FROM THE EDITOR

In an effort to increase dialogue about state court jurisprudence, the Federalist Society presents *State Court Docket Watch*. This newsletter is one component of the State Courts Project, presenting original research on state court jurisprudence and illustrating new trends and ground-breaking decisions in the state courts. These articles are meant to focus debate on the role of state courts in developing the common law, interpreting state constitutions and statutes, and scrutinizing legislative and executive action. We hope this resource will increase the legal community's interest in tracking state jurisprudential trends.

Readers are strongly encouraged to write us about noteworthy cases in their states which ought to be covered in future issues. Please send news and responses to past issues to Maureen Wagner, at maureen.wagner@fed-soc.org.

CASE IN FOCUS

Washington Supreme Court Rules on Attorney General's Discretion to Enter Litigation in Two Landmark Cases

by Seth Cooper

The Washington Supreme Court in September issued two of its most highly-anticipated rulings in recent years. Continuing public controversy over federal health care law and the attorney general's authority to join the states in a multi-state lawsuit challenging the law provided the backdrop to *City of Seattle v. McKenna*.[1] The exercise of the eminent domain power and the attorney general's discretion in representing state agencies is at issue in *Goldmark v. McKenna*.[2] The pair of rulings addresses the Washington attorney general's powers under the constitution and laws of Washington State—although opinions written by justices of the court raise their own questions about whether the scope of the attorney general's powers were addressed consistently.

The primary focus of this article is on the Washington Supreme Court's ruling in *City of Seattle v. McKenna*. At issue in the case was whether Washington's attorney general has the authority to join the state in a lawsuit challenging the individual mandate in the recently-enacted federal health care law.

City of Seattle v. McKenna

The attorneys general of thirteen states, including the State of Washington, filed a complaint challenging the constitutionality of the federal health care legislation under the Commerce Clause of the U.S. Constitution. The complaint was filed in the U.S. District Court for the Northern District of Florida on March 23, 2010, the same day the federal health care legislation was signed by President Barack Obama.[3]

On April 10, the City of Seattle filed a petition requesting the Washington Supreme Court to issue a writ of mandamus to compel Washington Attorney General Rob McKenna to withdraw the State of Washington from the litigation.[4] The court heard oral arguments in the case on November 18, 2010. It heard oral arguments in *Goldmark v. McKenna* on the same day.

While the Washington Supreme Court's decision in *City of Seattle v. McKenna* was pending, the U.S. district court held that the individual mandate provision in federal health care law was unconstitutional and not severable from the rest of the act.[5] On August 12, the U.S. Court of Appeals for the Eleventh Circuit issued its ruling affirming in part and reversing in part the U.S. district court's ruling.[6] In particular, the Eleventh Circuit likewise concluded that the individual mandate was unconstitutional, although severable.[7]

The Washington Supreme Court issued rulings in both *City of Seattle v. McKenna* and *Goldmark v. McKenna* on September 1, 2011.

Opinion of the Court

The Washington Supreme Court was unanimous in rejecting the city's request for a writ requiring Attorney General McKenna to withdraw the state from the ongoing federal health care litigation. Justice Susan Owens delivered the opinion of the court.[8] Mandamus is not available, Justice Owens' opinion for the court concluded, because the attorney general had no clear duty to withdraw the state from the litigation. Rather, "[s]tatutory authority

vests the attorney general with the discretionary authority to participate in the litigation at issue."[9]

The office of the Washington Attorney General is addressed in six provisions in the Washington Constitution.[10] In particular, article III, section 21 reads that "[t]he attorney general shall be the legal adviser of the state officers and shall perform such duties as may be prescribed by law." According to the court, by that section's plain meaning "'duties as may be prescribed by law' refers to those duties created by statute."[11] Consequently, "there are no common law or implied powers of the attorney general under our constitution." Rather, the court characterized its precedents as insisting on "an enumerated constitutional or statutory basis for the powers of executive officers, including the attorney general."[12]

In the opinion of the court, "[t]he Washington Constitution does not directly give the attorney general the authority to sue on behalf of the State of Washington, at least when not done on behalf of another state officer."[13] Attorney General McKenna did not claim to be acting as legal adviser in joining the State of Washington in the multistate litigation. So the court proceeded to examine whether Attorney General McKenna's action was authorized by statute. It found RCW 43.10.030 dispositive. The statute reads: "The attorney general shall . . . [a]ppear for and represent the state before the supreme court or the court of appeals in all cases in which the state is interested."[14]

The court's opinion explained that "[p]recedent establishes that this statute confers broader authority than the plain text indicates."[15] It therefore concluded that the statute "grants the attorney general discretionary authority to act in any court, state or federal, trial or appellate on 'a matter of public concern,' . . . provided there is a 'cognizable common law or statutory cause of action.'"[16]

While at the outset the court asserted that it "need not and do[es] not express any opinion on the constitutionality or wisdom of the health care reform legislation,"[17] the court nonetheless maintained that the federal health care law "is unquestionably a matter of public concern in which the State has an interest; its provisions directly affect residents of the state in numerous ways."[18] "It is also undisputed," the court explained, "that there is a cognizable statutory cause of action to enjoin enforcement of unconstitutional

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Nebraska High Court Applies Common Law Doctrine of *In Loco Parentis* to Confer Standing on Former Same-Sex Domestic Partner in Child Custody Dispute

by Megan T.R. Hitchens

With the use of surrogates, in-vitro fertilization, adoption, and egg and sperm donation, same-sex couples are increasingly able to have children. However, when these relationships sour, separation and divorce of gay and lesbian couples gives rise to complex issues of child custody and visitation. In *Latham v. Schwerdtfeger*,[1] the Nebraska Supreme Court was faced with the issue of whether the doctrine of *in loco parentis* granted a former same-sex domestic partner standing to sue for child custody and visitation for her non-biological child. Nebraska, like most states, does not have specific statutes to address same-sex couple unions, dissolution of marriage, and child custody disputes. Courts therefore turn to common law principles to fashion a remedy when such disputes arise.

Background

Appellant Teri Latham and appellee, Susan Schwerdtfeger met in college and moved in together in 1985.[2] After living together for a number of years, the couple desired to have a child. The women decided against adoption, and in 2001 Schwerdtfeger became pregnant through in-vitro fertilization, for which both parties shared the cost.[3] Latham accompanied Schwerdtfeger to doctors' appointments, was present at the birth of the child, P.S., and took maternity leave to care for Schwerdtfeger and the baby.[4] Latham maintained that she supported the child financially and emotionally and assumed a parental role by disciplining the child. She took the child to school and medical appointments, and was identified as "Mom."[5] By all accounts Latham and Schwerdtfeger lived together with the child as a family unit until 2006, when Latham and Schwerdtfeger separated. At this point, Latham saw the child three to five times per week.[6]

Latham and Schwerdtfeger shared finances through the summer of 2007, at which time Latham claimed that Schwerdtfeger began to reduce Latham's visitation with P.S. to only twice a week.[7] Schwerdtfeger

the governmental entity's performance of dual proprietary and governmental functions. The majority held that the alleged security lapse involved in a significant way the assignment of its police officers to various security risks—which is a policy decision. The assignment of police is a discretionary decision-making governmental function, and thus merits governmental immunity, as discretionary governmental acts may not be a basis for liability.[10] Given this holding, the majority did not reach the issue of fault allocation.

The dissent maintained that the alleged negligence stemmed from a proprietary function as a commercial landlord, as the decisions the Port Authority made were not uncommon to those of any commercial landlord.[11] The dissent stated that the Port Authority failed its duty to tenants and invitees as a the landlord of a commercial office complex, and found that the World Trade Center was a predominantly commercial venture.[12] The dissent agreed that there could be no liability for the Port Authority's decision where to deploy police personnel, but the Authority could be liable for failing to take security measures that a private landlord would take.[13] The dissent also stated that the jury's allocation of fault (68% to the Port Authority, and 32% to the terrorists) was permissible on the evidence presented and was not a basis for reversal.[14]

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Endnotes

1 *In re* World Trade Ctr. Bombing Litigation, No. 217 (N.Y. Sept. 22, 2011).

2 *Id.*, slip op. at 2.

3 *Id.* at 7.

4 *Id.*

5 *Id.* at 8.

6 Other smaller, side issues not relevant to the issues discussed in this article are not reviewed here.

7 *In re* World Trade Ctr. Bombing Litigation, No. 217, at 8.

8 *Id.*

9 *Id.* at 29.

10 *Id.* at 18.

11 *Id.* at 21.

12 *Id.* at 27.

13 *Id.* at 28.

14 *Id.* at 30.

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actions by the United States Government"[19] Thus, Attorney General McKenna acted within the authority granted to him by the statute when joining the state as a party to the multistate litigation.

The court also examined the question whether the Attorney General properly made the state a party to the multistate litigation, as opposed to acting in his individual, official capacity. Citing prior precedents the court answered the question by observing that "[t]he general rule is that where the attorney general is authorized to bring an action, he or she is authorized to do so in the name of the state."[20]

The court rejected the argument advanced by Washington Governor Christine Gregoire in an amicus brief that if the governor disagrees with a litigation decision, the attorney general cannot proceed in the state's name. The court acknowledged that Washington Constitution article III, section 2 vests "[t]he supreme executive power of this state" in the governor, and that the governor's superior authority may require accommodation in certain matters. As Justice Owens' opinion for the court put it, however, "the governor is not a party to the present action; Governor Gregoire neither initiated this petition for mandamus nor has she intervened."[21] The court asserted that it would therefore "leave for the appropriate case the issue of what result the Washington Constitution compels where the governor disagrees with the attorney general's discretionary decision to initiate litigation and seeks to preclude the attorney general's action."[22]

Concurring Opinions

Justice Gerry Alexander authored a concurring opinion that briefly addressed the issue of standing. Wrote Justice Alexander, "I am doubtful that Seattle could have established standing to maintain this action under any of the four doctrines that could have provided it with authority to bring this suit: traditional, representational, liberalized, or taxpayer."[23] Moreover, Justice Alexander characterized Seattle's assertion of taxpayer standing as "a particular stretch" for four reasons: (1) Seattle did not plead taxpayer status; (2) its submitted documents

provided no such support; (3) "it is questionable if a municipal corporation, like Seattle, can claim taxpayer status"; and (4) Seattle failed to make a demand on the Attorney General to cease representation, which is a "condition precedent" to a taxpayer's suit.[24] Justice James Johnson joined Justice Alexander's concurrence.

Justice Pro Tem Richard Sanders also wrote a concurring opinion.[25] While agreeing with the result based on the Washington Constitution and statute, Justice Sanders concluded that the result required the court to expressly overrule two of its prior decisions. Justice Sanders interpreted those decisions as recognizing common-law powers in the attorney general in cases involving the attorney general's enforcement of charitable trusts and the filing of an amicus brief on behalf of the state of Washington, respectively.[26] Justice Pro Tem Sanders wrote that since those cases "necessarily rely on a mistaken common-law authority in the office of the attorney general, they must be overruled."[27] Justice Debra Stephens concurred with Justice Pro Tem Sanders.

Goldmark v. McKenna

On the same day it issued its opinion in *City of Seattle v. McKenna*, the Washington Supreme Court also handed down its decision in *Goldmark v. McKenna*.[28] The case is also a mandamus action against the attorney general with significant implications for the scope of the office's constitutional and statutory authority. *Goldmark v. McKenna* raises questions regarding the authority of the attorney general to represent state agencies and to exercise discretion in his or her representation in order to reconcile possibly antagonistic interests of state officers and to protect the interests of the people.

The Commissioner of Public Lands Peter Goldmark sought a writ of mandamus compelling Attorney General McKenna to pursue an appeal from an adverse trial court decision in a condemnation action. The attorney general represented the commissioner before the trial court but chose not to pursue an appeal or to appoint a special assistant attorney general to pursue the appeal on behalf of the commissioner.

In a 7-2 ruling, the court concluded: "RCW 43.12.075 expressly requires the attorney general to represent the commissioner in any court when requested by the commissioner. This duty is mandatory, and the attorney general has no discretion to deny the commissioner legal representation." That statutory provision sets out duties of the attorney general in representing the Commissioner of Public Lands or Board of Natural Resources. However, the court's ruling also rested its decision, in part, on RCW 43.10.040—a statutory provision regarding the attorney general's duties regarding representation of state boards, commissions, and agencies in general. It also rested on RCW 43.10.067—a provision generally restricting state boards, commissions, and agencies from appointing or retaining their own, separate counsel and requiring representation by the attorney general.

Justice Charles Johnson wrote the opinion for the court.[29] The court's majority concluded that there is "nothing inherent in [the Washington Constitution's] structure that permits the attorney general to refuse to represent state officers when statutorily required to do so."[30] In the course of its ruling, the majority rejected the attorney general's argument that his statutory authority to initiate litigation on his own initiative gave him discretion to act contrary to the commissioner's objection and decline requested representation. Any such initiative, the majority concluded, extends to cases where neither the commission nor the Department of Natural Resources is a party but where the interests of the state are involved.[31] In addition, the majority maintained that "this case is consistent with *City of Seattle v. McKenna* because here, in addition to the attorney general's broad constitutional and statutory authority, there is a statute specifically directed to the situation before us."[32]

Justice Alexander issued a short concurring opinion. He insisted that the attorney general retains "discretion to decline such representation if the appeal is frivolous," in light of the attorney general's oath as a member of the Washington State Bar Association, officer of the courts of the state, and as a separate branch of the state government.[33] But Justice Alexander pointed out that Attorney General McKenna did not assert that such an appeal would be frivolous.

Justice Stephens wrote a dissenting opinion, joined by Justice Pro Tem Sanders. Justice Stephens insisted that the majority's opinion "fundamentally misunderstands the authority and duty of the attorney general under our constitution and relevant statutes," and that "it vastly expands the circumstances under which this court will grant a writ of mandamus."[34] Justice Stephens also offered a third reason for disagreeing with the majority: "I find it impossible to reconcile the majority's analysis here with our decision in *McKenna*."[35] In particular, Justice Stephens contended that the majority's understanding of the representational duties that the attorney general "shall" provide pursuant to RCW 43.10.030 is inconsistent with the discretion it recognized in *City of Seattle v. McKenna*. Justice Stephens also concluded that the majority's opinion granting a writ of mandamus on behalf of one constitutional officer was inconsistent with *City of Seattle v. McKenna*'s

rejection of the argument that "where the governor and attorney general disagree, the attorney general may not proceed in the name of the state." "Reading the two cases together," wrote Justice Stephens, "it is unclear why a writ of mandamus is appropriate to force the attorney general to follow the commissioner's wishes in this litigation but it is inappropriate in *McKenna*."

Goldmark Reconsidered?

On September 21, Attorney General McKenna filed a motion for reconsideration in *Goldmark v. McKenna*. In addition to offering several arguments that "the majority has misapprehended law and overlooked fact," the attorney general's motion alternatively requests that the court "modify the majority opinion to rest its opinion unambiguously on RCW 43.12.075 and remove references to RCW 43.10.040 and RCW 43.10.067."[36]

It is a rare occurrence for the Washington Supreme Court to reverse itself in the same proceeding.[37] However, the Court did withdraw and significantly modify one of its opinions in April, 2011.[38] The Attorney General's motion to reconsider in *Goldmark v. McKenna* is pending as of this writing.

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Endnotes

1 City of Seattle v. McKenna, 2011 Wash. LEXIS 666 (2011).

2 Goldmark v. McKenna, 2011 Wash. LEXIS 668 (2011).

3 *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

4 *City of Seattle*, 2011 Wash. LEXIS 666, at *3 (2011).

5 Florida v. U.S. Health & Human Servs., 2011 U.S. Dist. LEXIS 8822 (N.D. Fla., 2011).

6 Florida v. U.S. Health & Human Servs., 648 F.3d 1235 (11th Cir. 2011).

7 On November 14, 2011, the U.S. Supreme Court granted certiorari in the case. U.S. Supreme Court, Certiorari—Summary Dispositions 3 (Nov. 14, 2011), *available at* http://www.supremecourt.gov/orders/courtorders/111411zor.pdf.

8 According to the LEXIS reported version, the court's opinion was joined by Chief Justice Barbara Madsen, Justice Charles W. Johnson, Justice Gerry L. Alexander, Justice Tom Chambers, Justice Mary E. Fairhurst, and Justice James M. Johnson. *See City of Seattle*, 2011 Wash. LEXIS 666, at *1. Justice Pro Tem Richard Sanders issued a concurring opinion that was joined by Justice Debra L. Stephens, but neither is listed as specifically joining the court's opinion. *See id.*

Justice Owens wrote the opinion for the court in its unanimous ruling in *Brown v. Owen*, 206 P.3d 310 (Wash. 2009). Prior to *City of Seattle* and *Goldmark v. McKenna*, 2011 Wash. LEXIS 668 (2011), the Washington Supreme Court's most recent mandamus case involving a request for a writ of mandamus to be issued against a state executive branch officer and raising significant separation of powers issues was in *SEIU Healthcare 775NW v. Gregoire*, 229 P.3d 774 (2010) (dismissing a petition for a writ of mandamus compelling the governor to revise the budget submitted to the legislature to implement pay increases as inappropriate since redistributive budgetary decisions require the governor's discretion as a constitutional officer).

9 *City of Seattle*, 2011 Wash. LEXIS, at *2.

10 *See id.* at *6-7 (discussing Wash. Const. art III, secs. 1, 3, 10, 21, 24, art. IV, sec. 9).

11 *City of Seattle*, 2011 Wash. LEXIS, at *5.

12 *Id.* at *6-*7 (citing State *ex rel.* Attorney Gen. v. Seattle Gas & Electric Co. 28 Wash. 2d 488, 495-496 (1902) ("The attorney general of the state . . . is not a common-law officer. . . . Every office under our system of government, from the governor down, is one of delegated powers.")); *see also id.* at *9 (citing three additional cases relying on *Seattle Gas & Electric Co.*, 28 Wash. 2d 488).

13 *City of Seattle*, 2011 Wash. LEXIS at *11-*12.

14 RCW 43.10.030.

15 *City of Seattle*, 2011 Wash. LEXIS at *12.

16 *Id.* at *15-16 (quoting State v. Taylor, 58 Wash. 2d 252, 256, 257, (1961); citing Taylor, Young Ams. for Freedom v. Gorton, 588 P.2d 195 (Wash. 1978); RCW 40.10.030(1)).

17 *City of Seattle*, 2011 Wash. LEXIS at *1.

18 *Id.* at *17.

19 *Id.* (citing 28 U.S.C. § 2201(a)).

20 *City of Seattle*, 2011 Wash. LEXIS at *17 (citing Sate v. Asotin County, 79 Wash. 2d 634, 638 (1914)).

21 *City of Seattle*, 2011 Wash. LEXIS at *18.

22 *Id.* at *19.

23 *Id.* at *20-21 (Alexander, J., concurring).

24 *Id.*

25 *Id.* at *21-23 (Sanders, J., concurring).

26 *Id.* at *22-23 (discussing State v. Taylor, 362 P.2d 247 (Wash. 1961); Young Ams. for Freedom v. Gorton, 588 P.2d 195 (1978)).

27 *City of Seattle*, 2011 Wash. LEXIS at *24 (Sanders, J., concurring).

28 Goldmark v. McKenna, 2011 Wash. LEXIS 668 (2011).

29 The composition of the court's personnel in *Goldmark v. McKenna* differed slightly from *City of Seattle v. McKenna*. In *Goldmark*, Justice James M. Johnson recused and was replaced by Justice Pro Tem Anne L. Ellington, a member of Division One of the Washington Court of Appeals. According to the LEXIS reported version, the court's opinion was joined by Chief Justice Barbara Madsen, Justice Tom Chambers, Justice Susan Owens, Justice Mary E. Fairhurst, and Justice Pro Tem Anne L. Ellington. *See Goldmark,* 2011 Wash. LEXIS 668.

30 *Id.* at *17.

31 *See id.* at *9.

32 *Id.* at *16 n.4.

33 *Id.* at *24 (Alexander, J., concurring).

34 *Id.* at *26, (Stephens, J., dissenting).

35 *Id.* at *37.

36 Motion for Reconsideration at 22, Goldmark v. McKenna, No. 84704-5 (Wash. Sept. 21, 2011).

37 *See, e.g.*, Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake, 83 P.3d 419 (Wash. 2004) (on rehearing, vacating, in part, its prior ruling).

38 Schnall v. AT&T Wireless Servs., Inc., 259 P.3d 129 (2011) (substituting previously withdrawn opinion on reconsideration).

Nebraska High Court Applies Common Law Doctrine of *In Loco Parentis* to Confer Standing on Former Same-Sex Domestic Partner in Child Custody Dispute

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Bases for Standing

The primary issue before the court was the issue of Latham's standing to seek custody and visitation. "Standing relates to a court's power, that is, jurisdiction, to address issues presented and serves to identify those disputes which are appropriately resolved through the judicial process."[16] In Nebraska, courts have held that both biological and adoptive parents have a statutory basis for standing to seek custody and visitation of a minor child.[17] Because same-sex marriage and civil unions are invalid and unrecognized in Nebraska, Latham was neither eligible to marry Schwerdtfeger nor eligible to adopt P.S.[18] Complicating the matter further, existing statutes addressing child custody matters failed to confer standing on Latham.[19] On appeal, Latham conceded that she had no statutory basis for standing.[20] The court then looked to Nebraska common law and other jurisdictions for guidance as to whether the common law doctrine of *in loco parentis* granted Latham standing to seek custody and visitation of the child.[21]

"The *in loco parentis* basis for standing recognizes that the need to guard the family from intrusions by third parties and to protect the rights of the natural parent must be tempered by the paramount need to protect the child's best interest."[22]

> [A] person standing *in loco parentis* to a child is one who has put himself or herself in the situation of a lawful parent by assuming the obligations incident to the parental relationship, without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent.[23]

Nebraska recognized in *Hickenbottom v. Hickenbottom* that the doctrine of *in loco parentis* was applicable to determine stepparent visitation rights with the best interest of the child in mind.[24] Likewise, in *Weinand v. Weinand*, the Nebraska Supreme Court held "in the absence of a statute, child support may properly be imposed in cases where a stepparent has voluntarily taken the child into his or her home and acted *in loco parentis*."[25] Prior to this case, Nebraska had only applied the doctrine in cases of stepparents and grandparents, so the court looked to other jurisdictions for guidance on the issue of whether non-biological parents may seek custody using the doctrine.[26]

In Kentucky, "[a] nonparent has standing to seek custody and visitation of the child when the child was conceived by artificial insemination with the intent that the child would be co-parented by the parent and her partner."[27]

In *J.A.L. v. E.P.H.*, a Pennsylvania Superior Court explained that "the doctrine of *in loco parentis* is viewed in the context of standing principles in general, its purpose is to ensure that actions are brought only by those with a genuine substantial interest," and because "a wide spectrum of arrangements [have filled] the role of the traditional nuclear family, flexibility in the application of standing principles is required. . . ."[28] In that case, the Pennsylvania court ruled that a non-biological parent seeking partial custody had standing under the doctrine of *in loco parentis*.[29]

The Wisconsin Supreme Court explained that "the legislature did not intend the visitation statutes to bar the courts from exercising their equitable power to order visitation in circumstances not included within the statutes but in conformity with the policy directives set forth in the statutes."[30]

The Nebraska Supreme Court reversed the district court ruling, concluding that the common law doctrine of *in loco parentis* applied to the standing analysis of Latham's case.[31] The court explained,

> Because the purpose of the doctrine of *in loco parentis* is to serve the best interest of the child, it is necessary to assess the relationship established between the child and the individual seeking *in loco*