

Adoptive Couple v. Baby Girl

Thursday, May 30, 2013 - 05:00 PM

This is the story of a three-year-old girl and the highest court in the land. The Supreme Court case *Adoptive Couple v. Baby Girl* is a legal battle that has entangled a biological father, a heart-broken couple, and the tragic history of Native American children taken from their families.

When producer [Tim Howard](#) first read about this case, it struck him as a sad but seemingly straightforward custody dispute. But, as he started talking to lawyers and historians and the families involved in the case, it became clear that it was much more than that. Because *Adoptive Couple v. Baby Girl* challenges parts of the 1978 Indian Child Welfare Act, this case puts one little girl at the center of a storm of legal intricacies, Native American tribal culture, and heart-wrenching personal stakes.



Veronica, the little girl at the heart of *Adoptive Couple v. Baby Girl* (Courtesy of John Nichols)

Male: Wait, wait –

Female: Okay?

[Background noise –program intro]

Male: All right.

Female: Okay?

Male: All right.

Announcers: You are listening to Radiolab from WNYC and NPR.

Jad Abumrad: Hey, I'm Jad Abumrad.

Robert Krulwich: I'm Robert Krulwich.

Jad Abumrad: This is Radiolab...

Robert Krulwich: The podcast.

Jad Abumrad: And today on the podcast we are going to venture into new territory for us. We have the story of a little girl who became a very, very big deal.

Robert Krulwich: How big a deal did this little girl become?

Jad Abumrad: A very big deal to about 500-something nations.

Robert Krulwich: There aren't 500 and something...

Jad Abumrad: No, there are.

Robert Krulwich: Look, I've seen the front of the UN.

Jad Abumrad: Look, okay, it's going to make sense in about 30 seconds. That's a teaser. It isn't ultimately even that important to the story. You and I are going to sit right here and behave ourselves and Tim Howard, our intrepid producer, is going to tell us the story.

Tim Howard: So I first heard about this story, I saw it listed on the Supreme Court docket for cases that they were going to be hearing this spring.

Marcia Zug: The name of the case is Baby Girl vs. Adoptive Couple.

Tim Howard: Actually in strict legal parlance it's called Adoptive Couple v. Baby Girl.

Marcia Zug: So it's not a particularly catchy name.

Tim Howard: It's a weird name though, it's hard to picture.

Marcia Zug: Yeah.

Tim Howard: So this is Marcia Zug.

Marcia Zug: Associate Professor of Law at the University of South Carolina.

Tim Howard: And she wrote about this case in *Slate*. And it stood out to me because it just seemed odd at first that this would even be a Supreme Court case. It seemed more like a straightforward custody case.

Marcia Zug: Right.

Tim Howard: But when you dig in –

Marcia Zug: There's a lot going on here.

Announcers: Crusades. Text messages. State law. Errors. Children. Supreme Court. Christopher Columbus.

Robert Krulwich: Christopher Columbus?

Tim Howard: And it is not straightforward at all.

Jad Abumrad: Apparently not.

Tim Howard: So let me walk you through it the way I learned about it. The story begins with a couple.

Marcia Zug: Matt and Melanie Capobianco, they are a couple who live down here in South Carolina.

Tim Howard: He is a technician at Boeing. She is a developmental psychologist.

Marcia Zug: A nice, middle class white couple.

Tim Howard: They're in their late 30s.

Marcia Zug: And –

Tim Howard: They really wanted to have a kid.

Marcia Zug: They had gone through infertility problems.

Tim Howard: It wasn't working out.

Marcia Zug: So –

Tim Howard: Eventually –

Marcia Zug: They decide to adopt.

Tim Howard: Enter a woman named Christy Maldonado. She lives about 1000 miles away.

Marcia Zug: I believe she's in Oklahoma.

Tim Howard: She's in her 20s, already has a couple kids.

Marcia Zug: She's pregnant and decides that she wants to give the baby up for adoption and she picks the Capobianco's. And everyone seems happy.

Tim Howard: The Capobiancos get the baby and they name her Veronica.

Matt Capobianco: We used to call her boss lady, not a lot but most of the time.

Melanie Capobianco: Our family called her that.

Matt Capobianco: Boss lady.

Melanie Capobianco: Because she bosses everybody around.

Tim Howard: This is Matt and Melanie Capobianco.

Matt Capobianco: But you were happy to do whatever she told you to do because she's just the poster child for a proud father, you know? But it's just gone as wrong as it could have possibly gone.

[Music]

Tim Howard: This is basically how it unfolded on TV News.

Media: We are back in session. On the docket today, a young child ripped from the arms of the only parents she's ever known.

Media: And turned over to the Native American biological father she has never met.

Media: A man Veronica had never even met.

Tim Howard: What happened is, when Veronica was two –

Media: Her biological dad turned up –

Tim Howard: Seemingly out of nowhere and according to these clips, hadn't been around for two years, had abandoned the child. And now he is asking for custody. And he gets it.

Media: And the court is making them stand by and just let it happen.

Tim Howard: Why?

Matt Capobianco: Well, it's mainly because of this law.

Melanie Capobianco: The Indian Child Welfare Act.

Announcers: The 1978 Indian Child Welfare Act.

Tim Howard: Dusten, the dad, he is Cherokee.

Male: He is part of the Cherokee nation.

Tim Howard: So that makes his daughter, Veronica, eligible to be Cherokee. And the law is designed -

Male: -to keep Indian families together.

Tim Howard: It gives preference to Indian kids staying with Indian parents. So even though he'd actually signed papers agreeing to adoption, he was able to invoke this law and get custody of Veronica.

Jad Abumrad: He signed his custody away and he was able to then use his Cherokee-ness to reverse the rights he signed away?

Tim Howard: Just hang on.

Jad Abumrad: All right.

Tim Howard: This is all going to make sense.

Jad Abumrad: Okay. But he takes the kid is what you're saying.

Tim Howard: Yeah.

New Year's Eve, 2011. With cameras rolling, Dusten Brown drives his pickup truck into Charleston.

Media: Matt and Melanie Capobianco clutched two-year-old Veronica. This could possibly be the last time they hold their baby as her mom and dad.

Tim Howard: And that evening, Veronica is transferred to Dusten.

Melanie Capobianco: I didn't feel like we had enough time for her to be not afraid when she's -

Matt Capobianco: We left her with strangers.

Melanie Capobianco: Yeah, to her they're complete strangers and I can't imagine that she's not going to be terrified.

Tim Howard: And as Dusten gets into the truck, holding his two-year-old daughter for the first time, a reporter asks him -

Reporter: Do you think this is in her best interest?

Tim Howard: And this is all you hear from him.

Dusten Brown: I think so. Looking to give her a ____.

Reporter: Let's get back, please. Thank you.

Reporter: Have you ever seen the child before?

Media: They declined any further comment on camera.

Tim Howard: He gets into the truck with Veronica and they drive away, back to Oklahoma. Can I ask you when was the last time that you spoke with Veronica?

Matt Capobianco: The day after the, the day after the, uh –

Melanie Capobianco: Transfer.

Matt Capobianco: Transfer.

Tim Howard: A phone call?

Matt Capobianco: Yeah. We spoke to her for about two minutes and we told her we loved her and she said "I love you mommy" and "I love you daddy." I don't know, just a few minutes. But that was it, that was the last time we were able to be in touch.

Tim Howard: And that was sixteen months ago.

Jad Abumrad: And how long was Veronica with them again before this happened?

Tim Howard: About two years.

Jad Abumrad: Oh, man. That's hard.

Tim Howard: Yeah. And you know, when I first heard about this case, that's basically the only way I thought of it is just that's a crazy injustice. That's basically all I saw in it.

Marcia Zug: And if you're someone who has no background in this, then you see a case like the Baby Veronica case and you're like, whoa, where is this coming from? How can this possibly be okay?

Tim Howard: That's Marcia Zug again. And her article for *Slate* kind of caught me off guard because the title was *Doing What's Best for the Tribe. Two-year-old Veronica was ripped from the only home she's ever known. The court made the right decision.*

Marcia Zug: Yeah.

Tim Howard: So I called up to ask her, what do you mean by that?

Marcia Zug: One of the things that I think is important to realize is that the problems that ICWA was intended to address didn't stop happening that long ago.

[Music]

Tim Howard: And this is where the story turned into the biggest rabbit hole I have ever fallen into.

Jad Abumrad: What, what did she tell you?

Tim Howard: Marcia basically said the only way you can begin to wrap your mind around what is right and what's wrong in this story is to go back to the 1960s.

Tim Howard: How are you doing?

Male: Good, how are you, Tim?

Tim Howard: Great to meet you.

Male: Same here.

Tim Howard: And to this guy -

Burt Hirsch: Burt Hirsch, I'm a lawyer.

Tim Howard: He lives in Long Island now, which is where I visited him. But in 1967 -

Burt Hirsch: The fall of '67 I was on the staff of the Association on American Indian Affairs.

Tim Howard: Sort of a legal advocacy group for American Indians. And he traveled all over working with different tribes.

Burt Hirsch: And -

Tim Howard: One day, he gets a phone call from this guy, Louis Goodhouse.

Burt Hirsch: The tribal chair of the Devil's Lake Sioux Tribe in North Dakota.

Tim Howard: And this guy says, "I really need your help."

Burt Hirsch: He said there's a child.

Tim Howard: A Devil's Lake kid, one of ours, that was just abruptly taken away by social workers.

Burt Hirsch: The Benson County North Dakota social services agency came in and they took little Ivan Brown away from his grandmother.

Tim Howard: He was six.

Jad Abumrad: What was their stated reason for taking Ivan away?

Burt Hirsch: Neglect.

Jad Abumrad: Because what? Because grandmother wasn't around?

Tim Howard: No, actually, Burt says that the social workers were looking for that classic nuclear family.

Burt Hirsch: Biological mother, biological father, children.

Tim Howard: So when they saw him with an older relative but no mom or dad, they thought, "Uh-oh," and they took him away.

Burt Hirsch: The Tribal Council was extremely upset by this. They wanted to fight a battle about this.

Tim Howard: Burt took the case, fought it in court.

Burt Hirsch: We won that case, by the way. Mrs. Alex Fournier, she got Ivan back after a somewhat protracted battle.

Tim Howard: But he began to wonder how widespread is this?

Burt Hirsch: So from '67 to the end of '68 into '69...

Tim Howard: He visited...

Burt Hirsch: Tribe after tribe after tribe

Tim Howard: Doing interviews. And he says that everywhere he went, he would hear these stories.

Deb Wells: I remember it vividly.

Tim Howard: This is Deb Wells. She is a member of the Rosebud Sioux Tribe and when she was ten years old, a car pulled into her driveway.

Deb Wells: And they come driving in, social workers, and they got out of the car and I told my brothers and sisters, I said, "Go hide." And they had to drag us out from underneath the beds

because they got around and got in the house. And then they took us to Scotch Bluff and put us in a foster home. It was horrible.

Marla Jean Bigboy: This was just part of every native family's history.

Tim Howard: This is Marla Jean Bigboy. She grew up on the Pine Ridge reservation in South Dakota.

Marla Jean Bigboy: I remember when I was young we'd go to one of the border towns, and my grandma would say, "Stay in the car, lock yourself in, don't get out of the car, I'm going into the trading post, because they're going to steal you."

Tim Howard: Really?

Marla Jean Bigboy: Yeah.

Burt Hirsch: What we found is that on every reservation –

Michael Doeheart: My name is Michael Evan No Heart, I'm a full blooded Hunkpapa Lakota from Standing Rocks Reservation.

Burt Hirsch: You couldn't not find a family that didn't know of a child in placement.

Michael Doeheart: Social Services came and took me and my sister and told my mother and dad that they were taking us into Mobridge for a physical checkup and they never brought us back.

Tim Howard: Michael says that his dad spent the next 30 years looking for him. In any case, Burt would ask these people that he was interviewing, "What reason did the social workers give you for taking the child?" And the answers that he got ran the gamut.

Burt Hirsch: Conditions of poverty, alcoholism...

Tim Howard: Overcrowding...

Burt Hirsch: Maybe they don't have adequate ventilation in the house.

Tim Howard: No indoor plumbing. But in most cases, he says, the reasons wouldn't have stood up in court.

Burt Hirsch: They would put papers in front of them and they would sign. They didn't know what they were signing.

Tim Howard: Some families...

Burt Hirsch: If they could, they tried to fight it...

Tim Howard: But they usually couldn't afford to.

Burt Hirsch: Look, the tribal people are poor. So we began to do a statistical collection of data state by state...

Tim Howard: Asking how many Indian kids are in foster care?

Burt Hirsch: Foster care and adoptive placement, and institutional placement, juvenile facilities.

Tim Howard: And what he arrived at at the end of that analysis is a pretty shocking number.

[Music]

Burt Hirsch: About one-third of Indian children were in out-of-home placements in non-Indian settings.

Jad Abumrad: One-third?

Burt: 25 to 35% of Indian children nationwide were in out-of-home placement.

Jad Abumrad: That's a real number?

Tim Howard: That is the real number. That's the number you see cited again and again.

Burt Hirsch: Nobody connected the dots. Everybody thought that it was their own personal tragedy. Nobody realized that this was a pattern and a practice that was decimating these tribes.

Jad Abumrad: Wait a second, how would this happen on this scale? I mean, is this just a bunch of social workers making the same decision independently, or is it like a policy?

Tim Howard: This is basically social workers very much acting in the spirit of the day, because you have to keep in mind that in the 50s and 60s, you have all these government policies that are put in place, whose entire purpose is basically to try to once and for all solve this Indian problem that's gone on and on.

You've got this guy in 1953 who's a senator from Utah who starts basically trying to terminate the tribes.

Jad Abumrad: You mean like take away their sovereignty?

Tim Howard: Yeah, he goes tribe to tribe trying to convince them or force them, tell them there's now way out of it. He argues that this will be best for all of them.

Robert Krulwich: I remember this, this was like out of e pluribus unum, to integrate into the whole.

Tim Howard: They will melt into the wider culture, that's what will save them. Part of the social workers that were working in this period, they were working under the auspices of this thing called the Indian Adoption Project, which was very much about that idea of you take these kids from their poor conditions and you connect them directly to white families that are looking to adopt.

Jad Abumrad: So part of this was definitely top-down.

Tim Howard: Very much. In any case, the end result of this is that a third of these kids are being taken away.

Terry Cross: There were literally communities where there were no children.

Tim Howard: That's Terry Cross. He's the executive director of the National Indian Child Welfare Association.

Terry Cross: In Minnesota there were communities where there were no children. In Alaska there were communities where there were no children.

Marcia: I mean, what is a culture except the ideas and traditions that you pass on to your kids?

Tim Howard: That's Marcia Zug again.

Marcia Zug: If you are hemorrhaging your children then you're going to disappear.

Robert Krulwich: So, what do you do?

Burt Hirsch: Well, it's too massive a problem if you're trying to fight all these removals of kids on a case by case basis, forget about it, a national law is needed.

Tim Howard: So Burt spent years...

Burt Hirsch: Walking the halls of Congress literally.

Tim Howard: Endless law, being congressional hearings, until finally...

Marcia Zug: The Indian Child Welfare Act is passed by Congress in 1978.

Tim Howard: So it does a lot, but basically when it comes to adoptions.

Marcia Zug: ICWA has placement preferences. So the first preference would be with the immediate family. So you're removed from Mom, you're placed with Dad, or maybe with Grandmother.

Tim Howard: If they say no?

Marcia Zug: Second preference would be someone else in the tribe. And the third is any other American Indian.

Tim Howard: Wow.

Jad Abumrad: Any other?

Tim Howard: Yeah.

Marcia Zug: And then after that, then the child could be placed with another family.

Jad Abumrad: So if you're white and you're trying to adopt an Indian kid, you have a lot of roadblocks.

Tim Howard: Yes.

Marcia Zug: But by and large, most of us think that ICWA was probably the best federal Indian law ever passed. It did the most to help Indian tribes, respect tribal sovereignty, and really fulfill the United States' trust relationship with American Indian people.

Tim Howard: But now, because of this case...that law may be in jeopardy.

Jad Abumrad: We'll continue in a moment.

[Music]

Matthew Lott: Hi, I'm Matthew Lott and I'm calling from Nagoya, Japan. Radiolab is supported by audible.com, a provider of digital audiobooks and more, with more than 100,000 downloadable titles across all types of literature, including fiction, non-fiction and periodicals. Audible selection includes two newly released audiobooks and *The Mountains Echoed*, by Khaled Hosseini, and *Inferno*, by Dan Brown. To learn more about Audible and to get a free audiobook of your choice, go to audiblepodcast.com/radiolab.

Terry Stickley: This is Radiolab listener Terry Stickley calling from Lenexa, Kansas. With Hulu Plus you can watch all the TV shows you want, whenever and wherever you want. Whether you're on your smartphone, your tablet, or your gaming console, Hulu Plus offers unlimited instant streaming of current season hit TV shows and critically acclaimed movies. And for Radiolab listeners, you can get a special two-week free trial at HuluPlusRadio.com. Instantly watch the latest hits like *Community*, *Colbert Report*, *Saturday Night Live* and more. That's HuluPlusRadio.com for your special two-week trial.

Jad Abumrad: This is Jad Abumrad.

Robert Krulwich: I'm Robert Krulwich.

Jad Abumrad: This is Radiolab Today. We're looking at a Supreme Court case that may determine the future of a law called the Indian Child Welfare Act or ICWA. [*Indian tribal singing in background.*] The story comes from producer, Tim Howard, back to him.

Tim Howard: So in April I went to this conference in Tulsa.

Female: The board of directors, council of elders...

Tim Howard: Big room, there were about 700 people there. Most of them work in child welfare organizations in Indian communities around the country.

Male: ...we have in native communities.

Tim Howard: There was some traditional Cherokee drumming, there were films, workshops, and all anybody could talk about was this case.

Male: But there's no issue bigger now than how the Baby Veronica case may affect the Indian Child Welfare Act.

Male: So please, please do keep Baby Veronica and her family in your prayers.

Tim Howard: Everybody was on edge.

Terry Cross: Well, I'm really worried in this situation.

Tim Howard: This is Terry Cross again, and he's one of the organizers, and he told me, "Look, the Capobiancos..."

Terry Cross: I feel for them, but in what world is it okay for one family who feels they were damaged by a law to put thousands of other children at jeopardy for their own hurt. I can't imagine a world where that's okay.

Melanie Capobianco: It's hard for us to say that, because that's not what motivated us.

Matt Capobianco: Our daughter is what's motivating us.

Melanie Capobianco: How we feel, we just feel that in this case it was a beautiful law that was put into place to prevent the breakup of families, Indian families, and I just think it really wasn't supposed to be applied to a situation like ours.

Tim Howard: They say, we get that there's a huge historical wrong here, but what does that have to do with us?

Jad Abumrad: It reminds me of arguments that happen over Affirmative Action, weirdly.

Tim Howard: But here the details are so different. They say, “This is a law that was created to protect Indian families,” right? But here you’ve got an Hispanic birth mom, you’ve got a white couple, and then you’ve got a dad who’s out of the picture. So you’re not actually protecting an Indian family, you’re forcibly creating a new one.

Melanie Capobianco: Absolutely, I mean...

Jad Abumrad: And in the process, you’re breaking up a loving home.

Melanie Capobianco: I don’t think that was the intent of the law ever.

Mark Fiddler: My personal opinion is that ACWA has outlived its usefulness and causes more problems than it solves.

Tim Howard: This is Mark Fiddler.

Mark Fiddler: I’m one of the attorneys for Matt and Melanie Capobianco.

Tim Howard: He also happens to be Native American himself.

Mark Fiddler: I’m an enrolled member of the Turtle Mountain band of Chippewa Indians, that’s a reservation up in North Dakota, right on the border of Canada. So I’ve kind of had a foot in two cultures, so to speak. I go back to the rez in the summer.

Tim Howard: Mark actually used to argue the other side, that the most important thing was to keep Indian families together, and that Indian kids...

Mark Fiddler: ...Who are placed in non-Indian homes would experience emotional psychological harm by being raised outside of the culture.

Tim Howard: But then...

Mark Fiddler: I had a case in I think it was ’94...

Tim Howard: ...which gave him pause.

Mark Fiddler: Ah, boy, that’s a good word.

Tim Howard: It was a case in which this young American Indian girl...

Mark Fiddler: Sierra.

Tim Howard: Wanted to be adopted by this white couple, and Mark opposed it.

Mark Fiddler: Even though in my heart of hearts I knew that it was probably not the right thing for the child.

Tim Howard: He won the case, she was removed from the couple's home...

Mark Fiddler: And Sierra would tell you herself she had a really rough life.

Tim Howard: She bounced in and out of more than 20 foster homes, ran away many, many times, and got into serious trouble with the law.

Mark Fiddler: It always nagged me.

Tim Howard: Mark says even though the tribes have suffered, that doesn't change the fact that if you take a kid out of a loving home, you're going to cause her real harm. And he says that's why he took this case.

Mark Fiddler: Because the Capobiancos, they are among the most loving people I know.

Tim Howard: He said they did everything you could ask.

Mark Fiddler: They're just amazing people.

Tim Howard: They met the birth mother, Christy Maldonado, when she was pregnant, they got to know her.

Lori Alvino McGill: She felt a connection to them.

Tim Howard: That's Lori Alvino McGill, she's represented Christy since last year.

Lori Alvino McGill: They were also willing to have an open adoption.

Matt Capobianco: Yeah, we still have a relationship with Christy, we love her to death.

Tim Howard: When Christy gave birth to Veronica...

Lori Alvino McGill: They were there with her in the delivery room.

Matt Capobianco: The day she was born I cut the cord.

Lori Alvino McGill: Matt Capobianco cut the umbilical cord.

Tim Howard: That's such a degree of intimacy that I find...

Lori Alvino McGill: I know, I mean having given birth twice myself, the idea that anyone under than my husband would be in the room is kind of scary, but it gives you some idea of how she felt about the Capobianco's.

Tim Howard: Now, as for Dusten Brown, Veronica's biological dad, a couple months before she was born, Christy, the birth mom, sent him a text message asking him if...

Lori Alvino McGill: If he wants to pay child support or he wants to waive his rights.

Tim Howard: And he replied, "I'll waive my rights."

Lori Alvino McGill: Rather than pay a dime in child support.

Jad Abumrad: Well, there's a contrast. So in the beginning it sounds like he did not want to be a dad.

Tim Howard: Yeah, then actually a few months later he seems to make it even more official by signing a form agreeing to the adoption.

Jad Abumrad: And then he changes his mind?

Tim Howard: And obviously, I was wondering, what was he thinking? Because you can't avoid the fact that how you feel about this guy is going to influence how you feel about this law. So I was trying to get in touch with him, I was pestering his lawyers, will he do an interview? This went on for weeks, and they were basically like, "He doesn't want to do interviews, he doesn't want to talk."

Jad Abumrad: So you didn't get him.

Tim Howard: Yeah, I got him.

Jad Abumrad: [Laughing] Good.

Tim Howard: So shortly before we were going to wrap this story I get an email saying, "Come to Oklahoma." So I went.

[Knocking on door] He lives in this one-story house on this tree-lined block in a small town north of Tulsa.

Hey, how's it going?

Dusten Brown: How're we doing? Doing good.

Tim Howard: He's just a very normal looking guy, a little bit of an army haircut. He had a 'stache that night when he got Veronica, but he's clean-shaven now, big smile. Anyway, we go inside and the first thing he tells me...

Dusten Brown: Right now my daughter, she's not here.

Tim Howard: Is that Veronica is not there.

Oh no, I was excited to meet her.

She was out with his wife, Robin.

Dusten Brown: She goes out with my wife...

Tim Howard: Turns out he's remarried.

In any case -- test, test, test, all right -- we sat down at the kitchen table and started talking.

Do you mind introducing yourself and telling me where we are?

Dusten Brown: I'm Dusten Brown. We're in Nowata, Oklahoma, this is my house. I'm part of the Wolf Clan.

Tim Howard: Wolf Clan is one of the seven Cherokee clans.

Dusten Brown: And my name Dusten means "brave warrior" in Cherokee. I actually joined the army up and go over to Iraq, I'm like, wow, I'm here for the Cherokees. I'm the brave warrior out in the desert.

Tim Howard: He's been a registered member since he was a little kid. His parents were members, and their parents. And he said he's proud to be Cherokee basically because it means that he's from where he lives.

Dusten Brown: It's a big deal to me.

Tim Howard: So anyway, we started talking about the case and it gets complicated. There's a lot of detail. I'm not going to go into all of it. But basically, he and Christy Muldonado, the birth mom...

Dusten Brown: We've known each other since we were 16. We dated off and on...

Tim Howard: 2008 he joins the army.

Dusten Brown: Basic training.

Tim Howard: He lives on a base, it's four hours away.

Dusten Brown: Four hours south of...

Tim Howard: And Christmastime that year he basically says, "Let's get serious."

Dusten Brown: I got down on one knee and proposed to her. I said, "Hey, I want to bring you into my life." She said, "Okay, that's just great." And almost a month later she sent me a

message saying that she was pregnant. I was excited. I mean, to have children with her was one of the things I wanted at that time. I told her, "I can move you and your kids up to the base." Housing was going to be free on base. There was schools for her kids, and she could get a job right there on base, you know. Everything was taken care of. I mean, everything was going great, you know.

Tim Howard: And then pretty quickly the whole thing just soured. It's impossible to know exactly what happened but Christy says that Dusten just simply didn't offer any support. He says that he did, or he tried to, at least, but shortly after she got pregnant she basically just shut him out and stopped taking his calls.

Dusten Brown: I didn't get no phone calls, no text messages, nothing from her, out of the blue, and I'm just like, well, what's going on?

Tim Howard: And he says that he tried to get in touch with her.

Dusten Brown: Texting her up and trying to call her, still no answer. There was a couple of times that I've went back to Bartlesville and went to her house.

Tim Howard: Drove those four hours from the base.

Dusten Brown: Knocked on her door. I could hear voices in the house. It sounded like her and the kids. They wouldn't answer the door for me.

Tim Howard: And then one day he says...

Dusten Brown: She sent me a message saying, "I don't want to be with you no more."

Tim Howard: And three weeks after that...

Dusten Brown: She's like, "I want you to sign your rights over."

Tim Howard: His parental rights.

Dusten Brown: "Would you sign your rights over?"

Tim Howard: You guys are texting this, or you're talking?

Dusten Brown: The whole time we're text messaging this because she wouldn't talk to me.

Tim Howard: And what did you think it meant?

Dusten Brown: To me, I just thought she wanted me to sign my rights over to her, and I'm like, this is something I really don't want to do.

Tim Howard: He says she kept texting him that question, and looming in his mind that he first learned....

Dusten Brown: That we were going to be going to Iraq to do a radar mission.

Tim Howard: And he starts to wonder, what's the right thing to do here?

Dusten Brown: You know, if there was one of them chances I wasn't going to come back, I wanted to make the right choice and let the mother be that sole parent.

Tim Howard: And he says that he's holding out hope that if he does make it back...

Dusten Brown: We'll get back together and she'll just change her mind. Finally I just told her, I was like, "All right, I'll sign my rights over."

Tim Howard: Months go by, Christy has the baby, he says he doesn't know exactly when because they weren't speaking. But then...

Dusten Brown: Six days before I had to deploy to Iraq I get a phone call from some guy in Washington County...

Tim Howard: The process server.

Dusten Brown: He said, "Hey, we need you to sign some papers, so you can sign your custody rights over."

Tim Howard: And the guy directed him to an office right near the base.

Dusten Brown: I went there and signed the paper.

Tim Howard: What did you think it meant?

Dusten Brown: The whole time I thought it was just the paperwork for me to sign custody rights to her, but when I got done signing the guy said, "You just signed your rights away and so did the biological mother, the baby's been up for adoption, she's been living in South Carolina for four months."

[Music]

Tim Howard: Dusten says, this is the first moment that he realized what was actually happening, that the baby was up for adoption, and he says that he had no idea he had just legally consented to it.

Dusten Brown: I should have had a lawyer there with me. At that point in time I grabbed the paper, and the guy looked at me and said, "If you're going to rip that up, it's not good to do that."

Tim Howard: That he could be arrested.

Dusten Brown: And I said, "What do I gotta do?" He said, "You need to get a lawyer."

Tim Howard: Which he immediately did. And that's why the courts have ruled in his favor, because they say that from that moment he's clearly demonstrated that he wants to be her dad.

Dusten Brown: Never once did I want to give up on my daughter. Never once did I want to give her up. Everybody says that I gave her up. I never wanted to.

Tim Howard: Now, Mark and Lori say if this were any other guy...

Lori Alvino McGill: Any other man of any other race...

Tim Howard: The story would be over right about here.

Lori Alvino McGill: It's too late.

Mark Fiddler: He wouldn't have any rights at all.

Lori Alvino McGill: Under every state's laws, too late. Under the federal constitution, too late. He rejected that opportunity to become a father.

Tim Howard: But he has one thing in his favor, says Lori, he happens to be Cherokee, and because of that fact...

Lori Alvino McGill: Not only can this sort of man object, but he gets an automatic transfer of custody to him.

Tim Howard: And Mark and Lori see that as basically the worst kind of preferential treatment.

John Nichols: And that is unbelievable.

Tim Howard: This is John...

John Nichols: John Nichols.

Tim Howard: This is Shannon.

Shannon Jones: Shannon Jones.

Tim Howard: They're two of Dusten's lawyers. And John says, "Okay, there's preferential treatment."

John Nichols: Fine, but...

Tim Howard: But think about why all the protections of ICWA are there.

John Nichols: These roadblocks are there for a reason.

Tim Howard: We went over this earlier, but, you know, basically people are being manipulated out of their kids. And while you might like to think that that's ancient history...

John Nichols: Now fast forward to 2010.

Tim Howard: He says the same thing is happening in this case.

John Nichols: We have a registered member of the Cherokee Nation. We have his child being given up for adoption without his knowledge and without his consent.

Tim Howard: And they kept this adoption from him for months, and then spring it on him six days before he leaves the country?

John Nichols: It looks to us like it was engineered to make sure he got served, but not in enough time to where he could put up a fight.

Shannon Jens: I believe it was absolutely intentional.

Tim Howard: And Shannon suggests that they knew about ICWA, they knew it would apply, and they were trying to sidestep it.

Shannon Jens: There were so many errors.

Tim Howard: You just did little air quotes on errors, didn't you?

Shannon Jens: Yeah, I did.

Tim Howard: Like, for example, there's this one important form where Shannon says that they went out of their way to make it look like Veronica is not Native American.

Shannon Jens: Because it would be detrimental to the adoption.

Mark Fiddler: That's a preposterous argument.

Tim Howard: Mark and Lori say the reason that nobody put "Cherokee" in big bright flaming letters is simple.

Lori Alvino McGill: Christy herself is predominantly Hispanic. Dusten is predominantly Caucasian and is approximately two percent Cherokee.

Jad Abumrad: What? Did she say two percent?

Tim Howard: Yeah, Veronica herself would be a little bit over one percent.

Jad Abumrad: Wait, this whole thing is happening because he's only two percent? I feel like that changes things somehow.

Tim Howard: Well, yeah, but you have to keep in mind that Cherokee Nation doesn't care about the percentage of Cherokee in your blood, that's not how they determine their members.

Male: Being a member of the Cherokee Nation is like being a member of the United States. You are a citizen of the nation.

Chrissi Nimmo: If you're parent's a US citizen, you're automatically a citizen.

Tim Howard: That's Chrissi Nimmo, Assistant Attorney General for Cherokee Nation.

Chrissi Nimmo: If your parent's a Cherokee citizen, you're not automatically a citizen...

Tim Howard: But you can automatically apply. So it's based on direct lineage. But still, you're right, because this is the argument that is most troubling to the tribes.

Both Chrissi Nimmo and Marcia Zug told me that if the Supreme Court ends up deciding that...

Marcia Zug: ICWA is unconstitutional because it really is race-based...

Chrissi Nimmo: Unconstitutional because it's a race-based preference.

Marcia Zug: It calls into question every single federal Indian law. There goes Indian law. This is a case that they could use to do that.

Tim Howard: If ICWA falls because it's unconstitutional, it could have a crazy domino affect.

Marcia Zug: Every single federal Indian law is premised on giving some sort of special treatment to Indians.

Jad Abumrad: What would that mean concretely if Indian Law were to go away?

Tim Howard: It means that they're policing their court system, their education, anything they do as a sovereign nation, all of that just evaporates. A tribe would just become another group of people on some land. That said, this is not the likely outcome. Now, the Supreme Court will probably rule as narrowly as they possibly can, and as far as the tribes are concerned, they can do a lot of damage to the law to calling it unconstitutional. They could allow for this certain kind of exception to ICWA, which would make it a lot easier for people like the Capobiancos to adopt.

Jad Abumrad: So they could rule any number of ways.

Tim Howard: Yeah, and the thing is that it's all strangely connected to this three-year-old girl.

Dusten Brown: The whole time through this I'm thinking I'm just going to sign custody rights over.

Tim Howard: So when she finally showed up halfway through my interview with Dusten...
[child's voice] Hello. Hi. It was kind of surreal.

Dusten Brown: This is my daughter Veronica.

Veronica: Daddy.

Tim Howard: Hey, Veronica, I'm Tim. She's got dark curly hair, she's a ball of energy.

Dusten Brown: She's definitely bull-headed.

Tim Howard: And within a minute?

Veronica: What is this?

Tim Howard: She's giving me a tour of every single object in her room.

Veronica: And this is a phone...

Tim Howard: I mean everything.

Who's that?

Veronica: Army Bear.

Tim Howard: Army Bear.

Dusten Brown: Has he got one of daddy's dog tags on it?

Veronica: Yes.

Tim Howard: She was a very proud host. A few minutes later she wanted to show me her geese.

I don't think I've seen geese in a long time.

Veronica: You're about to.

Tim Howard: I'm about to. *[Geese sounds]*

Jad Abumrad: Those are real geese?

Tim Howard: Yeah.

Veronica: Hi, babies.

Tim Howard: She feeds them out of her hand.

Veronica: There he is.

Dusten Brown: No, no, no, don't mess with the water. Come here, babies.

[Train whistle]

Veronica: Thomas, Thomas the train.

Dusten Brown: Thomas the train?

Veronica: Yes.

Jad Abumrad: So, what could happen to her?

Tim Howard: Well, if the Supreme Court said Dusten Brown shouldn't have qualified as father under ICWA, what they'd do is they would send it back down to a South Carolina court, and then they would have this new best interest evaluation, basically like what's the best thing for her at this point. She's been with him now for about a year and a half and so that actually might really change the calculation.

Veronica: Ten of m.

Tim Howard: Honestly, hanging out with her and Dusten in the backyard, it's really easy to forget all these people whose lives are just completely tangled up in this scene, but who aren't there. Christy Maldonado, the birth mom.

Lori Alvino McGill: She did not intend to give Veronica up. She intended to give Veronica a life.

Tim Howard: Matt and Melanie Capobianco.

Melanie Capobianco: This has been going on for so long, we've kind of been in a holding pattern for like, well, forever.

Matt Capobianco: We're just waiting and waiting and waiting.

Tim Howard: And of course the hundreds of tribes who are just worried about their own kids.

Pretty cool. Are you a good swimmer?

Veronica: Yes. I'm a good swimmer.

Tim Howard: I'm a bad swimmer.

Veronica: You're not, you a good swimmer.

Tim Howard: No, I'm a pretty bad swimmer.

Veronica: No, you're not. You're a good swimmer.

Tim Howard: How do you know I'm a good swimmer?

Veronica: I know you're a good swimmer. You're a good swimmer.

Tim Howard: Well, I appreciate that.

Dusten Brown: Positive reinforcement.

Tim Howard: Yeah.

Jad Abumrad: Producer Tim Howard – thanks, Tim. The Supreme Court will likely be deciding this case sometime in June. We'll tag this podcast when we know what's happened, and thanks for listening. I'm Jad Abumrad.

Robert Krulwich: I'm Robert Krulwich.

Jad Abumrad: We'll see you next time.

Laura Maxwell: My name is Laura Maxwell from Dallas, Texas. Radiolab is supported in part by the National Science Foundation, and by the Alfred P. Sloan Foundation enhancing public understanding of science and technology in the modern world. More information about Sloan at www.sloan.org.