

No. 33287 *Debbie Plumley v. West Virginia Department of Health and Human Resources*
 /Office of Health Facility Licensure and Certification

FILED

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Albright, J., dissenting:

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OF WEST VIRGINIA

This case should forever be known as the “No Chance of Redemption; Scarlet Letter” case.

The lower court opinion and order in this case evidenced a thorough and sensitive consideration of the evidence and a thorough and sensitive consideration of the language and underlying purposes of Article 5E, Chapter 16 of the Code of West Virginia of 1931, as amended, providing for the “Registration and Inspection of Service Providers in Legally Unlicensed Health Care Homes,” and of the regulations promulgated under the authority of that statute.

In essence, the lower court gave a reasoned, limiting, interpretation to the provisions of that statute and the regulations promulgated under it which operate to prohibit the granting of registration to certain prospective service providers in legally unlicensed health care homes. In effect, the lower court sought to ascertain whether the record disclosed that the applicant had been guilty of abuse or a criminal act that might reasonably be expected to be a threat to the “dependent population” the applicant sought to serve. After carefully considering the record of the particular facts underlying this applicant’s felony conviction in 1987, and the applicants’ employment activities since that time, the lower court concluded that those underlying facts, that felony conviction and that employment record clearly demonstrated that the applicant posed no threat whatever to the dependent population she sought to serve.

My colleagues who joined in the majority opinion chose instead a rigid, all encompassing

interpretation of the statute and regulations, setting in concrete bright line syllabus points in support of their approach to the statute. The clear effect of the majority opinion is to announce that there can be no extenuating circumstances, no reasoned exceptions, no redemption!

The reality of this case is that the applicant did not herself engage in an incestuous act with her child. The reality is that the lapse of judgment—the criminal act of which she was guilty in 1987—arose out of a serious failure to protect her child from sexual assault by another person, for which she has expressed remorse and for which she has been punished by rather lengthy imprisonment. The reality of the case is also that the lower court heard substantial evidence that for a long time the applicant had in fact rendered to an aged “dependent population” the very services for which she was seeking registration, all without any incident or occasion that suggests in the slightest that she might abuse or hurt that aged “dependent population.” The lower court could see what my majority colleagues would not:

There simply was nothing in record which demonstrated any reasonable likelihood that this applicant, in these circumstances, had or would abuse or hurt the “dependent population” she sought to serve.

The lower court properly concluded that the designee of the Secretary of the Department of Health and Human Resources serving as the “Director” under the statute had unreasonably applied the statute and the regulations to deny this applicant registration.

In reversing that conclusion, the majority has conjured up new law, rigid, no-holds barred, bright lines of prohibition that deny the possibility--indeed the high probability--that a person can achieve redemption, can overcome failings, can become a productive, good citizen deserving of

employment and, in this case, registration as a service provider to an aged dependent population.

Accordingly, her reward from this Court is to be awarded a “Scarlet Letter.” From that I dissent, with a special note of admiration for the courage and sagacity of the lower court.