



NATIONAL CENTER FOR LESBIAN RIGHTS

Child Custody and Visitation Issues for Lesbian, Gay, Bisexual, and Transgender (LGBT) Parents in Wisconsin

About NCLR

The National Center for Lesbian Rights (NCLR) is a non-profit legal organization with over thirty years of experience and expertise in family law issues affecting lesbian, gay, bisexual, and transgender (LGBT) people. We work to achieve fair and equal treatment of LGBT parents by representing LGBT parents in impact litigation in state and federal courts and by providing legal information to attorneys and individuals.

Disclaimer

This document provides a summary and discussion of relevant Wisconsin law for attorneys who are representing LGBT parents in cases involving custody or visitation. Our goal is to familiarize you with the unique legal issues that may arise for LGBT parents, and to increase your understanding of current Wisconsin law in this area. Because every case is different and because the law relating to LGBT parents is often unsettled and may be subject to differing interpretations by different courts, you should not rely on the information in this resource without conducting independent legal research. This document is not intended to provide and should not be relied on for legal advice about a specific case.

LGBT Parents Face Unique Legal Issues

This document addresses the two most common situations in which LGBT parents face actions for custody or visitation. First, a person who enters into a different-sex marriage and has children may later divorce after discovering that he or she is gay, lesbian, bisexual, or transgender. This situation is still quite common, and many LGBT people have children as a result of prior different-sex marriages. In such cases, the heterosexual or non-transgender parent may attempt to argue that the court should consider the sexual orientation or gender identity of the LGBT parent as a negative factor in determining custody. To ensure that trial courts do not allow subtle biases or misinformation to affect their resolution of a case, it may be necessary to present both legal arguments and expert testimony, as explained in more detail below.

Second, same-sex couples who are raising a child or children together may separate and then become involved in a dispute over custody or visitation. As explained further below, because it is often the case that only one of the partners is a legal parent, the dissolution of a same-sex relationship involving children frequently raises unique legal issues that are not present in most custody disputes between heterosexual parents.

LEGAL PARENTS WHO ARE LGBT SEEKING CUSTODY/VISITATION

A parent's sexual orientation is irrelevant to custody and visitation determinations unless the parent's actions are actually directly harming the child. The mere possibility that the child will experience future societal discrimination is not enough to establish harm—there must be specific evidence that the parent's relationship is directly harming the child. It has long been clear under Wisconsin law that a court's disapproval of a parent's non-marital relationship cannot be a basis for denying or limiting custody unless there is evidence that the relationship itself has a significant adverse affect on the children.

Cases:

Dinges v. Montgomery, 179 Wis.2d 849, 514 N.W.2d 723 (Wis. App. 1993) [unpublished]. The father sought a change in custody based in part on the mother's relationship with another woman. The trial court denied the father's motion, finding that the only credible evidence showed that the child had been well-cared for and was thriving while in the mother's custody. The appellate court affirmed, holding that there was no evidence that the mother's long-term relationship with another woman was harmful to the child.

Gould v. Gould, 116 Wis.2d 493, 342 N.W.2d 426 (Wis. 1984). The trial court modified custody from the mother to the father because the mother was living with her boyfriend. The Wisconsin Supreme Court reversed, holding that a transfer of custody cannot be based on the court's disapproval of one parent's non-marital relationship unless there is a connection between the relationship and some harm to the child. The Court also held that the possibility of the child being affected in the future by societal disapproval of the parent's relationship is not sufficient to establish harm.

In re Custody of Neven D.H., 272 Wis.2d 796, 681 N.W.2d 552 (Wis. Ct. App. 2004). The trial court granted the father custody even though the mother had been the primary caregiver in large part based on the mother's non-marital relationship. The appellate court reversed the order and held that the trial court abused its discretion when it determined that the mother's cohabitation with her boyfriend showed that her living situation was unstable. The Court of Appeals held that it is unconstitutional for a court to "base a placement decision on a parent's non-marital sexual conduct or relationship with a third party absent specific evidence that the conduct or relationship in question has had or would have a significant adverse impact on the child."

NON-LEGAL¹ PARENTS WHO ARE LGBT SEEKING CUSTODY/VISITATION

Non-biological and non-adoptive parents who have had a “parent-like” relationship with a child may petition for visitation if the legal parent “substantially interferes” with their relationship. The Supreme Court of Wisconsin has recognized that children can be greatly harmed by severing their relationships with people who have been their functional parents.

The petition must be brought “promptly” after the legal parent interferes with the non-legal parent’s relationship with the child, so it is important for non-legal parents to act quickly if they are prevented from having contact with the child.

Case:

In re Custody of H.S.H.-K., 193 Wis.2d 649, 533 N.W.2d 419 (Wis. 1995).

In *Custody of H.S.H.-K.*, the Supreme Court of Wisconsin held that a person who has a “parent-like” relationship with a child may seek visitation if a legal parent has interfered substantially with that relationship and if the petition is filed promptly. *Id.* at 699. A parent-like relationship means: “(1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.” *Id.* at p. 694-95. The contribution to support “need not be monetary.” *Id.* at 695, n.39.

In *Custody of H.S.H.-K.*, the biological mother and her same-sex partner raised their child together from birth until they broke up when the child was four-and-a-half years old. *Id.* at 660-61. The non-biological mother sought custody and visitation shortly after the biological mother cut off contact between the non-biological mother and the child. *Id.* at 662-63. The Court held that “when a parent consents to and fosters another person’s establishing a parent-like relationship with a child and then substantially interferes with that relationship,” a court may order visitation if it is in the best interest of the child. *Id.* at 697.

¹ This document uses the term “non-legal parent” to mean a person who functions as a child’s parent but who is not legally recognized as a parent.

The **FAMILY PROTECTION PROJECT** improves access to family law services for low-income same-sex parent families, with a focus on increasing and improving services to families of color. The project provides free legal information to low-income LGBT parents and their children; trains and supports attorneys providing free and low-cost services to these families; and works in coalition with organizations serving communities of color to provide culturally competent services to families of color.

FOR MORE INFORMATION, CONTACT

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This resource is intended to provide general legal information. It is not intended to provide and should not be relied on for legal advice about individual cases. Because case law and statutes are subject to frequent change and differing interpretations, the National Center for Lesbian Rights cannot ensure the information in this resource is current. Do not rely on this information without conducting independent legal research.