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

claimed that after the couple separated their finances, Latham discontinued financial support of the child.[8] Between October and December of 2009, Latham claimed that she was only allowed to spend a total of three days with the child.[9]

Procedural History

In December 2009, Latham filed a complaint for custody and visitation of P.S. in the district court for Douglas County in which she claimed she had standing to bring the action under the doctrine of *in loco parentis*.[10] In February 2010, Schwerdtfeger filed a motion for summary judgment.[11] The court then ordered the parties to submit briefs on Latham's *in loco parentis* status.[12] On July 2, 2010, the district court ruled that the doctrine of *in loco parentis* did not apply and dismissed Latham's claim with prejudice and granted Schwerdtfeger's motion for summary judgment.[13]

Latham appealed and claimed that the district court erred when it concluded that "the doctrine of *in loco parentis* did not apply," that "there were no genuine issues [as] to a material fact," and that she "lacked standing to seek for custody and visitation of the minor child."[14]

When the Nebraska Supreme Court reviewed the case, it did not make a final determination of whether to grant Latham custody and visitation. The court reversed and remanded, holding that 1) the district court erred when it concluded that the doctrine of *in loco parentis* did not apply and 2) there were genuine issues of material fact as to whether Latham was entitled to custody and visitation of the minor child.[15]

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Arkansas Supreme Court Strikes Down Ban on Adoption by Unmarried Cohabitating Couples

by Jordan E. Pratt

In a unanimous opinion handed down on April 7, 2011, the Arkansas Supreme Court invalidated—on state constitutional right-to-privacy grounds—a ban on adoption and foster parenting by unmarried adults who cohabitate with sexual partners.[1] Although the law applied to both heterosexual and homosexual couples, the decision has captured public attention largely because of its implications for the latter group.[2] This article briefly describes the law, the suit leveled against it, and the Arkansas Supreme Court's decision in *Arkansas Dep't of Human Services v. Cole*.

A. The Law

In November 2008, the voters of Arkansas approved a ballot initiative known as the Arkansas Adoption and Foster Care Act of 2008.[3] Taking effect on January 1, 2009, the Act prohibited individuals who cohabitate with a sexual partner outside of marriage from adopting or foster parenting minor children.[4] Noting the state's public policy of promoting marriage, and declaring that "it is in the best interest of children in need of adoption or foster care to be reared in homes in which adoptive or foster parents are not cohabitating outside of marriage," the Act applied equally to heterosexual and homosexual couples.[5]

B. The Litigation

Two days before the Adoption and Foster Care Act became effective, a group of plaintiffs filed suit in state court for injunctive relief.[6] The group included a lesbian grandmother wishing to adopt her granddaughter (Sheila Cole),[7] unmarried couples who wanted to foster or adopt children, adult parents who wanted to designate unmarried couples as the adoptive parents of their children in the event of their death or incapacity, and the biological children of those parents.[8] In a thirteen-count complaint, the plaintiffs alleged multiple violations of the federal and Arkansas constitutions. In Count 10, the plaintiffs alleged that the Act violated, among other things, federal and state constitutional rights to privacy by placing an impermissible burden on intimate relationships.[9]

The State moved to dismiss the complaint, and the Family Council Action Committee (FCAC), an intervening party in support of the Act, filed its own motion to dismiss.[10] After discovery, the State, FCAC, and the plaintiffs moved for summary judgment.[11] The trial court granted the plaintiffs' motion on Count 10 and determined that the Act violated the Arkansas Constitution. The court found that the Act "infringes upon the fundamental right to privacy guaranteed to all citizens of Arkansas" because it "significantly burdens non-marital relationships and acts of sexual intimacy

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).

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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*

parentis status. The primary determination in an *in loco parentis* analysis is whether the person seeking *in loco parentis* status assumed the obligations incident to a parental relationship.[32]

Satisfied with the reasoning of other jurisdictions on the threshold question of standing, the court then addressed the issue of summary judgment.

Summary Judgment

"In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence."[33] In its reversal, the court stated,

> The facts taken in light most favorable to Latham show that she was involved in the decision to conceive the minor child, was present at his birth, spent the first four years of his life in the home with him, and took part in parental duties such as feeding, clothing, and disciplining him.[34]

The court was "persuaded that Latham had raised genuine issues of material fact for trial concerning her continuing relationship with the minor child and what outcome will best serve the child's interests.[35]

The Nebraska Supreme Court placed the emphasis on the relationship between Latham and the child, asserting that the district court erred when it placed the emphasis on the relationship between Latham and Schwerdtfeger at the time of the hearing.[36] The Nebraska Supreme Court determined that the district court erred when it determined that the doctrine of *in loco parentis* did not apply and dismissed the case.[37] While the decision granted Latham standing to seek custody and visitation, the court concluded,

> There are material questions of fact concerning the amount of time Latham spent with P.S. and the nature and extent of the relationship between Latham and P.S. after Latham and Schwerdtfeger separated. Whether and to what extent Latham's participation in P.S.'s life are in his best interests must await trial.[38]

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Endnotes

1 Latham v. Schwerdtfeger, 282 Neb. 121 (2011).

2 *Id.* at 123.

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.* at 124.

8 *Id.*

9 *Id.*

10 *Id.* at 122.

11 *Id.* at 124.

12 *Id.*

13 *Id.* at 125.

14 *Id.* at 125-126.

15 *Id.* at 123.

16 *Id.* at 126. (citation omitted).

17 *Id.* at 126.

18 *See* Neb. Const. art. I, § 29 (2000) ("Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.").

19 *Latham*, 282 Neb. at 128.

20 *See, e.g.*, Neb. Rev. Stat. §§ 42-341 to 42-381 (2008) (dissolution actions); Neb. Rev. Stat. §§ 43-1401 to 43-1418 (2008) (paternity actions); Neb. Rev. Stat. §§ 43-245 to 43-2,130 (2008) (juvenile proceedings); Neb. Rev. Stat. §§ 30-2601 to 30-2616 (2008) (guardianship proceedings); Neb. Rev. Stat. §§ 43-101 to 43-165 (2008) (adoption proceedings); Neb. Rev. Stat. §§ 43-1226 to 43-1266 (2008) (Uniform Child Custody Jurisdiction and Enforcement Act).

21 *Latham,* 282 Neb. at 127-128.

22 *Id*. at 126 (citation omitted).

23 *Id.* at 128 (citation omitted).

24 *Id.*

25 *Id*. (citation omitted).

26 *Id*. at 129.

27 *Id*. (quoting Mullins v. Picklesimer, 317 S.W.2d 569, 575 (Ky. 2010)).

28 *Id*. (citation omitted).

29 *Id*. at 130-131.

30 *Id*. at 131 (quoting Custody of H.S.H.-K, 193 Wis. 2d 649, 533 N.W.2d 419 (1995)).

31 *Id*. at 132.

32 *Id.* at 131.

33 *Id*. at 122.

34 *Id*. at 133.

35 *Id.*

36 *Id*.

37 *Id.* at 135.

38 *Id.*

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a fundamental right and a statutory privilege—in this case, sexual intimacy and adoption, respectively—can constitute a burden on the right.[21] As its chief support for this proposition, the court enlisted the United States Supreme Court's decision in *Sherbert v. Verner*,[22] a well-known free exercise case that shielded a Seventh-Day Adventist from a state welfare benefits regime requiring availability to work on Saturdays. The Arkansas Supreme Court analogized the Adoption and Foster Care Act, which required a choice between sexual intimacy and adoption, to the welfare benefits regime in *Sherbert*, which required a choice between worshiping God according to the dictates of conscience and receiving welfare benefits. The court reasoned that the Act, by forcing such a choice, burdened the right to privacy implicitly protected by the Arkansas Constitution.[23]

Before deciding whether the burden imposed on the right to privacy was sufficient to trigger heightened scrutiny, the court set out to distinguish the Act from non-cohabitation orders historically permitted in divorce and child custody cases. The court cited two important distinctions. First, cohabitation orders are more narrowly directed toward the state's interest in promoting the best interest of children because they result from case-by-case determinations, not simply a blanket prohibition.[24] Second, the state has a much greater need to shield children from third-party "strangers" who live with divorced parents than it does to shield children from individuals who presumably must undergo extensive pre-adoption and pre-fostering screening.[25]

Having determined that the Adoption and Foster Care Act burdened the right to privacy implicit in the state constitution, the Arkansas Supreme Court found that the burden was severe enough to trigger the strict scrutiny test mandated by *Jegley*. The court reasoned that forcing a choice between sexual intimacy and adoption or fostering "is not appreciably different from [the burden] imposed by the criminal [sodomy] statute in *Jegley*," as both laws would ultimately require state investigations in the bedroom.[26] According to the court, forcing the plaintiffs to choose between their fundamental right to extramarital sexual intimacy and the privilege of having children by adoption or fostering was enough of a burden to trigger *Jegley*'s heightened scrutiny test.

The court concluded that the Arkansas Adoption and Foster Care Act could not meet the rigorous narrow-tailoring requirement of strict scrutiny. The court acknowledged that Arkansas' goal in enacting the statute—protecting the state's children and their best interests—was compelling.[27] But the Act's blanket ban cast too wide a net, the court explained. The court began by noting that several state officials had asserted in their depositions that a categorical prohibition on adoption and fostering by unmarried cohabitating couples would not serve the best interests of children.[28] And counsel for the state had conceded at oral argument that some individuals cohabitating with sexual partners could provide suitable homes for children.[29] Additionally, the state's concerns that unmarried cohabitating relationships are unstable and put children at higher risk than marital relationships "can . . . be addressed by the individualized screening process currently in place in foster and adoption cases."[30] The court described this screening process in detail, concluding that "[w]e have no doubt that this individualized assessment process is a thorough and effective means to screen out unsuitable applicants . . . ."[31]

Having determined that the Arkansas Adoption and Foster Care Act directly and substantially burdened the fundamental right to privacy implicit in the state's constitution and that the Act was not the least restrictive means of protecting the state's children from unstable homes, the Arkansas Supreme Court invalidated the Act and affirmed the decision below.[32] Accordingly, the court refused to address the federal constitutional claims and remaining state constitutional claims that the plaintiffs advanced on cross-appeal.[33] Although limited in its immediate effect to Arkansas, this decision will certainly add to the ongoing national dialogue concerning the ability of the several states to prohibit gay couples from adopting children or serving as foster parents.

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Endnotes

1 Ark. Dep't of Human Servs. v. Cole, 2011 Ark. 145 (2011).