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## Fox v. Fox: Redefining the Best Interest of the Child Standard for Lesbian Mothers and Their Families

Katja M. Eichinger-Swainston

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## NOTES

### **FOX v. FOX: REDEFINING THE BEST INTEREST OF THE CHILD STANDARD FOR LESBIAN MOTHERS AND THEIR FAMILIES**

#### I. INTRODUCTION

Custody disputes between parents are often difficult and traumatizing for both parents and children. However, this already painful process may become even more difficult and painful if one parent attempts to use the other's sexual preference as a trump card to win custody of the children. Oscar Wilde expressed the trauma of being separated from his children while incarcerated under sodomy charges: "[M]y two children are taken from me by legal procedure. That is and always will remain to me a source of infinite distress, of infinite pain . . . ."<sup>1</sup>

The Oklahoma Supreme Court, in the recent case of *Fox v. Fox*,<sup>2</sup> considered a custody decision in which the mother was a lesbian. This note focuses

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1. David S. Dooley, Comment, *Immoral Because They're Bad, Bad Because They're Wrong: Sexual Orientation and Presumptions of Parental Unfitness in Custody Disputes*, 26 CAL. W. L. REV. 395, 395 (1990) (citing Robert A. Beargie, *Custody Determinations Involving the Homosexual Parent*, 22 FAM. L.Q. 71 (1988) (quoting OSCAR WILDE, DE PROFUNDIS 34 (R. Ross ed., 1909))). See also NATIONAL CTR. FOR LESBIAN RIGHTS, LESBIAN MOTHER LITIGATION MANUAL 1-2 (2d ed. 1990).

There are at least 1.5 million lesbian mothers living in the United States. Regardless of whether they have ever been involved in a legal battle to maintain custody of their children, these mothers live with the constant fear that someone may challenge their right to live with and care for their children. When that right is, in fact, challenged in court, the lesbian mother and her family confront an intense emotional trauma as well as a significant legal problem. The threat of terminating or interfering with, the mother/child relationship can be devastating . . . . Because of the traditional legal, psychological, and social sanctions imposed against women, particularly those women engaged in same-sex relationships, many lesbians still live in absolute fear of being discovered. Such fear is well grounded in reality—women do continue to lose custody of their children, jobs, housing, and other rights, solely on the basis of their sexual orientation.

*Id.* (footnote omitted). See also Donna Hitchens, *Social Attitudes, Legal Standards and Personal Trauma in Child Custody Cases*, 5 J. HOMOSEXUALITY 89, 93-94 (1979) (discussing the effect fear of custody challenges has on homosexuals).

Regardless of whether a parent has ever been involved in a court challenge, the threat of losing the custody of one's children—or being forced to choose between one's lover and a child—is an everyday reality for homosexual fathers and mothers. Gay parents are aware that their sexual orientation can all too easily be used against them by ex-spouses, family, or state authorities. Decisions about how to live, with whom to live, how to raise children, whether to "come out," and whether to become involved in political activities, all have potentially severe legal consequences bearing on the right to remain a parent.

*Id.* See generally Kathleen M. Sullivan, *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508 (1989).

2. 904 P.2d 66 (Okla. 1995).

on the *Fox* decision as well as the general standards used in custody disputes. Special attention is given to arguments which many courts use to deny custody to homosexual parents. This note concludes that the Oklahoma Supreme Court has made a well-reasoned decision which will be in the best interest of children of lesbian mothers and their families.

## II. BACKGROUND ON STANDARDS USED IN CUSTODY DISPUTES

The legal standard almost universally applied by courts in child custody disputes is the "best interest of the child" standard.<sup>3</sup> However, without further interpretation, the standard is very vague, allowing trial courts large amounts of discretion.<sup>4</sup> Thus, courts may apply the best interest of the child standard differently in custody cases involving homosexual parents.

Historically, there have been three different standards governing how the homosexuality of a parent should be applied by courts in making custody decisions. First, the *per se* standard generally holds that a homosexual parent is unfit as a matter of law.<sup>5</sup> This approach establishes a rebuttable presumption that being homosexual renders a parent unfit to raise a child.<sup>6</sup> The court does not have to consider any factors concerning the child's best interest, but can categorically deny custody to a homosexual parent.<sup>7</sup>

Second, some courts have instead used a presumption of harm or middle ground approach in determining the fitness of homosexual parents.<sup>8</sup> These courts conclude that declaring a lesbian mother unfit as a matter of law is improper, and that other factors affecting the best interest of the child must be considered.<sup>9</sup> However, even though the parent is not *per se* considered to be an

3. See Nan D. Hunter & Nancy D. Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 *BUFF. L. REV.* 691, 693 (quoting HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 572 (1968)).

4. See *id.*

5. See LAURA BENKOV, *REINVENTING THE FAMILY: THE EMERGING STORY OF LESBIAN AND GAY PARENTS* 40 (1994); Hunter & Polikoff, *supra* note 3, at 695-96 (citing *Nadler v. Superior Court*, 63 Cal. Rptr. 352 (1967) (reversing the trial court which decided that the mother's homosexuality rendered her *per se* unfit and emphasizing the need to consider all of the factors to determine the best interest of the child)). See also Donna Hitchens & Barbara Price, *Trial Strategy In Lesbian Mother Custody Cases: The Use of Expert Testimony*, 9 *GOLDEN GATE U. L. REV.* 451, 453-54 (1978-79) (citing *Nadler v. Nadler*, No. 177331 (Cal. Super. Ct., Sacramento County, Nov. 1967)).

6. See *Dooley*, *supra* note 1, at 407 (citing *G.A. v. D.A.*, 745 S.W.2d 726 (Mo. Ct. App. 1987); *T.C.H. v. K.M.H.*, 784 S.W.2d 281 (Mo. Ct. App. 1989)); Robert A. Beargie, *Custody Determinations Involving the Homosexual Parent*, 22 *FAM. L.Q.* 71 (1988)). See generally BENKOV, *supra* note 5, at 40-46.

7. See *Dooley*, *supra* note 1, at 395-96, 407.

8. See BENKOV, *supra* note 5, at 44.

9. See *id.*; see also NATIONAL CTR. FOR LESBIAN RIGHTS, *supra* note 1, at 12-14.

The following are factors commonly considered relevant to the determination of the best interest of the child: . . .

1. The physical home environment that can be provided by each party, including the availability of separate bedrooms for each child and parent's own bedroom;
2. The geographical location of the home, the kind of neighborhood, and its proximity to schools, and recreational facilities;
3. The composition of the family unit, such as other adults and children living in the home;
4. The moral standards of the parties;
5. The age, gender, and health of the parties as compared to each other and the children;
6. The financial status of the parties;

unfit parent, the court presumes that the child will suffer because of the social stigma attached to the parent's homosexuality.<sup>10</sup> This approach condemns the homosexual *conduct* but not the homosexual *person*.<sup>11</sup> Consequently, the court will often forbid the child to have contact with the parent's homosexual lifestyle.<sup>12</sup> Moreover, the presumption of harm or the middle ground standard is often used to find homosexuality detrimental to the child without clearly supporting evidence.<sup>13</sup>

Finally, the nexus standard<sup>14</sup> resolves many of the problems and detrimental effects of the *per se* and presumption of harm standard. The nexus standard takes a parent's sexual preference into consideration as only one of many factors.<sup>15</sup> Homosexuality will only be held against the parent if there is a nexus between the parent's sexual preference and possible harmful effects on the child.<sup>16</sup> Accordingly, courts using this standard require a showing that the homosexuality of a parent has an adverse effect on the child.<sup>17</sup> The nexus standard does not consider homosexuality by itself or the homosexual behavior as a valid consideration for denying custody; it only considers the parent's sexual orientation when it has an adverse effect on the child's best interest.<sup>18</sup>

### III. FOX v. FOX<sup>19</sup>

#### A. Facts

Donna Jeanne Fox and Larry James Fox were divorced in August 1988.<sup>20</sup> Donna was awarded custody of their two children, and Larry was awarded reasonable visitation rights.<sup>21</sup> In May of 1989, Larry requested but was denied

7. The child's preference, if the child is of sufficient age to formulate a mature preference; and

8. The emotional bonds that exist between the child and each of the parents.

In lesbian mother custody cases there have been several additional factors that have commonly been considered by the court. For example:

1. Whether the lesbian mother lives with a partner;
2. Whether the lesbian mother is active in lesbian and gay rights endeavors and will expose the children to such activity; and
3. Whether there are "appropriate" male role models available to the children.

*Id.*

10. See generally BENKOV, *supra* note 5, at 63-67.

11. See Dooley, *supra* note 1, at 409.

12. See *id.* at 396.

13. See BENKOV, *supra* note 5, at 44. *But see* Hunter & Polikoff, *supra* note 3, at 694-95 (citing Stack v. Stack, 11 Cal. Rptr. 177, 187 (Cal. Dist. Ct. App. 1961)) (recognizing that a judge should not decide on the basis of his on morals and values but solely on the best interest of the child); see also Gorham v. Gorham, 692 P.2d 1375, 1378 (Okla. 1984) (same).

14. Also referred to as the detriment standard. See BENKOV, *supra* note 5, at 45.

15. See *id.* at 45.

16. See *id.*; Dooley, *supra* note 1, at 396.

17. See Dooley, *supra* note 1, at 411 (citing Robert A. Beargie, *Custody Determinations Involving the Homosexual Parent*, 22 FAM. L.Q. 71, 74 (1988)).

18. See *id.* at 411 (citing S.N.E. v. R.L.B., 699 P.2d 875 (Alaska 1985)).

19. 904 P.2d 66 (Okla. 1995).

20. See *id.* at 68.

21. See *id.*

joint custody.<sup>22</sup> In February of 1992, he applied for a change in custody on the grounds that Donna's homosexuality was contrary to the children's moral and religious values and harmful to their psychological and emotional stability.<sup>23</sup>

The trial court heard the motion to modify custody in a two-day hearing.<sup>24</sup> Numerous witnesses were called,<sup>25</sup> including expert witnesses.<sup>26</sup> The children's school records and psychological reports were presented.<sup>27</sup> Apparently, Larry and Donna also disagreed on disciplinary matters and an intended move by Donna and her lesbian lover, Joani.<sup>28</sup> After the hearing, the trial court awarded custody of the children to Larry, finding a substantial change in conditions, specifically, Donna's lesbianism.<sup>29</sup>

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22. *See id.*

23. *See id.*

24. *See id.*

25. *See id.* Donna-Maria Naila Williams, a friend of Donna Fox for over two years, testified that lesbianism is not looked upon well by her religion, Catholicism, but that nonetheless she sees Donna as a good mother and the children seemed happy and well-cared for. *See* Brief-in-Chief of Appellant at 7, *Fox* (No. 79,676). Witness Patricia Lynn-Meyers, Donna's boss at the University of Oklahoma library and a social friend, testified that Donna is a good mother and one of the few persons she allows to baby-sit her own children. *See id.* She observed that the children seemed happy since Joani moved in. *See id.* Joani Bedoe, Donna's companion, testified that she had a loving relationship with the children. *See id.* She also stated that she and Donna had discussed a total commitment to a lifetime relationship and they felt that a monogamous relationship would not harm the children. *See id.*

26. *See Fox*, 904 P.2d at 68. Dr. Gwen Garner, a clinical psychologist, evaluated the children for their current level of cognitive, social, and emotional functioning. *See* Brief-in-Chief of Appellant at 11, *Fox* (No. 79,676). She testified that the children were well adjusted and functioned at normal or above average levels. *See id.* Dr. William Sill, who has doctoral degrees in biology and geology and is a member of the Church of Jesus Christ of Latter Day Saints Institute for Religious Studies, is authorized to teach the doctrines of the church. *See id.* at 8. He testified that, under the church's view, the family was the central unit, both spiritually and physically, and that it viewed homosexuality in the same light as adultery because it destroys or prevents the formation of a normal marriage relationship. *See* Appellee's Answer Brief, Appendix at VI, *Fox* (No. 79,676). However, he did not know any of the persons involved in the case. *See* Brief-in-Chief of Appellant at 8, *Fox* (No. 79,676). Dr. John Call, a psychologist specializing in clinical and forensic psychology testified that being a lesbian does not render a mother *per se* unfit. *See* Appellee's Answer Brief, Appendix at III, *Fox* (No. 79,676). He warned about societal prejudices and the conflict between the children's Mormon religion and a lesbian relationship's effect on the children. *See id.* at III-IV. He did state, however, that he had no actual opinion about the psychological make-up or the parenting skills of any of the parties. *See* Brief-in-Chief of Appellant at 9, *Fox* (No. 79,676).

27. *See Fox*, 904 P.2d at 68.

28. *See* Brief-in-Chief of Appellant at 2-15, *Fox* (No. 79,676). In October of 1991, Donna started living with her lesbian lover Joani. *See id.* at 2. Larry Fox, at the time, did not raise any objections to Donna's fitness as a parent. *See id.* Much of the controversy seems to be triggered by Donna and Joani's announcement that they planned a move to Alaska and wanted to work out visitation rights with Larry. *See id.*

Larry Fox remarried and purchased a new home. *See id.* While he was working, his new wife Martha was at home running a day care and was available to supervise the children. *See* Appellee's Answer Brief, Appendix at I, *Fox* (No. 79,676). He emphasized that he would be able to provide a traditional family atmosphere for the girls. *See id.* The main dispute between Donna and Larry was regarding some of disciplinary aspects of the girls' education. *See id.* at II. Larry complained that the girls were not always properly dressed and that they were afraid of monsters because they were allowed by their mother to watch late night television. *See id.*

However, even Larry testified that he was unaware the children were experiencing harm in the home of the mother other than the fact of her lesbianism. *See Fox*, 904 P.2d at 69. He was unaware of any harm to the children in their peer relationships, in their school work, in their community relationships, or in their family relationships, and they suffered no physical evidence of harm. *See id.* He also saw Donna and himself acting as fit and proper persons who would show love, concern and care for their children. *See* Reply Brief of Appellant at 10, *Fox* (No. 79,676). On the other hand, Donna alleged that the father was often too busy to spend time with the girls and used a rigid system of discipline including spanking and checkmarks for bad behavior. *See* Appellee's Answer Brief, Appendix at X, *Fox* (No. 79,676).

29. *See id.* at 68-69.

### B. Issue Presented to the Oklahoma Supreme Court

Does a mother's lesbianism alone provide sufficient support to modify a permanent child custody order to the benefit of the noncustodial father?

## IV. STANDARD OF REVIEW AND BURDEN OF PROOF

Oklahoma, along with most other states, applies the best interest of the child standard to determine custody as required by law.<sup>30</sup> However, appellate courts generally defer to trial courts' findings of fact as to what is in the best interest of the child,<sup>31</sup> and the standard of review generally used by courts is whether the trial court abused its discretion.<sup>32</sup> Oklahoma similarly requires that the trial court's decision must be clearly erroneous to be overruled on appeal.<sup>33</sup> Moreover, the Oklahoma Supreme Court in *David v. David*<sup>34</sup> placed the burden of proof for modification of child custody on the applicant to show a substantial change in circumstances which directly affects the best interest of the child.<sup>35</sup> Therefore, in Oklahoma, a reversal of the trial court's determination of what is in a child's best interest is often difficult to obtain.

## V. THE LAW PRIOR TO FOX

*M.J.P. v. J.G.P.*<sup>36</sup> was a case of first impression in Oklahoma.<sup>37</sup> The case involved a homosexual mother who was initially awarded custody.<sup>38</sup> The Oklahoma Supreme Court affirmed the trial court's decision to modify the initial custody decision, granting custody to the father.<sup>39</sup> The Oklahoma Supreme Court in *M.J.P.* supported modification of custody with the best interest of the child standard laid out in *Gibbons v. Gibbons*:<sup>40</sup>

[A] permanent, material and substantial change of circumstances or conditions of the parties, directly affecting the welfare of the child to a substantial or material degree, and as a result of which it would appear that the child would be substantially better off, with respect to its temporal welfare and its mental and moral welfare, if the requested change in custody were ordered by the court.<sup>41</sup>

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30. See OKLA. STAT. tit. 43, § 112 (1991 & Supp. 1994). Almost every state in the union has adopted the best interest of the child standard. See Sullivan, *supra* note 1, at 1630.

31. See Sullivan, *supra* note 1, at 1630.

32. See *id.*

33. See *Fox*, 904 P.2d at 69.

34. 460 P.2d 116 (Okla. 1968).

35. See *id.* at 117.

36. 640 P.2d 966 (Okla. 1982).

37. See *id.* at 967.

38. See *id.*

39. See *id.* at 969.

40. 442 P.2d 482 (Okla. 1968).

41. *M.J.P.*, 640 P.2d at 967 (citing *Gibbons*, 442 P.2d at 485).

However, in determining the best interest of the child, the court in *M.J.P.* focused extensively on the possible future harm to children which could be caused by the mother's homosexuality.<sup>42</sup> Although the court stated that the change of custody should be sustained based on the all of the "above mentioned evidence,"<sup>43</sup> it is difficult not to draw the conclusion that possible future harm stemming from the mother's sexual preference was the determining factor in the court's decision.

In *Gorham v. Gorham*,<sup>44</sup> the Oklahoma Supreme Court held the best interest of the child preeminent once more.<sup>45</sup> This case involved a mother who had gone through "several relationships."<sup>46</sup> The court took into consideration the mother's discretion to shield the child from her lifestyle.<sup>47</sup> The court emphasized that the determinative factor in deciding child custody is a nexus between behavior that is detrimental to the best interest of the child and the effect of the behavior on the child.<sup>48</sup> Thus, a trial court may consider a parent's discretion as only one factor regarding the effect of the parent's behavior on the child. Most importantly, in denying a change of custody, the court in *Gorham* held that a court should not enter legal judgments based on its own conception of morality and emphasized the necessity to show a direct and adverse effect on the best interest of the child in order to modify custody.<sup>49</sup>

Other jurisdictions considering the issue under the best interest of the child standard have not awarded custody to a lesbian mother. For example, one of the most recent and controversial cases concerning the issue of lesbian mothers and child custody is the case of *Bottoms v. Bottoms*.<sup>50</sup> There, the court refused custody to the natural mother, Sharon Lynne Bottoms, and awarded custody to the grandmother, Pamela Kay Bottoms, contrary to the presumption in favor of the natural mother.<sup>51</sup> In considering the best interest of the child and what makes a parent unfit, the *Bottoms* court looked at the following factors: (1) the parent's misconduct that affects the child, (2) the parent's neglect of the child, (3) the parent's unwillingness or inability to care for the physical and emotional well-being of the child, (4) and the nature of the home environment and the moral climate.<sup>52</sup> The court did not hold that a lesbian mother is per se unfit but recognized that conduct inherent in lesbianism is a felony in Virginia.<sup>53</sup> The court reiterated the social condemnation argument that the child will be affected by

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42. See *id.* at 969.

43. See *id.*

44. 692 P.2d 1375 (Okla. 1984).

45. See *id.* at 1378.

46. See *id.* at 1378-79.

47. See *id.* at 1379.

48. See *id.* at 1378.

49. See *id.*

50. 457 S.E.2d 102 (Va. 1995).

51. See *id.* at 108.

52. See *id.* at 107. See also, NATIONAL CTR. FOR LESBIAN RIGHTS, *supra* note 1, at 12-14 (listing factors considered by courts in custody cases and additional factors considered in lesbian mother custody cases).

53. See *Bottoms*, 457 S.E.2d at 108.

the stigma of active lesbianism.<sup>54</sup> However, the *Bottoms* court did focus on other elements to determine custody and not solely on the lesbianism issue.<sup>55</sup> Apparently, Sharon Lynne Bottoms, the defendant and natural mother, was not deemed a proper caretaker of the child by the court. According to the court, she repeatedly neglected the child's needs, was physically abusive to the child and was unable to hold a job.<sup>56</sup> Thus, there were sufficient factors weighing against Sharon Bottoms to justify a change of custody without focusing on her lesbian relationship.

The dissenting opinion in *Bottoms* disagreed with the trial court's per se finding of parental unfitness because of the mother's homosexuality.<sup>57</sup> Analogous to *Gorham*, the dissent's argument was that the majority opinion should not have based its decision on its own perceptions of morality when there is no evidence that the homosexual orientation of the parent hurts the child.<sup>58</sup> The dissent asserted that the trial court and the majority opinion erroneously attached importance to factors that have no actual or real effect on the child.<sup>59</sup>

The United States Supreme Court also discussed the possibility of future trauma and social stigma to children resulting from community disapproval of a parent's personal relationships in *Palmore v. Sidoti*.<sup>60</sup> The *Palmore* case dealt with the legal effect on the custody of a child when a European American mother remarried an African American man.<sup>61</sup> Unlike the court in *M.J.P.*, the *Palmore* Court disagreed with the reasoning that allows a change of custody based on possible future harm to the children caused by private biases.<sup>62</sup> The Court, therefore, reversed a child custody ruling which considered such a factor.<sup>63</sup> The court expressly held that "the Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."<sup>64</sup>

## VI. THE DECISION IN FOX

After a two-day hearing, the trial court in *Fox* decided to modify custody.<sup>65</sup> The District Court of Cleveland County held that the mother was unfit as a parent.<sup>66</sup> The court also held, as its basis for custody modification, that there was a material change in conditions.<sup>67</sup> The Oklahoma Court of Appeals af-

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54. *See id.*

55. *See id.* at 106.

56. *See id.*

57. *See id.* at 109.

58. *See id.*; *Gorham v. Gorham*, 692 P.2d 1375, 1378 (Okla. 1984).

59. *See Bottoms*, 457 S.E.2d at 109.

60. 466 U.S. 429 (1984).

61. *See id.* at 430.

62. *See id.* at 433-34.

63. *See id.*

64. *See id.* at 433.

65. *See Fox v. Fox*, 904 P.2d 66, 68 (Okla. 1995).

66. *See id.*

67. *See id.*



firmed, finding not that the mother was unfit, but relied instead on the authority of *M.J.P. v. J.G.P.*<sup>68</sup>

The Oklahoma Supreme Court reversed both the trial court and the appellate court decisions to modify custody in favor of the father.<sup>69</sup> The court specifically used the nexus standard and found the evidence insufficient to establish that the best interest of the children was directly and adversely affected by a significant change of circumstances of the custodial environment provided by the appellant mother.<sup>70</sup> The court further held that the trial court's order changing the custody from appellant mother to the appellee father was an abuse of discretion.<sup>71</sup> The court relied on three factors to find that there was no relevant evidence of mother's unfitness. First, the court strictly followed the best interest of child standard.<sup>72</sup> Second, there was no showing of a significant change of circumstances that adversely affected the best interest of the child.<sup>73</sup> Third, there was no evidence to support a finding that the temporal, moral, and mental welfare of the child would be improved if custody was changed.<sup>74</sup>

## VII. ANALYSIS

### A. *Focusing On the Best Interest of the Child*

Using a parent's sexual preference as the controlling factor to deny custody rights violates the Oklahoma statutory requirement of basing custody decisions on the best interest of the child.<sup>75</sup> In *Fox*, the Oklahoma Supreme Court, as it had done in prior decisions,<sup>76</sup> emphasized the three *Gibbons* factors for modification of child custody.<sup>77</sup> The three factors are clear indicators of the nexus standard which *Fox* holds applicable in child custody cases relating to issues of lesbianism and its effect on child custody.<sup>78</sup> Thus, in cases involving a homosexual parent, the determining factor for custody decisions is the effect of the parent's homosexual relationship on the child. Custody modification is allowed *only* if the parent's homosexual relationship is found to be detrimental to the child's well being or is found to be an impairment to the child's emotional or physical health.<sup>79</sup> Thus, the Oklahoma Supreme Court set a clear precedent

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68. See *id.* at 70 (citing *M.J.P. v. J.G.P.*, 640 P.2d 966 (Okla. 1982)).

69. See *id.*

70. See *id.* at 69.

71. See *id.* at 67-68.

72. See *id.* at 69 (citing *Gibbons v. Gibbons*, 442 P.2d 482 (Okla. 1968)).

73. See *id.*

74. See *id.*

75. See OKLA. STAT. tit. 43, § 112 (1991 & Supp. 1994).

76. See *Gorham v. Gorham*, 692 P.2d 1375 (Okla. 1984); *M.J.P. v. J.G.P.*, 640 P.2d 966 (Okla. 1982); *David v. David*, 460 P.2d 116 (Okla. 1969); *Gibbons v. Gibbons*, 442 P.2d 482 (Okla. 1968).

77. See *Fox*, 904 P.2d at 69 (citing *Gibbons*, 442 P.2d at 485). See also *supra* notes 40-41 and accompanying text (discussing the *Gibbons* factors).

78. See *id.*

79. See *id.* at 68-69.

that, for all future decisions in custody cases, Oklahoma courts must apply the nexus standard.<sup>80</sup>

The *Fox* court also rejected the reasoning applied in the *Bottoms* case: a court cannot use its conception that homosexuality is wrong as a reason for denying custody to the natural mother.<sup>81</sup> *Fox* follows the reasoning in *Gorham* by holding that a court should not enter legal judgments based on its own individualized conceptions of morality; instead, it is necessary to show a direct and adverse effect on the best interest of the child.<sup>82</sup> Furthermore, possible future psychological harm to children, including that caused by the parent's homosexuality, should not be considered by courts in making custody determinations, as held in *Miracle v. Miracle*.<sup>83</sup>

[W]e must not necessarily consider what the facts and circumstances of the parents might be eight or ten years from now or even five years from now, as any consideration would have to be predicated on conjecture, but what would be for the best interest of the child presently and in the immediate future.<sup>84</sup>

#### B. Factors Affecting the Psychological Well-Being of the Child

Widespread perceptions based on Judeo-Christian dogma that homosexuality is wrong, bad, and sinful lead to society's view of homosexuality as a sickness. Moreover, since such views are codified by sodomy statutes, courts may feel justified in viewing homosexuality as detrimental to the child's best interest per se.<sup>85</sup> When homosexuality is seen as a crime, a mortal sin, or a sickness, courts may impose their own views on the issue.<sup>86</sup> When judgment is colored by courts' perception of proper moral behavior, courts may lose sight of the child's best interest.

However, as established in *Gibbons*, the child's temporal, moral and mental welfare must be improved by a change in custody in order to justify modification to the noncustodial parent.<sup>87</sup> Although courts are clearly trying to evaluate the psychological effects of the custody situation on the child, it seems difficult, even for judges, to distinguish between their own concepts of morality and objective psychological factors that harm or benefit a child. The nexus standard does not focus on anyone's morality; instead, it focuses on the best interest of the child.<sup>88</sup>

80. See *id.* at 69.

81. See *id.*

82. See *id.*

83. 360 P.2d 712 (Okla. 1961).

84. *Id.* at 715. See also *supra* notes 60-64 and accompanying text (discussing *Palmore v. Sidoti*, 466 U.S. 429 (1984)).

85. See generally BENKOV, *supra* note 5, ch. 3 (discussing in more detail the relationship between homosexuality and religion, homosexuality and psychiatry, and homosexuality and criminality).

86. See *id.* at 41.

87. See *Gibbons v. Gibbons*, 442 P.2d 482, 482-83 (Okla. 1968).

88. See *Fox v. Fox*, 904 P.2d 66, 69 (Okla. 1995); *Gorham v. Gorham*, 692 P.2d 1375, 1378 (Okla. 1984); BENKOV, *supra* note 5, at 45.

As explored below, a number of myths about homosexuality exist.<sup>89</sup> There are well over 1.5 million lesbian mothers in this country who could potentially be affected by the impact of these myths.<sup>90</sup> A topic that consumes much trial time in lesbian mother custody cases is the possible effects of these myths on the children of a lesbian mother.<sup>91</sup> However, these myths should not enter into the nexus equation in considering what is in the best interest of the child.

### 1. Negative Effects on the Moral Development of the Child

Courts often presume that the homosexuality of the parent will negatively affect the moral development of the child.<sup>92</sup> Thus, it may be inferred that some courts consider homosexuality in itself immoral.<sup>93</sup> For example, in a 1989 custody case, a Missouri appellate court stated:

Private personal conduct by a parent which could well have an effect on children during years in which their character, morality, virtues and values are being formed cannot be ignored or sanctioned by courts. Private conduct of a parent in the presence of a child or even under some other circumstances may well influence his or her young, impressionable life . . . . No matter how [the gay parent] or society views the private morality of the situation, we cannot ignore the influence [the gay parent's] conduct may well have upon the future of this child [sic] and cannot give our judicial cachet to such conduct by etching in the law-books for all to read and follow. We see no salutary effect for the young child by exposing him to the [gay parent's] miasmatic moral standards.<sup>94</sup>

Similarly, in *Collins v. Collins*, a Tennessee appellate court expressed its opinion on the subject: "Homosexuality has been considered contrary to the morality of man for well over two thousand years. It has been and is considered to be an unnatural, immoral act."<sup>95</sup>

This kind of reasoning is contrary to *Gorham*, which speaks strictly against the sole use of a judge's conception of morality and mandates consideration only of what is in the best interest of the child.<sup>96</sup> The nexus of the best interest of the child and the relative effects of the parent's behavior cannot justly be applied when judges' conceptions of morality enter into the picture. The Oklahoma Supreme Court in *Fox*, by citing *Gorham*, appears to agree with the reasoning of the nexus standard.<sup>97</sup> The *Fox* court seems to reject decisions based

89. See generally BENKOV, *supra* note 5, at 57-68; Dooley, *supra* note 1, at 414-23; Hitchens & Price, *supra* note 5, at 452-61; Hunter & Polikoff, *supra* note 3, at 723-24; Sullivan, *supra* note 1, at 1637-40.

90. See Hunter & Polikoff, *supra* note 3, at 691. It has been estimated that between 13 and 20 percent of all lesbians are mothers. See *id.* at 691 n.1.

91. See Hitchens & Price, *supra* note 5, at 455.

92. See Dooley, *supra* note 1, at 414 (citing J.P. v. P.W. 772 S.W.2d 789 (Mo. Ct. App. 1989); Collins v. Collins, 1988 WL 30173 (Tenn. Ct. App. Mar. 30, 1988) (Tomlin, J., concurring)).

93. See *id.*

94. *Id.* (quoting J.P. v. P.W. 772 S.W.2d 786, 789 (Mo. Ct. App. 1989)).

95. *Id.* at 414-15 (quoting Collins v. Collins, 1988 WL 30173, at \*6 (Tenn. Ct. App. Mar. 30, 1988) (Tomlin, J., concurring)).

96. See *Gorham v. Gorham*, 692 P.2d 1375, 1378 (Okla. 1984).

97. See *Fox v. Fox*, 904 P.2d 66, 69 (Okla. 1995) (citing *Gorham*, 692 P.2d at 1378).

on judges' individualized conceptions of morality while focusing on direct and adverse effects on the child.<sup>98</sup>

## 2. Homosexuality as a Transmittable Disease

An often considered question is whether the children of homosexual parents are more likely to become gay.<sup>99</sup> Studies have found that children raised by homosexual parents are no more likely to grow up gay than children raised in heterosexual households.<sup>100</sup> Studies also show that children who grew up in homosexual households were no more confused about their gender identities or any more emotionally disturbed than children raised in heterosexual homes.<sup>101</sup> Furthermore, homosexuality has long been viewed as a choice made by the lesbian or gay parent and a learned behavior.<sup>102</sup> For example, in *Collins*, the Tennessee appellate court in its decision relied on expert testimony that pointed to homosexuality as a learned behavior.<sup>103</sup> In another Tennessee case, it was held that "it is unacceptable to subject children to any course of conduct that might influence them to develop homosexual traits, and the facts of this case indicate that there is a strong possibility, because [the mother and her lesbian lover live together], the children would be subjected to such influences."<sup>104</sup>

However, most homosexuals have heterosexual parents.<sup>105</sup> There is also a consensus in the scientific community that being raised by a homosexual parent does not increase the likelihood that the child will turn out to be homosexual.<sup>106</sup> Therefore, there is likely no "inherent danger" of transmitting homosexuality to the child if the child is raised by homosexual parents, and such an upbringing probably will not affect the best interest of the child in a negative manner, perceived or real.

Further implicated in this myth is that lesbian mothers are often denied custody because there is no heterosexual role model in the household.<sup>107</sup> In *In re Nicholson*, a lesbian mother was denied custody because she could not provide a heterosexual role model in her household.<sup>108</sup>

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98. See *id.*

99. See BENKOV, *supra* note 5, at 58; Dooley, *supra* note 1, at 421-22; Sullivan, *supra* note 1, at 1637-38.

100. See BENKOV, *supra* note 5, at 62; Dooley, *supra* note 1, at 421 (citing B.S. Herrington, *Children of Lesbians, Developmentally Typical*, PSYCHIATRIC NEWS, Oct. 19, 1979, at 23; R. Green, *The Best Interest of the Child with a Lesbian Mother*, BULL. AM. ACAD. PSYCHIATRY & L., Vol. 10, Nov. 1, 1982, at 7-15; Note, *Sexual Identity of 37 Children Raised By Homosexual Parents*, 135 AM. J. PSYCHIATRY 692 (1978)).

101. See BENKOV, *supra* note 5, at 62.

102. See Dooley, *supra* note 1, at 421.

103. See *Collins v. Collins*, 1988 WL 30173, at \*3 (Tenn. Ct. App. Mar. 30, 1988).

104. Dooley, *supra* note 1, at 421 (quoting *Black v. Black*, 1988 WL 22823, at \*3 (Tenn. Ct. App. Mar. 10, 1988)).

105. See *id.*

106. See *id.* (citing *Conkel v. Conkel*, 509 N.E.2d 985, 986 (Ohio Ct. App. 1987)).

107. See BENKOV, *supra* note 5, at 60.

108. See *Hitchens & Price*, *supra* note 5, at 456 (citing *In re Nicholson*, docket number unavailable because case was sealed by the court, (Iowa Dist. Ct., Iowa County, Nov. 1974)).

The Court observes that the situation in the home occupied by petitioner [lesbian mother] and [her partner] is now the optimum which the petitioner can hope to offer. This is not true in the case of respondent [heterosexual father]. He may remarry and establish a home where the children would have the attention of both a father and a step-mother. The Court realizes that this might turn out to be a situation worse for the children than is presently offered them. It also might be substantially better. In the home of the respondent any changes may create either a better or a worse environment for the children. Any changes in the home of the petitioner and [her partner] can only be in the direction of deterioration of the present situation.

Both would of necessity involve the employment of baby-sitters. At the home of the petitioner the children would be in an all female environment. At the home of the respondent they will be in a male environment, but on occasions when with the babysitter they will be in a female environment in a heterosexual home.<sup>109</sup>

A heterosexual home is considered per se better than a lesbian home by many courts.<sup>110</sup> It is often assumed, without any underlying factual support, that it is necessary for a child's normal development to have a male and a female role model available directly in the household.<sup>111</sup> This clearly bodes ill for our society where "[s]ingle-parent homes comprise approximately thirty percent of homes with children under eighteen."<sup>112</sup> Single parent households are more often than not predominately female households,<sup>113</sup> with the only distinction that they are not necessarily lesbian households. It does not necessarily follow that there is a correlating number of children confused in their gender identity simply because there is no heterosexual role model in their homes.

Often it is also incorrectly assumed that one of the lesbian partners acts as the "husband" and the other as the "wife."<sup>114</sup> One judge held that there was a husband and wife relationship in a lesbian partnership because one of the women took the son to Cub Scout meetings.<sup>115</sup> The judge inferred that the woman took on the role of a father.<sup>116</sup> When the witness responded that she filled the role of an aunt or a grandmother, the judge responded, "Oh, come on now, you and I both know what's going on."<sup>117</sup> Here, the judge seems to have imposed his own values and morals on a case without any underlying factual support. However, California courts have held that a judge's opinion regarding the

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109. *Id.* (quoting *In re Nicholson*, docket number unavailable because case was sealed by the court, (Iowa Dist. Ct., Iowa County, Nov. 1974)).

110. See *BENKOV*, *supra* note 5, at 60.

111. See *id.* at 61.

112. Joyce McConnell, *Standby Guardianship: Sharing the Legal Responsibility for Children*, 7 MD. J. CONTEMP. LEGAL ISSUES 249, 255 (1996) (footnote omitted).

113. See *id.* at 256.

114. See *Hitchens & Price*, *supra* note 5, at 458.

115. See *id.* at 458 (citing *In re Mathews*, docket number unavailable because case was sealed by the court, (Cal. Super. Ct., Santa Clara County, 1975)).

116. See *id.* (citing *In re Mathews*, docket number unavailable because case was sealed by the court, (Cal. Super. Ct., Santa Clara County, 1975)).

117. See *id.* (citing *In re Mathews*, docket number unavailable because case was sealed by the court, (Cal. Super. Ct., Santa Clara County, 1975)).

parent's moral and personal characteristics and a judge's offended sensibilities should not enter into custody decisions when there is no apparent connection of harm to the children.<sup>118</sup> "The judge's view of the child's moral well-being may not be the same as the child's best interest."<sup>119</sup>

Ultimately, the Oklahoma Supreme Court in *Fox* did not address the issue of homosexuality as a "contagious disease." By ignoring this issue, it wisely omitted another myth that has no direct and adverse effect on the children. The court based its decision solely on the best interest of the child, as established by factors that are actually and directly adverse to the children.<sup>120</sup>

### 3. Stigma and Social Condemnation

Another factor the courts consider is whether the stigma attached to the homosexual relationship of their parents will result in future harm to the children.<sup>121</sup> It is usually the possible future harm with which the courts and experts on children's issues are concerned. In one California case, an expert psychologist testified that the children should be removed from their mother's custody because of a "definite possibility" that the children may experience derision in the future.<sup>122</sup> But studies on the issue of stigmatization have shown that there is much less actual stigmatization than feared by the courts<sup>123</sup> and there is rarely any evidentiary support of harassment of children.<sup>124</sup>

In *Palmore v. Sidoti*,<sup>125</sup> the United States Supreme Court held that even when a risk of societal stigmatization exists, private biases and possible future harm should not override the rights of the natural mother for custody.<sup>126</sup> The Court stated: "The question, however, is whether the reality of private biases and the possible injury they *might* inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not."<sup>127</sup> Also, in 1974, the Ohio Supreme Court approved the adoption of an African American child by a Caucasian petitioner, holding that it could not deny custody based on a belief that the child might be stigmatized by societal prejudice.<sup>128</sup>

118. See *id.* at 459 (citing *Clarke v. Clarke*, 217 P.2d 401 (Cal. 1950); *Stack v. Stack*, 11 Cal. Rptr. 177 (Cal. Dist. Ct. App. 1961); *In re Marriage of Ciganovich*, 132 Cal. Rptr. 261 (Cal. Dist. Ct. App. 1976)).

119. Sullivan, *supra* note 1, at 1639.

120. See *Fox v. Fox*, 904 P.2d 66, 69 (Okla. 1995).

121. See generally BENKOV, *supra* note 5, at 63-67.

122. See Hitchens, *supra* note 1, at 90 (citing Reporter's Transcript at 38, *Smith v. Smith*, Civ. No. 125497 (Cal. Super. Ct., Stanislaus County, 1978)).

123. See BENKOV, *supra* note 5, at 64; Hitchens & Price, *supra* note 5, at 468.

124. See Sullivan, *supra* note 1, at 1638; Hitchens & Price, *supra* note 5, at 468-69. Apparently there is only one reported case involving actual evidence of harassment. See Sullivan, *supra* note 1, at 1638 (citing *L. v. D.*, 630 S.W.2d 240, 244 (Mo. Ct. App. 1982) (referring to evidence that the children were teased about the lesbian mother's lifestyle while in the custody of the heterosexual father)).

125. 466 U.S. 429 (1984).

126. See *id.* at 433.

127. *Id.* (emphasis added).

128. See Dooley, *supra* note 1, at 418 (citing *Portage County Welfare Dep't v. Summers*, 311 N.E.2d 6 (Ohio 1974)).

These cases are analogous to child custody situations involving lesbian mothers.<sup>129</sup> As in *M.J.P.*,<sup>130</sup> the argument in such cases is often that the societal prejudice against lesbian mothers will result in future harm to the child. Just as the United States Supreme Court held this reasoning unconstitutional for interracial situations,<sup>131</sup> this reasoning must also be held unconstitutional for societal prejudice against lesbian mothers.<sup>132</sup> Accordingly, in an Alaska Supreme Court decision, the court held that "it is impermissible to rely on any real or imagined social stigma attaching to [the] mother's status as a lesbian."<sup>133</sup> The Oklahoma Supreme Court agrees with this reasoning as evidenced by the *Miracle* decision which held that possible future psychological harm to children should not be considered by courts in making custody determinations.<sup>134</sup>

Additionally, the effect of social stigmatization may easily be buffered by a supportive and loving home.<sup>135</sup> Children will inevitably learn that discrimination exists in a not-so-perfect world, and they can be taught to deal with the experience of discrimination in a constructive way.<sup>136</sup> A New Jersey appellate court denied a motion for custody modification after determining that modifying custody would not eliminate the potential source of embarrassment and stigmatization caused by the parent's sexual orientation.<sup>137</sup> The court also noted that children in the custody of a gay parent might benefit from learning to deal with and overcome prejudice.<sup>138</sup> Similarly, an Ohio appellate court used the same reasoning when denying a modification of custody because of the father's homosexuality.<sup>139</sup> These cases establish that the potential for future harm to the child because of prejudice and stigmatization should not be a factor in determining a homosexual parent's custody rights.<sup>140</sup>

The Oklahoma Supreme Court in *Fox* firmly rejected the Court of Appeals' interpretation of *M.J.P.*, that custody could be changed based on potential future harm because of stigmatization due to the mother's lesbianism.<sup>141</sup> The *Fox* court instead noted that the *M.J.P.* decision was based on the presence of sufficient evidence to change custody which did not exist in *Fox*.<sup>142</sup>

129. See *id.* (citing *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Portage County Welfare Dep't v. Summers*, 311 N.E.2d 6 (Ohio 1974)).

130. See *M.J.P. v. J.G.P.*, 640 P.2d 966, 969 (Okla. 1982).

131. See *Palmore*, 466 U.S. at 433.

132. See *Dooley*, *supra* note 1, at 418.

133. *Id.* (quoting *S.N.E. v. R.L.B.*, 699 P.2d 876, 879 (Alaska 1985)).

134. See *Miracle v. Miracle*, 360 P.2d 712, 715 (Okla. 1961).

135. See *BENKOV*, *supra* note 5, at 64.

136. See *id.*

137. See *Dooley*, *supra* note 1, at 418 (citing *M.P. v. S.P.*, 404 A.2d 1256, 1261 (N.J. Super. Ct. App. Div. 1979)).

138. See *id.* (citing *M.P. v. S.P.*, 404 A.2d 1256, 1261 (N.J. Super. Ct. App. Div. 1979)).

139. See *id.* at 418-19 (citing *Conkel v. Conkel*, 509 N.E.2d 985, 987 (Ohio Ct. App. 1987)).

140. See *id.* at 419.

141. See *Fox v. Fox*, 904 P.2d 66, 70 (Okla. 1995).

142. See *id.*

#### 4. Molestation by Gay Parents

One of the most enduring myths concerning homosexuals is that they are more likely to molest children than heterosexuals.<sup>143</sup> This perception stems partly from the view that homosexuality is a sickness.<sup>144</sup> However, empirical data has shown that most child molestation is committed by heterosexual males.<sup>145</sup> Accordingly, it is statistically far less likely that Donna Fox or her lover would put the children at risk for molestation than would Larry Fox. The myth connecting homosexuality and pedophilia not only puts another unnecessary burden on lesbian mothers, but it also obscures one of the darker sides of heterosexuality.<sup>146</sup> The court in *Fox* made no reference to the danger of child molestation by Donna Fox. This should be a future guideline for Oklahoma courts not to entertain unfounded claims of molestation dangers based solely on the mother's sexual orientation.

#### 5. Lesbianism and Sodomy As Crime

Another often articulated argument against granting custody to a homosexual parent maintains that it is psychologically detrimental for a child to be raised by a parent engaged in criminal acts, most notably sodomy.<sup>147</sup> Sodomy statute arguments track the general moral and religious condemnation of homosexuality by judges.<sup>148</sup> "Homosexuality has been considered contrary to the morality of man for well over two thousand years. It has been and is considered to be an unnatural, immoral act."<sup>149</sup> The Oklahoma Sodomy Statute holds sodomy to be a "detestable and abominable crime against nature" punishable by imprisonment.<sup>150</sup>

The American Heritage Dictionary defines sodomy as: (1) "anal copulation of one male with another," (2) "anal or oral copulation with a member of the opposite sex," or (3) "copulation with an animal."<sup>151</sup> It is questionable according to this definition whether lesbian sexual acts are even proscribed *at all* under sodomy statutes. The dictionary definition only refers to male/male and heterosexual sexual practices, and sodomy statutes do not generally declare

143. See BENKOV, *supra* note 5, at 68; Hitchens, *supra* note 1, at 94.

144. See generally BENKOV, *supra* note 5, at 52-57.

145. See *id.* at 68; Sullivan, *supra* note 1, at 1640 n.81 (citing R. GEISER, HIDDEN VICTIMS: THE SEXUAL ABUSE OF CHILDREN 75 (1979); Fredrick W. Bozett, *Children of Gay Fathers*, in GAY AND LESBIAN PARENTS 47 (Fredrick W. Bozett ed., 1987)); Marilyn Riley, *The Avowed Lesbian Mother and Her Right to Child Custody: A Constitutional Challenge That Can No Longer Be Denied*, 12 SAN DIEGO L. REV. 799, 860 (1975).

146. See BENKOV, *supra* note 5, at 68.

147. See *Bottoms v. Bottoms*, 457 S.E.2d 102, 107 (Va. 1995); Dooley, *supra* note 1, at 419-421; Sullivan, *supra* note 1, at 1640. See generally BENKOV, *supra* note 5, at 48-52.

148. See BENKOV, *supra* note 5, at 48.

149. Dooley, *supra* note 1, at 414-15 (citing *Collins v. Collins*, 1988 WL 30173 (Tenn. Ct. App. Mar. 30, 1989) (Tomlin, J., concurring)).

150. OKLA. STAT. tit. 21, § 886 (Supp. 1995) (entitled "Crimes Against Nature").

151. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1227 (William Morris ed., 1969).



homosexuality illegal per se.<sup>152</sup> "Since fewer than half the states still have sodomy statutes, and since most sodomy statutes do not prohibit" many homosexual and lesbian sex practices, most lesbians "are not engaging in criminal behavior" according to the language in the sodomy statutes.<sup>153</sup>

Further, the act of sodomy is illegal "whether performed by heterosexual or homosexual couples."<sup>154</sup> When sodomy statutes are discussed in court opinions, sodomy is equated to homosexuality and courts rarely inquire whether actual sodomy took place.<sup>155</sup> Moreover, inquiry into sodomy statutes is generally only made when *homosexual* parents are involved in custody disputes.<sup>156</sup> Courts do not routinely question heterosexual parents about whether they engage in sodomy.<sup>157</sup> Such questioning directed toward homosexuals seems arbitrary since some homosexuals, and in particular lesbians, do not engage in sodomy practices, and some heterosexuals do.<sup>158</sup>

Because sodomy statutes are in decline, courts should not apply the sodomy statute selectively to the lesbian mother. As the law applies to heterosexuals and homosexuals alike,<sup>159</sup> the sexual practices of the heterosexual parent would have to be questioned as well. Although Oklahoma still has a sodomy statute, the courts in Oklahoma may consider the nationwide trend to abolish those statutes which do nothing more than legislate morality. Legislating concepts of morality, in clear conflict with rational considerations and empirical evidence, is an archaic practice.

It is also questionable whether there is a direct relation between the parent's illegal sodomy practices and the best interest of the child.<sup>160</sup> The nexus standard would require the court to find that negative effects on the child were caused by the parent's sexual practices.<sup>161</sup> Judges and lawyers often try to insinuate that homosexuals have sex in front of their children.<sup>162</sup> However, most parents, heterosexual or homosexual, engage in sexual acts in privacy and not in view of their children. Therefore, the effect of homosexual sexual acts on the child should generally be nonexistent.

Sodomy statutes are archaic statutes that have little or no application to the realities of lesbian sexuality and the effect on their children and should not be considered in lesbian custody cases.<sup>163</sup> Even though Oklahoma has a sodomy statute,<sup>164</sup> the Oklahoma Supreme Court made no mention of it in *Fox*. This

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152. See BENKOV, *supra* note 5, at 51.

153. Dooley, *supra* note 1, at 419-20.

154. BENKOV, *supra* note 5, at 51.

155. *See id.*

156. *See id.*

157. *See id.*

158. *See id.*; Dooley, *supra* note 1, at 419-20.

159. See BENKOV, *supra* note 5, at 51.

160. See Dooley, *supra* note 1, at 420-21.

161. *See id.*

162. See Hitchens, *supra* note 1, at 94.

163. *But see* Bottoms v. Bottoms, 457 S.E.2d 102, 107 (Va. 1995) (emphasizing that sodomy is a felony and applying the sodomy statute to the case).

164. See OKLA. STAT. tit. 21, § 886 (Supp. 1995).

omission is in harmony with the court's focus on the best interest of the child and the nexus standard. The court made a prudent decision to disregard archaic and unapplicable precepts under the sodomy statutes.

C. *Was Fox a Good Decision in Light of the Factors Affecting the Psychological Well-Being of the Child?*

Empirical studies, scientific data, and logical reasoning have disproved common myths about homosexual parents. Children raised by homosexual parents are not significantly more likely to suffer harm than children raised by heterosexual parents. Although there is a greater chance of stigmatization for children living in a lesbian household than for children in a heterosexual household,<sup>165</sup> the possible psychological effects are not as extensive as often feared by the courts.<sup>166</sup>

The courts should focus on the actual facts in each case rather than using these myths to deny lesbian mothers custody. Clearly, to determine what is in the best interest of the child, the court must consider overall parental capabilities to provide for the child's emotional, physical, and mental welfare. Accordingly, evaluating each case under the nexus standard, as applied in *Fox* by the Oklahoma Supreme Court, is the only viable alternative.<sup>167</sup> It is often detrimental to the child, rather than in the best interest of the child, when judges make child custody decisions based on individual conceptions of morality.<sup>168</sup>

### VIII. IMPLICATIONS

The Oklahoma Supreme Court did not pass judgement on or approve of homosexuality. The court did not impose its own values and morals, but simply made a rational and well-reasoned decision as to what was in the best interest of the children involved. Consequently, the court made no value judgement on whether homosexuality is "right or wrong." Since the court's reasoning focused only on actual adverse factors, there may be positive implications for possible adoptions by lesbians and gays. If a parent's homosexuality does not negatively affect the child's best interest, there seems to be no logical reason why otherwise qualified homosexuals should not be allowed to adopt children just like their heterosexual counterparts. New York's highest court held that unmarried couples in New York, including homosexuals, may adopt the children of their partners.<sup>169</sup> The highest courts in Massachusetts, Vermont, and the District of Columbia have also made similar findings.<sup>170</sup>

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165. See generally BENKOV, *supra* note 5, at 63-64.

166. See *id.* at 64.

167. See *id.* (suggesting determinations of custody be made on a case-by-case basis).

168. See *Gorham v. Gorham*, 692 P.2d 1375, 1378 (Okla. 1984).

169. See *In re Jacob*, 660 N.E.2d 397, 398 (N.Y. 1995). Chief Judge Judith Kaye stated that to deny the second non-marital parent adoption rights "would mean that thousands of New York children actually being raised in homes headed by two unmarried persons could only have one legal parent, not the two who want them." *Id.* See also *Nationline*, USA TODAY, Nov. 3, 1995, at 3A.

170. See *In re Tammy*, 619 N.E.2d 315 (Mass. 1993); *In re B.L.V.B.*, 628 A.2d 1271 (Vt. 1993); *In re*

There may be upcoming criticism that the court in *Fox* endorsed homosexuality. The court, however, actually refused to bring in its own conceptions of morality and ruled solely on the factors that objectively affect the best interest of the child. The court tried to leave out the unanswerable query of whose morals and values apply. Nonetheless, the question remains whether the court should consider values as part of the education and upbringing of children. Most recent cases have implied that questions of morality are either private issues or, at best, issues for the legislature because they involve policy decisions. Therefore, courts should not interfere in those issues.

Since the court refused to legislate morality in this case, the *Fox* decision, perhaps more remotely, implicates other issues. Gay marriages currently are not allowed in any state of the nation.<sup>171</sup> If there are enough logical and reasoned factors supporting gay marriages, should the courts not allow them absent any considerations of morality? Moreover, sodomy statutes largely legislate morality and should perhaps be reconsidered without moral evaluation. It would seem consistent by implication that, after the decision in *Fox*, there is a need to reconsider the applicability and utility of the Oklahoma sodomy statute.

#### IX. CONCLUSION

In *Fox v. Fox*, the Oklahoma Supreme Court clearly established that in custody cases, including those where the mother is a lesbian, the "nexus standard" should be applied. The court followed a trend in many jurisdictions to view the homosexuality of a parent not as a determinative factor, but instead electing to focus on direct and adverse factors affecting the best interest of the child. Using a parent's sexual preference as the sole and ruling determinant to deny custody rights violates the statutory requirement of basing the decision on the best interest of the child. The Oklahoma Supreme Court in *Fox* made a well-reasoned decision and the only decision that is acceptable in view of the best interest of the child standard.

*Katja M. Eichinger-Swainston*

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M.M.D., 662 A.2d 837 (D.C. 1995). See also *Nationline*, USA TODAY, Nov. 3, 1995, at 3A.

171. The Hawaii Supreme Court case of *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), held that a statute restricting marriage to the union of a man and woman to be a sex-based classification which would be subject to strict scrutiny in an equal protection challenge. In response, the United States Congress enacted the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996), defining marriage as a union between one man and one woman. *Id.* at § 3 (to be codified at 1 U.S.C. § 7). The Act also allows states not to give effect to same-sex marriages created in other states. *Id.* at § 2 (to be codified at 28 U.S.C. § 1738C).