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 **Debate:** ADOPTIVE COUPLE V. BABY GIRL

**Adoption Case Brings Rare Family Law Dispute to High Court**

By Nina Totenberg

April 16, 2013

National Public Radio

Take the usual agony of an adoption dispute. Add in the disgraceful U.S. history of ripping Indian children from their Native American families. Mix in a dose of initial fatherly abandonment. And there you have it—a poisonous and painful legal cocktail that goes before the U.S. Supreme Court on Tuesday.

At issue is the reach of the Indian Child Welfare Act, known as ICWA. The law was enacted in 1978 to protect Native American tribes from having their children almost literally stolen away and given to non-Indian adoptive or foster parents.

Two of the justices likely have a special interest in the case: Chief Justice John Roberts and Justice Clarence Thomas both have adopted children.

The case before them and the other justices is a tragic saga. Christy Maldonado, an Oklahoma resident of primarily Hispanic heritage, was engaged to be married to Dusten Brown, a member of the Cherokee Nation, who is technically about 2 percent Native American. In 2009, Christy, a casino worker and single mother of two, told Dusten she was pregnant. But the relationship deteriorated and she broke off the engagement.

Beyond these facts, the protagonists in this story agree on little. One fact, though, is beyond dispute: Whatever happened in the first few months of the pregnancy, Dusten eventually texted Christy that he was giving up his parental rights and would not support the child.

“It punched me in the gut, knowing that the father of my child did not want her at all,” Christy says. “That’s when I pretty much decided I had to do something because I could barely even put food on the table for the kids at that time.”

**An Adoption, and a Legal Challenge**

Christy decided to put her child up for adoption. Through an agency, she found a couple in South Carolina she liked, Matt and Melanie Capobianco, and the three agreed to an open adoption. The Capobiancos helped support Christy in the last months of the pregnancy and were in the delivery room for the birth. Matt cut the umbilical cord.

A month prior to the birth, Christy, through her lawyer, sent a letter notifying the Cherokee Nation of her adoption plans, giving them a chance to intervene under the Indian Child Welfare Act. The tribe said it had no record of Dusten Brown as a tribal member. So the adoption went forward.

Four months after the birth of the baby girl—as Dusten was about to deploy to Iraq, and as the adoption was about to become final—he was served with papers notifying him of the adoption. Dusten signed off on them, inadvertently, he says. But within days he filed a formal objection, invoking the Indian Child Welfare Act. He says that in agreeing to give up his parental rights, he thought he was relinquishing his parental rights to Christy.

“I just figured the best interest would be ... for [Christy] to have the full custody of her, but for me to still be in the picture—be able to come visit and stuff,” he says.

But after learning about the adoption, he sought full custody of his daughter. While there is no doubt that he would have had no leg to stand on under state law, by the time the case went to court, the Cherokee Nation had located him in its records. And the South Carolina courts ruled that the Indian Child Welfare Act trumped state law. In December 2011, the South Carolina Supreme Court ordered the Capobiancos to give their then-2-year-old daughter to her biological father, a man she had never met.

“It was by far the worst day of our lives and I’m sure of hers,” says Matt Capobianco. “She cried after us,” Melanie adds.

The adoptive parents appealed to the U.S. Supreme Court, backed by the birth mother and the guardian ad litem, appointed by the South Carolina family court to represent the best interests of the child.

Normally, the Supreme Court does not hear such family law disputes, but this case is a test of the Indian Child Welfare Act.

**Competing Views**

The law was enacted after extensive congressional investigations and hearings revealed that 35 to 40 percent of Native American children were being improperly removed from their families and given to white adoptive and foster parents. Charles Rothfeld, Dusten Brown’s lawyer, notes that these abuses were “catastrophic” for the tribes, which “were at risk of becoming extinct because their children were literally being taken away from them.”

To combat the dire situation, ICWA established a chain of adoptive preferences for children with Indian heritage. In the event that neither parent could take custody, other Indian family members were to have priority, and after that, tribal adoptive parents.

Just how you see this case is something of a Rorschach test, with the adoptive parents seeing it one way, the father another, the mother yet another, and the court-appointed guardian still another.

As the adoptive parents see it, they were not stealing a child from an Indian parent because the only parent with Indian heritage had already given up his parental rights. And as the Capobiancos’ lawyer, Lisa Blatt, puts it, the federal law was meant to protect Indian children from being snatched from their existing Indian families.

Even if Dusten qualifies as “a parent” under the law, “the Indian Child Welfare Act only protects those parents who already have a prior custodial relationship,” she argues.

Not so, say the tribes. They see the case as an attempt to undo the protections that Congress established in the face of evidence that states were trampling on the rights of Native American parents. “Congress decided it had to step in,” says Rothfeld, and it did so by creating “special federal rules superseding state custody rules that would govern where Indian child custody was at stake.”

The case also is about the autonomy of a non-Indian mother. The birth mother’s lawyer, Lori Alvino McGill, contends that if Indian fathers can sweep in this way, based only on biology, and override the birth mother’s decision, why couldn’t sperm donors or rapists who are Indian do the same? “No other set of men can choose to kind of sit back, renounce all responsibility but hold a back-pocket veto to an adoption choice,” she says.

The guardian ad litem, represented by lawyer Paul Clement, scathingly says there is “no box” like the one Dusten Brown is seeking to check.

“Generally you’re not allowed to say, ‘Well, look, I don’t really want to give you any financial support, I don’t really want to have much to do with this child, but I do really want you, person I’ve just gotten pregnant, I want you to take care of this child, and I don’t want you to do something like give up this child for adoption,’” he says.

What’s more, he adds, under state law, it is the best interests of the child that prevail. “Except if this federal statute applies and applies only on the basis of her Indian heritage, well, then everything changes. ... It just completely shifts the focus of the whole proceeding around based on race,” says Clement, and “that’s something that we generally wouldn’t think the Constitution allows.”

**A Heartbreaking Case**

Native Americans bristle at the charge of racial classification. Indian tribes, they note, are quasi-sovereign nations recognized by the U.S. Constitution.

“This law does not apply because of race,” says Chrissi Nimmo, assistant attorney general of the Cherokee Nation. “This father was a citizen of the [Cherokee Nation’s] government; it’s not just if you have Indian in your background.”

Whichever way the Supreme Court rules in June, the case of “Baby Girl,” as she is referred to in the briefs, is heartbreaking. No one disputes that she was sublimely happy with her adoptive parents, and videos of her with her father, now married, seem to show a little girl equally happy.

Her birth mother says that while she spent time with her child at the adoptive parents’ home in South Carolina and listened to her child on the phone regularly, she now does not even know where her daughter lives. Neither do the adoptive parents. Dusten Brown says he has kept his daughter apart for the past 16 months to allow her to become used to her new home, away from the chaos and bitterness of the legal fight. ◾

**Baby Veronica and Native American Family Values**

By Jaqueline Pata

April 16, 2013

*Indian Country Today*

The mainstream media has continued to make repeated factual errors when reporting on the high profile Supreme Court custody case involving a Native American father and his daughter. The latest are today’s Washington Post and New York Times editorial board opinions of Adoptive Couple v. Baby Girl, being heard today by the Supreme Court. The misrepresentations are significant, one sided, and a direct affront to Native American family values.

The facts of the case are straightforward: Dusten Brown is an Iraq war veteran and a member of the Cherokee Nation. He understands service and commitment and nothing could be clearer than his commitment to his daughter Veronica.

Veronica is Brown’s now 3 1/2-year-old daughter; Veronica and Dusten now are a family together in Oklahoma. Veronica’s father and mother were engaged when she was conceived. When Dusten Brown first learned of the pregnancy, he begged his fiancé to marry him right away, to move into military housing on base with him, and even suggested she quit her job so that she could focus on their unborn child. He pledged to financially support her, their child and even her children from another relationship.

The father was heartbroken and confused when his pregnant fiancé broke off their engagement and stopped answering his phone calls and text messages. He called and sent text messages, repeatedly and without response.

Finally, he got permission to leave the base and traveled to her home, some four hours away. Her car was there and he heard voices inside her home, but she would not come to the door.

Court testimony shows that the birth mother kept her plans to adopt the baby a secret from the father—because she knew that the father would never consent to give his child up for adoption. The father did not learn of the mother’s plans to give up the baby until the child was four months old and the father was on the verge of shipping out to Iraq. Once learning this news, the father immediately took all the legal steps he could consistent with the pressures of his deployment into hostile territory and subsequent combat.

Although adoption lawyers for the South Carolina couple filed an adoption action just days after her birth, they waited four months to serve the father with the legal papers—finally serving him just before he deployed for his mission in Iraq.

In short, from his first knowledge of the pregnancy, the father expressed nothing but a sincere desire to love, support and care for his child.

Throughout the two-year long court proceedings, the father sent child support payments to the South Carolina couple, which deposited them into their attorney’s trust account. The father also purchased stuffed animals and other toys for his daughter during this period—all of which were returned, along with the 20 pairs of socks hand-knitted by the child’s grandmother.

The case was eventually taken up by three separate courts in South Carolina, and all of them ruled in favor of Dusten Brown. After a full, four-day trial, the Family Court judge noted that Brown “is the father of another daughter” and that “[t]he undisputed testimony is that he is a loving and devoted father. Even [Birth Mother] herself testified that [Brown] was a good father. There is no evidence to suggest that he would be anything other than an excellent parent to this child.” The Family Court judge concluded “the birth father is a fit and proper person to have custody of his child”; he “has demonstrated that he has the ability to parent effectively” and “has convinced me of his unwavering love for this child.”

Despite this factual record developed in tremendous detail by three separate courts over the last two years, members of the mainstream media have continued to misreport key aspects of the case.

Most damning of all are the media reports have created the mistaken impression that South Carolina family adopted the child and Dusten Brown is seeking to undo the adoption. The facts are exactly the opposite: Veronica was never adopted, and the attorneys for the South Carolina couple knew from the start that the father was going to fight for the right to raise his child and that the Indian Child Welfare Act (ICWA) was going to be a key legal issue.

Despite the knowledge that the father wanted to raise the child and the fact that ICWA could apply, the South Carolina couple’s adoption lawyers made the decision to fight to keep the child—against the will of her family and against the will of her Cherokee Nation.

In contrast, Dusten Brown and his representatives have always shown respect for the legal process and for the South Carolina couple—even though the process kept him apart from his daughter for two years.

Likewise, the mainstream media has failed to explore the misconduct that led to Veronica being removed from Oklahoma and taken away to South Carolina when she was barely a week old. The court proceedings in this case revealed that the lawyers were at fault, in particular, according to the brief Dusten Brown’s attorneys filed with the Supreme Court, “[a]lthough Mother's attorney provided the Cherokee Nation with father's name while inquiring whether the child would be an ‘Indian child’ subject to ICWA, the attorney misspelled Father's first name and provided both the wrong day and wrong year for Father's date of birth; based on these misstatements, the Cherokee Nation responded that the child appeared not to be an Indian child, adding that any misinformation would invalidate that determination. Mother testified at trial that she knew the Cherokee Nation's determination could not be correct—and that she informed her attorney of that fact—but no further efforts were made to determine whether Baby Girl was an Indian child.”

Had the Oklahoma Interstate Compact Commission been provided accurate information about this child's Native American heritage, the South Carolina adoption attorneys would never received permission to take her out of Oklahoma and all of this heartache for Dusten Brown and for the South Carolina family could have been avoided.

Yet almost no attention has been paid to the conduct of these adoption attorneys, and that is truly unfortunate. Because, in many ways, the story of the case of Adoptive Couple v. Baby Girl is about two increasingly common trends in the adoption services industry: First, attempts to purposefully circumvent ICWA through legal evasion, and second, attempts by adoption lawyers to take advantage of active duty service members in the process of being deployed to combat, or in active deployments.

That’s why the National Congress of American Indians (NCAI), with the permission of the Brown family, has released a new video about the Brown family, and specifically about Dusten Brown, because up until recently the media has failed in their job in telling a balanced and full story about this case and the Brown family.

At its very heart, this case is about a father’s deep desire to raise his daughter Veronica. Dusten Brown is an Iraq war veteran, a family man, a man of conviction, and most importantly, a father. He is also a member of his tribal nation, the Cherokee Nation.

Let the world and the United States not forget that Native men and women are caring fathers and mothers, parents and grandparents Our family and community values are what have carried us through our most difficult times—we are all a family and we stand together. Our young people are our future and we will not give up on protecting them and their rights.

It’s long past time for the mainstream media to get the story right and to dig deeper and explore the endemic misconduct that is threatening to break up the families of both Native Americans and members of the military. ◾

***excerpts from***

**The Indian Child Welfare Act of 1978**

**§ 1901. Congressional findings**

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—

. . . (2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

**§ 1902. Congressional declaration of policy**

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

. . .

**§ 1913. Parental rights; voluntary termination**

**(a) Consent; record; certification matters; invalid consents**

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge’s certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. . .

**(c) Voluntary termination of parental rights or adoptive place-ment; withdrawal of consent; return of custody**

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

**(d) Collateral attack; vacation of decree and return of custody; limitations**

After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law. ⬩

**Technical Vocabulary**

**(from *The American Heritage Dictionary*, 4th ed.)**

 consent (*n*.)—“Acceptance; agreement”

 custodian (*n*.)—“One that has charge of something; caretaker”

 duress (*n*.)—“Constraint by threat; coercion”

 fraud (*n*.)—“A deliberate deception for unfair or unlawful gain; swindle”

 jurisdiction (*n*.)—“Authority or control”

 terminate (*v*.)—“To bring or come to an end; conclude”

 trustee (*n*.)—“A person or agent holding legal title to and administering property for a beneficiary”

 vacate (*v*.)—“To make void or annul”

***excerpts from***

**The Constitution of the United States of America**

**Preamble**

We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America. . . .

**Amendment I**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. . . .

**Amendment IV**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. . . .

**Amendment XIV**

Section 1.

. . . No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. ◾

***excerpts from***

**The Constitution of the Iroquois Nations:**

**The Great Binding Law, Gayanashagowa**

1. I am Dekanawidah and with the Five Nations' Confederate Lords I plant the Tree of Great Peace. I plant it in your territory, Adodarhoh, and the Onondaga Nation, in the territory of you who are Firekeepers. I name the tree the Tree of the Great Long Leaves. Under the shade of this Tree of the Great Peace we spread the soft white feathery down of the globe thistle as seats for you, Adodarhoh, and your cousin Lords. We place you upon those seats, spread soft with the feathery down of the globe thistle, there beneath the shade of the spreading branches of the Tree of Peace. There shall you sit and watch the Council Fire of the Confederacy of the Five Nations, and all the affairs of the Five Nations shall be transacted at this place before you, Adodarhoh, and your cousin Lords, by the Confederate Lords of the Five Nations.

2. Roots have spread out from the Tree of the Great Peace, one to the north, one to the east, one to the south and one to the west. The name of these roots is The Great White Roots and their nature is Peace and Strength. If any man or any nation outside the Five Nations shall obey the laws of the Great Peace and make known their disposition to the Lords of the Confederacy, they may trace the Roots to the Tree and if their minds are clean and they are obedient and promise to obey the wishes of the Confederate Council, they shall be welcomed to take shelter beneath the Tree of the Long Leaves. . . .

**Official symbolism**

56. Five strings of shell tied together as one shall represent the Five Nations. Each string shall represent one territory and the whole a completely united territory known as the Five Nations Confederate territory.

57. Five arrows shall be bound together very strong and each arrow shall represent one nation. As the five arrows are strongly bound this shall symbolize the complete union of the nations. Thus are the Five Nations united completely and enfolded together, united into one head, one body and one mind. Therefore they shall labor, legislate and council together for the interest of future generations. The Lords of the Confederacy shall eat together from one bowl the feast of cooked beaver's tail. While they are eating they are to use no sharp utensils for if they should they might accidentally cut one another and bloodshed would follow. All measures must be taken to prevent the spilling of blood in any way. . . .

**Laws of Adoption**

. . . 69. Any member of the Five Nations who through esteem or other feeling wishes to adopt an individual, a family or number of families may offer adoption to him or them and if accepted the matter shall be brought to the attention of the Lords for confirmation and the Lords must confirm adoption.

70. When the adoption of anyone shall have been confirmed by the Lords of the Nation, the Lords shall address the people of their nation and say: “Now you of our nation, be informed that such a person, such a family or such families have ceased forever to bear their birth nation's name and have buried it in the depths of the earth. Henceforth let no one of our nation ever mention the original name or nation of their birth. To do so will be to hasten the end of our peace.

**Rights of Foreign Nations**

73. The soil of the earth from one end of the land to the other is the property of the people who inhabit it. By birthright the Ongwehonweh (Original beings) are the owners of the soil which they own and occupy and none other may hold it. The same law has been held from the oldest times. . . .

75. When a member of an alien nation comes to the territory of the Five Nations and seeks refuge and permanent residence, the Lords of the Nation to which he comes shall extend hospitality and make him a member of the nation. Then shall he be accorded equal rights and privileges in all matters except as after mentioned. ◾

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