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Appeals court sends lesbian custody case to trial

Ruling vacating 5th Circuit 3-judge panel's earlier decision catches Vowels and her attorney by surprise

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A lesbian custody battle could be headed back to Dallas County Judge Tena Callahan's courtroom after a three-judge panel of the 5th District Court of Appeals, in a surprise move, reversed itself and ruled that Kristie Vowels does have standing to sue for joint custody of her child with a former partner.

Michelle May O'Neill, Vowels' attorney, said Wednesday, Dec. 2 that the ruling handed down the previous day had come as a complete surprise, since the three-judge panel had already ruled against Vowels in a September decision.

"In September, they issued a ruling that basically created new law in cases like [Vowels']," O'Neill said. "This ruling held Kris to a very high standard to have standing to sue for custody, and the judges said she didn't meet that standard. We filed a motion for a rehearing and they denied it. Then we filed a motion for an en banc hearing."

She explained that appeals are usually heard first by a three-judge panel, but those dissatisfied with the panel's ruling can file a motion for the entire nine-judge appeals court — en banc — to reconsider a case.

"We filed that about two months ago, and it just sat there. That made me pretty nervous. Usually, they rule pretty quickly on those motions," O'Neill said. "Then I got an e-mail [Tuesday, Dec. 1]. It said the three judges had vacated their earlier ruling and issued a new opinion that was in our favor. They said that Kris does have standing to sue for custody."

Scourfield's lawyers have 45 days to appeal that ruling to the Texas Supreme Court. If they do not appeal, at the end of those 45 days, the case goes back to Callahan's 302nd District Court for trial.

Vowels and Tracy Scourfield had been a couple for more than four years and had gone through counseling to help them decide whether to have a child together when Scourfield gave birth to their daughter, conceived through artificial insemination, on May 21, 2004.

A little more than a year later, the two women broke up and Scourfield and the little girl moved out of Vowels' home, although Vowels' continued

to help support the child financially and the women agreed to and operated on a visitation schedule very similar to what is considered "standard visitation" in a heterosexual custody case.

The three-judge panel, in its latest ruling written by Justice Martin E. Richter, described the visitation schedule as allowing Vowels "regular access to and possession of the child."

But in April 2007, Scourfield abruptly cut off Vowels' contact with the child. A month later Vowels filed suit in Callahan's court, seeking conservatorship with a legally binding visitation schedule.

Associate Judge Christine Collie ruled in August 2007 that Vowels did not have standing to sue for custody, and Callahan later affirmed that decision.

Vowels appealed the decision to the 5th Circuit in May 2008.

"We expected the appeal to take six months. It took 18 months," O'Neill said this week.

She said that even if Scourfield does not appeal to the state Supreme Court, or if she does and that court upholds the appeals court's opinion, Vowels still would have a fight ahead of her.

"If the ruling remains in place, we still have to go back to Judge Callahan's court, and she will

have to make a decision based on what is best for the child. We're not out of the woods yet, but at least now we have the right to be on the playground," O'Neill said.

But, she added, a ruling Callahan handed down in a separate LGBT-related case this year could be a good sign for Vowels.

Callahan in October ruled that two gay men legally married in Massachusetts in 2006 did have the right to seek a divorce in a Texas court, and that Texas' constitutional amendment banning same-sex marriage did itself violate the U.S. Constitution.

"We know from that ruling [in the gay divorce case] that Tena Callahan is a very brave and assertive judge who's not afraid to push the envelope when it's something she thinks is right," O'Neill said. "She is an outstanding judge, and Dallas County is lucky to have judges of her caliber on the bench."

O'Neill also said Callahan's ruling in the divorce case might have played a role in the appeals court's unusual move in vacating its earlier decision in Vowels' case.

"It's very strange. I wish I did know why it happened," O'Neill said of the court's reversal. "Maybe Tena Callahan's ruling in the divorce case

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had something to do with it. Maybe they just realized that more sympathy is being shown now to people in Kris' position. I don't know why they did it. I just know it's wonderful that they did it."

Vowels herself said she was surprised and grateful for the appeals court's ruling.

"We've been waiting for so long, and I am just very humbly grateful," Vowels said Wednesday, adding that even after O'Neill called and told her the news on Tuesday, it took a while for it to really sink in.

"I was up all night. I was in the gym at 3:30 that morning. On my way — I made a point to look at the clock so I know it was 5:31 that morning — I turned onto my street and that's when it really hit me what was happening, not just for me, but for the whole community," Vowels said. "This is important to me because it is about my child. But this is a case that could be very important for the whole community."

"That's when it really hit me, when I really realized the magnitude of what had happened. And I just started grinning. It was a grin of pure gratitude." ■