

The Herland Legal Defense Fund

Lesbian/Gay Parental Rights in Oklahoma

Oklahoma Supreme Court Rulings Favoring Lesbian/Gay Parents

Your sexual orientation is not the determining factor in a child custody fight in Oklahoma. Do not automatically assume that you cannot have custody or retain custody of your children based solely on your sexual orientation. Before you retain an attorney for a divorce or child custody case, make sure your attorney knows about *Fox v. Fox* and is willing to stand up with you on that point.

In 1995, the Oklahoma Supreme Court ruled that a lesbian mother is not, per se, unfit. Also, being a lesbian is not, by itself, enough to warrant a change in custody from the mother to the father. In that now famous case, *Fox v. Fox*, 904 P.2d 66 (Okla. 1995), the mother had lost custody to the father at the trial court simply because she was a lesbian. The lower court ruling was overturned by the Supreme Court which established a precedent which all courts in the state must now follow. In other words, it is the law in Oklahoma that the mere fact that a mother is lesbian (and from there we may presume that when the father is gay) is not enough to prevent her from retaining custody of the children.

***Fox v. Fox* Precedent**

In the *Fox* case, the mother originally got custody of the two children in the divorce decree. Four years later, the father sought custody, claiming that because the mother was a lesbian and now lived in a lesbian relationship, she was an unfit mother. The legal standard for such a permanent change in custody in Oklahoma was well established in 1968. In *Gibbons v. Gibbons*, 442 P.2d 482 (Okla. 1968), the Oklahoma Supreme Court held that the parent asking for modification must establish:

- a permanent, substantial and material change in circumstances;
- the change in circumstances must adversely affect the best interests of the child; and,
- the temporal, moral and mental welfare of the child would be better off if custody is changed.

This means that the custodial parent's situation must have seriously changed since the divorce, that the change must be one that adversely affects the child's best interests and that the child would be better off in the other parent's custody.

In a later case, *Gorham v. Gorham*, 692 P.2d 1375 (Okla. 1984), the Oklahoma Supreme Court emphasized the necessity for the motioning party to show a direct and adverse effect on the child's best interests. In that case, the court recognized that it is not the function of the court to enter a judgment based solely upon individualized conceptions of morality. Therefore, the determinative factor is always the effect of the parent's behavior on the child.

In *Fox*, the evidence showed that the children had a loving relationship with both the mother and the father. Both children were doing well in school and were well-adjusted and happy. There was no evidence that the mother's behavior had an adverse effect on the children. Basically,

the court ruled that the father did not present any evidence to prove the essential determinative factor - a significant change of circumstance that directly and adversely affected the children. So the father failed to meet the legal standard already well-established in Oklahoma law in 1968.

Upholding *Fox v. Fox*

The *Fox* case was upheld in an unpublished decision by the Oklahoma Court of Civil Appeals in 1998. (In Oklahoma, a published decision like *Fox* becomes a precedent, the law of the state. An unpublished decision is only useful to a lawyer in persuading a court to rule a certain way). In that case, *Hall v. Maldonado*, the trial court had refused to follow the *Gibbons* case as reinforced by *Fox*. The father claimed the mother was a lesbian and should lose custody of the child. The mother denied the claim that she was a lesbian but the court changed custody anyway. On appeal, the mother got custody back. The court said there was no evidence that the mother was a lesbian but "even if she is," there was not enough evidence to change custody to the father.

The Herland Legal Defense Fund

The Herland Legal Defense Fund (LDF) was begun in 1992 to support the mother in *Fox v. Fox* in her battle to regain custody of her two children. As a result of its efforts in support of the appeal, Herland Sister Resources was recognized by the ACLU of Oklahoma with the 1997 Human Rights Award.

The Herland LDF continues to work to promote awareness of the *Fox v. Fox* precedent through its outreach, education, and attorney referral programs.

NOTICE: This brochure is not intended to be legal advice. If you need legal advice or have specific questions concerning your legal rights, please seek the services of an attorney.

About Herland Sister Resources

Herland is a nonprofit volunteer organization whose purpose is to support women in their journey toward self-definition and self determination. Herland was established in 1983 by a group of women activists concerned about the oppression of all women and lesbians in particular. Their mission, most simply stated, was to create a safe place for lesbians to meet and exchange ideas, feelings, hopes and fears and to learn about themselves and each other.

Herland works to educate individuals and expand community awareness about lesbian, gay, bisexual and transgender (l/g/b/t) issues. We publish a monthly newsletter, operate a bookstore and lending library, and provide musical and cultural events for education and entertainment.

Herland works in collaboration with and supports the efforts of other l/g/b/t and minority organizations to eliminate racism, ageism, sexism, and heterosexism.

