Employment

Elder-Care Employment Ban Ruled Unconstitutional

BY BEN SEAL
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A lifetime employment ban preventing people convicted of an enumerated crime from working in the care of older adults is unconstitutional, the Commonwealth Court has declared.

A unanimous en banc panel of the court held Dec. 30 in *Peake v. Commonwealth* that a provision in Chapter 5 of the Older Adults Protective Services Act prohibiting convicted workers from elder-care employment, no matter the time of their conviction, violates due process because it goes beyond the necessities of the case and isn't substantially related to the act's stated objective.

"A lifetime employment ban at act-covered facilities for anyone convicted of any enumerated offense at any time ... does not bear a real and substantial relation to the stated goal of protecting older adults from 'abuse, neglect, exploitation and abandonment,'" Judge Mary Hannah Leavitt wrote for the panel.

A group of five individuals, led by Tyrone Peake, along with nonprofit social services provider Resources for Human Development Inc., filed a petition for review in the Commonwealth Court in April 2015, challenging the act's constitutionality for preventing them from obtaining employment in act-covered facilities because of past criminal convictions, despite their full qualifications.

Leavitt

Peake was convicted of attempted theft of an automobile more than 30 years ago but cannot gain employment at such facilities because of the ban, Leavitt said in a footnote. Resources said it has been forced to refuse employment to qualified candidates that it wished to hire because of the act, negatively impacting its ability to serve its clients, she said.

A 1996 amendment to the act required applicants and employees in facilities covered by the act to submit to a criminal history records check, establishing two categories for past criminal convictions. One category, including murder, rape and sexual assault, disqualified an individual from obtaining or continuing employment regardless of the date of the conviction; the other category disqualified an individual if the conviction occurred within the past 10 years, Leavitt said. A 1997 amendment to the act revised the scope of the ban, establishing a grandfather clause for employees with identical convictions who had been employed for one year at an act-covered facility upon the effective date of the amendment.

The state Supreme Court's 2003 decision in *Nixon v. Commonwealth* held the criminal history provisions of the act were unconstitutional because there was no rational basis for treating the two groups—those with one year of employment as of July 1, 1998, and those without—as differently capable of rehabilitation, Leavitt said. She struck at its irrationality.

"There is simply no rational basis to treat those employed for a year in a facility providing services to older adults as of July 1, 1998, as having rehabilitated themselves following their criminal convictions solely because of the amount of time they worked in one facility such that they do not pose a threat to older adults, but treat all other employees and applicants as incapable of rehabilitation and forever a threat to older adults," Leavitt said.

Following *Nixon*, the Department of Aging adopted an interim policy allowing a person with a disqualifying criminal record to become eligible for employment by working five years in dependent-care work after conviction or release, and allowing act-covered facilities to make hiring decisions on a case-by-case basis. But the General Assembly never amended the act, leaving the lifetime ban and the employee differentiation in place.

The petitioners argued that social science research conducted after *Nixon* shows the risk of recidivism declines over time and loses meaningful value in predicting future criminal conduct, Leavitt said. They raised a facial constitutional challenge to the ban, arguing it violates Article I, Section 1 of the Pennsylvania Constitution by unreasonably and arbitrarily excluding individuals from lawful employment. They argued the act also violates the rights to substantive due process and equal protection, Leavitt said. Resources said its substantive due process rights were violated by the act's interference with the company's right to conduct business and best serve its clients.

The state argued that the petitioners couldn't show the ban is per se unconstitutional in every application, and that the interim policy provides a mechanism for all people to gain employment.

Chapter 5 strips employers of discretion, Leavitt said, as they are not able to consider factors beyond the conviction itself, such as its timing and the job's requirements. She also rejected the act's "irrebuttable presumption of unfitness for

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Family Law

Paternity by Estoppel Hearing Needed Before Blood Test

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A full hearing on paternity by estoppel is required before the issue of biological paternity can be considered, the Superior Court has ruled.

A unanimous three-judge panel of the court in *M.L. v. J.G.M.* vacated a trial court order granting a putative father's motion for blood tests to determine paternity, holding that a record must be developed with respect to the father-child relationship before conducting a blood test.

In its Jan. 4 ruling, the court applied a 2012 state Supreme Court decision in *K.E.M. v. P.C.S.* that held that paternity by estoppel applies in Pennsylvania, but only where it can be shown on a developed record that it is in the best interests of the child.

"Although the *K.E.M.* court acknowledged flexibility in the application of the paternity by estoppel doctrine, we interpret this as requiring a searching inquiry of the father-child relationship and the child's best interests, and not a 'preliminary analysis' after ordering paternity testing," Judge Anne Lazarus wrote for the panel, which included Senior Judge William H. Platt and Judge Jack A. Panella.

Lazarus

Paternity by estoppel holds that biological status is irrelevant if a person holds a child out as his own.

The mother in the case, M.L., was married to J.G.M. in 2001 and the couple had a daughter, E.M., in 2005. The pair separated in 2011 and divorced in 2014. When they separated, J.G.M. began to question his paternity, and administered a home DNA test that excluded him as E.M.'s father, Lazarus said. In 2013, he filed a petition to terminate support.

Following a motion from M.L. to deny the petition, J.G.M. sought a psychological evaluation to determine the bond between him and the child. The Berks County trial court ordered the evaluation, and J.G.M. then filed a motion for blood tests to determine paternity. The trial court granted his motion, but had not yet determined whether the doctrine of paternity by estoppel applied, Lazarus said.

M.L. argued to the Superior Court that the doctrine should apply.

The court in *K.E.M.* determined that blood testing is authorized by the Uniform Act on Blood Tests to Determine Paternity in cases where paternity is a relevant fact, Lazarus said. But paternity is not a relevant fact where the doctrine of paternity by estoppel applies, she said.

In *M.L.*, the trial court had ordered blood testing before holding a hearing on the paternity issue, Lazarus said.

"Although the court ordered a psychological evaluation to determine the nature and extent of the bond between J.G.M. and the child ... and it relied on the evaluator's finding that the bond was virtually non-existent, there is no evaluation in the certified record on appeal," Lazarus said.

For that reason, she vacated and remanded the trial court's order, directing the court to hold a hearing on the issue of paternity to determine whether estoppel principles apply before moving forward.

Sharon L. Gray of the Law Offices of Sharon L. Gray in Wyomissing represents M.L. and said she was happy to have the case remanded.

Daniel Rabenold and Jill Koestel of Rabenold Koestel Goodman & Denaro in Wyomissing represent J.G.M. Rabenold did not return a call for comment.

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(Copies of the eight-page opinion in M.L. v. J.G.M., *PICS No. 16-0021, are available from Pennsylvania Law Weekly. Please call the Pennsylvania Instant Case Service at 800-276-PICS to order or for information.)* •

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Peer Review

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peer-review process is becoming kind of a non-issue."

Murtagh said peer review is as important as ever, but when performed without following the strictures established by the PRPA, "it can be a real boon for a plaintiff's lawyer." The situation complicates attempts at hospitals to openly discuss past incidents in order to learn from them, he said.

As an example, Murtagh pointed to an incoming director at a large hospital group. The director wanted to sit down and talk with staff, educate them on certain issues, but grew concerned about having a discussion that fell outside the protections of the PRPA. If the director referred to a specific case, could it be discoverable down the line, given that it wasn't a formal peer review?

What if a hospital's anesthesiologists attend a staff meeting to brainstorm ideas? Would the protection be in place if they referenced certain incidents?

It's becoming more and more difficult to protect peer-review information, according to defense attorney Gary Samms at Obermayer Rebmann Maxwell & Hippel.

"The more decisions there are that allow plaintiffs to get statutorily protected information, [it] can act to disincentivize health care providers from having these necessary and important peer-review committees," Samms said.

When that happens, he said, patient safety can be inhibited.

The only way to avoid questions about what material falls under the PRPA is to prospectively prepare for them, Murtagh said. He counsels clients to follow a checklist in order to adhere to the act's requirements and ensure a teaching exercise won't be available to plaintiffs in potential future litigation.

The act describes peer review, in part, as "the procedure for evaluation by professional health care providers of the quality and efficiency of services ordered or performed by other professional health care providers, including practice analysis." It gives immunity to those providing information to a peer-review organization and confidentiality to records involved in the process, as long as they aren't available from an original source.

The confidentiality issue has been the subject of recent litigation, and attorneys said the courts are beginning to tighten the protection, creating opportunities for plaintiffs. Rieders said it's a move back to the original intent of the act, and an important one as health care becomes more corporate.

"In order to be able to prove systemic negligence, you have to be able to investigate the system," Rieders said.

Gary Solomon of Lowenthal & Abrams represented the plaintiff in *Venosh v. Henzes*, an Aug. 7 Superior Court decision that held a peer review initiated by an insurance company to decide whether to maintain a business relationship with the doctors being reviewed is not privileged. Hospitals are changing their policies and procedures in an effort to get certain information protected by the act, he said.

Even when the PRPA is pierced and information is made available in discovery, it's often "boilerplate," Solomon said, not the type of evidence that will turn a case. Weitz agreed, saying he never plans on getting anything internal that will help his case.

But the possibility exists for a golden piece of evidence to come from an internal discussion that didn't meet the PRPA's standards, Solomon said, so plaintiffs will continue to pursue it and health care professionals will continue to seek the act's protections.

Richards said that because of the fact-specific nature of PRPA cases, "there is absolutely no uniformity throughout the state." Some judges simply accept the defendants' claims that material is protected, while others lean toward allowing discovery of similar material, she said.

Even appellate precedent, like the *Venosh* case, can only go so far to delineate the law of the land because each case has its own set of facts, Solomon said.

Murtagh said plaintiffs don't chase potentially privileged material as much as they once did, but the defense bar is still focused on "protecting the protection." In any medical malpractice case that comes through the door, he said, it could be an issue.

"It's a case-by-case situation and the only way to pre-empt it is to do everything right to begin with," he said.

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Penalties

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present scenario." He said it could affect declaratory relief in theoretical cases as disparate as a district attorney's intent to seek the death penalty or a negligence plaintiff's intent to seek punitive damages.

Robert L. Byer of Duane Morris represented EQT along with Leonard Fornella and Kevin Garber of Babst Calland. Byer referred comment to EQT.

The company's general counsel and vice president, Lewis B. Gardner, said in a statement that he was pleased with the decision.

"We look forward to a hearing before the Commonwealth Court on the [DEP]'s erroneous legal interpretation of the Clean Streams Law," Gardner said.

Geoffrey Ayers represented the DEP and did not return a call for comment.

Justice J. Michael Eakin did not participate in the decision.

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(Copies of the 20-page opinion in EQT Production v. Department of Environmental Protection*, PICS No. 16-0019, are available from Pennsylvania Law Weekly. Please call the Pennsylvania Instant Case Service at 800-276-PICS to order or for information.)* •

Unconstitutional

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employment."

"It defies logic to suggest that every person who has at any time been convicted of any of the crimes listed in Section 503 of the act, including misdemeanor theft, presents a danger to those in an act-covered facility," Leavitt said.

Further, she said, facilities should have the opportunity to assess a situation and exercise discretion in hiring applicants.

The state did not argue the ban was constitutional, Leavitt said, but rather that it is not applying the ban to the petitioners and instead is operating under the Department of Aging's interim policy. The policy, though, is not legally binding because the agency lacks the authority to excise the ban, she said.

The petitioners were represented by Peter "Tad" LeVan Jr. of LeVan Law Group, Sharon M. Dietrich and Janet Ginzberg of Community Legal Services, Seth Kreimer of the University of Pennsylvania Law School, and Robert LaRocca of Kohn, Swift & Graf. LeVan said he was "thrilled" with the result and hopes the unanimity of the decision will dissuade the state from appealing to the Supreme Court.

The state was represented by Doris Leisch and Daniel Fellin of the Office of Chief Counsel, along with Kenneth Joel, Jonathan Koltash and Lucy Fritz of the Office of Attorney General. Leisch did not respond to a request for comment.

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(Copies of the 30-page opinion in Peake v. Commonwealth*, PICS No. 16-0018, are available from Pennsylvania Law Weekly. Please call the Pennsylvania Instant Case Service at 800-276-PICS to order or for information.)* •

PENNSYLVANIA BULLETIN

Below is the table of contents of the last issue of the Pennsylvania Bulletin, the official gazette of the Commonwealth. The Bulletin contains notices, regulations and other documents filed with the Legislative Reference Bureau, and supplements to the Pennsylvania Code. Courts are required to take judicial notice of the contents of the Bulletin.

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