the period of the restraining/protective order to a date beyond the minor's eighteenth birthday.
- [https://www.capitol.hawaii.gov/session2021/bills/GM1127\\_.PDF](https://www.capitol.hawaii.gov/session2021/bills/GM1127_.PDF)



