

Virginia State Crime Commission

Barrier Crimes

2011

Barrier Crimes

Executive Summary

Based on the Virginia Commission on Youth's (COY) 2011 report on kinship care in Virginia, a letter was sent to the Crime Commission, requesting a study of how Virginia's barrier crime statutes affect kinship care placements, and whether it might be possible to ease the prohibition on relatives serving as foster home providers if anyone in the household has ever been convicted of felony drug possession or a non-egregious misdemeanor. It was also requested that the Crime Commission examine all of Virginia's barrier crimes statutes, to determine if they should be clarified, and to identify any existing gaps in their lists of offenses.

Virginia has one of the most restrictive barrier crimes statutes in the country for purposes of qualifying to be a foster care provider. Any conviction for any of the offenses listed in Va. Code § 63.2-1719 serves as a permanent bar to ever being a foster parent. This prohibition also applies in cases where a relative of the child offers to provide foster care, a situation referred to as kinship care. As a result of Virginia's stringent barrier crimes laws, for the past two fiscal years, 80 individuals were precluded from serving as kinship care providers to a relative. Federal law does not permit states to adopt differing standards between kinship care providers and other foster care homes. However, federal law does allow states to create a waiver process for kinship care homes, provided that the process involves a case-by-case determination of the suitability of the home, and no safety standards are waived.

The four barrier crimes statutes in Virginia do not individually list every offense that is included. Instead, some of the offenses are referred to in a general sense; e.g., "arson as set out in Article 7 (§ 18.2-77 et seq.) of Chapter 4 of Title 18.2." This makes the statutes difficult to read—it is not easy to tell, without referring to other parts of the Code of Virginia, whether a particular criminal offense is included or not. Even more problematic is the fact that several serious felonies have been created by the Virginia legislature, but have not been added to the barrier crimes statutes: abduction for purposes of forced labor, violations of protective orders and family abuse protective orders, and extortion.

The Crime Commission recommended that a waiver process be created for kinship care situations, so that a felony conviction for drug possession, or a misdemeanor conviction for an arson offense, would not continue to be a permanent bar to a relative serving as a kinship care provider. The waiver process must include an individual determination that the applicant not pose a risk to the safety of the child, and ten years must have passed from the time of the conviction. Only felony drug possession convictions could be waived; felony convictions for drug distribution or possession with the intent to distribute would still be a lifetime bar to providing kinship care. The Crime Commission also recommended that the felony crimes of abduction for purposes of forced labor, violations of protective orders and family abuse protective orders, and extortion, be

included in all four of Virginia's barrier crimes statutes. The Crime Commission declined to endorse the concept of rewriting Virginia's barrier crimes statutes so that all the criminal offenses are listed individually.

Background

In 2011, COY sent an official request to the Crime Commission to study the issue of how kinship care placement in Virginia is affected by the applicable barrier crimes statute, Va. Code § 63.2-1719.¹ It was determined by COY, as a result of their 2010 study on the topic, that for purposes of kinship care, Virginia's barrier crimes statute is overly restrictive.² It was also found that all four of Virginia's barrier crimes statutes,³ not just the one that pertains to kinship care, are confusing and inconsistent, with existing gaps in the statutes.⁴ The COY requested the Crime Commission examine the barrier crimes statutes, and offer recommendations on making them consistent.

Analysis

CRIMINAL CONVICTION BARRIERS TO KINSHIP CARE

Under Virginia law, anyone who has ever been convicted of any of the crimes listed in Va. Code § 63.2-1719 is ineligible to serve as a foster parent.⁵ There are no "look back" provisions, or expiration periods, for any of these crimes, with the exception of misdemeanor assault and battery in violation of Va. Code § 18.2-57.⁶ Unless a person has had their civil rights restored by the Governor,⁷ a conviction for any offense listed under Va. Code § 63.2-1719 creates a lifetime bar to serving as a foster parent. This prohibition also applies if any individual living in the proposed foster home has been convicted of any of the offenses.⁸ Under Virginia law, no exception can be made, even if a relative of the child offers to serve as a foster care provider.⁹

Virginia's barrier crimes prohibitions for foster care are amongst the most stringent in the country and exceed what is required by federal law.¹⁰ This may be a contributing factor to Virginia ranking last in the country in terms of kinship care placements.¹¹ According to information provided by the Virginia Department of Social Services, in both Fiscal Year (FY) 2010 and FY11, there were 80 individuals who were barred from providing kinship care after a criminal background check revealed a criminal conviction for one of the offenses listed under Va. Code § 63.2-1719. By way of comparison, in FY10, 656 relatives of foster children were deemed to be eligible to provide foster care after a criminal background check; 297 children were subsequently placed in kinship care. For FY11, 778 relatives were deemed to be eligible after a criminal background check, and 294 children were placed in kinship care. These figures contrast with the 3,493 children who were placed in non-relative foster homes in FY10, and the 3,345 children placed in non-relative foster homes in FY11.

While the number of potential kinship care placements is much smaller than the total number of children who are placed in foster care each year, public policy generally

regards it as desirable to place foster children in the homes of relatives, when feasible. Nationally, there has been an initiative to increase the use of kinship care when a foster care placement is required.¹² Several dozen additional children might be placed into kinship care each year, if Virginia created a time limit for certain of the less egregious offenses in Va. Code § 63.2-1719, such as simple possession of a Schedule I or II controlled substance, or a misdemeanor arson conviction, with such time limits only being applicable to kinship care.

However, federal law does not permit states to create separate standards for kinship care homes, compared with the standards for foster care homes. The same standards must apply to each.¹³ If a state violates this federal requirement, it is subject to losing federal funds.¹⁴

One solution to this problem would be to allow exemptions for these criminal convictions for all foster care families, not just kinship care providers. Another possibility is suggested by federal law, which allows states to create a waiver process for kinship care applicants who would otherwise be unable to meet all of the requirements for a foster care home.¹⁵ Such waivers must be made “only on a case-by-case basis for non-safety standards.”¹⁶ A prior felony conviction for drug possession would not constitute a safety standard violation, provided at least five years had passed from the time of the conviction.¹⁷

VIRGINIA’S BARRIER CRIMES STATUTES

The four barrier crimes statutes located in the Code of Virginia do not individually list every specific offense that is included.¹⁸ Rather, many of the prohibited offenses are referred to generally, using such phrases as “arson as set out in Article 1 (§ 18.2-77 et seq.) of Chapter 5 of Title 18.2.”¹⁹ As a result, these statutes can be difficult for the general public to read, and also can create ambiguities.²⁰ Therefore, it has been proposed that the barrier crimes statutes be rewritten, with all the criminal offenses clearly listed.²¹

Even more problematic is when the Virginia legislature creates a new criminal offense, but fails to include it in the barrier crimes statutes. For example, in 2009, Virginia created the new offense of abduction for purposes of forced labor, but failed to include this crime in any of the barrier crimes statutes.²² Currently, the felonies of abduction for purposes of forced labor,²³ violation of a protective order,²⁴ and violation of a family abuse protective order,²⁵ are not included in any of the barrier crimes statutes, and extortion²⁶ is not included in Va. Code § 63.2-1719, though it is included in the other three statutes.

Conclusion

The Crime Commission discussed the advisability of modifying Virginia’s barrier crimes law, as it pertains to foster care, generally, and kinship care in particular. After deliberations, the Crime Commission voted to recommend that Virginia modify the barrier crimes statute, as it pertains to kinship care placement, to allow for individual

waivers on a case-by-case basis, but only for the crimes of felony drug possession and misdemeanor arson offenses. Ten years must have passed from the time of the conviction. Prior convictions for felony drug distribution or possession with the intent to distribute should continue to be an absolute bar to serving as a kinship care provider. The Crime Commission declined to endorse the concept of rewriting Virginia’s barrier crimes statutes so that all the criminal offenses are listed individually. The Crime Commission did vote to recommend that the crimes of abduction for purposes of forced labor, felony violation of a protective order, and felony violation of a family abuse protective order all be included in the various barrier crimes statutes.

During the 2012 Regular Session of the Virginia General Assembly, Senator Janet Howell introduced Senate Bill 299, which modified the kinship care barrier crimes statutes in the manner recommended by the Crime Commission.²⁷ After passing both the Senate and the House of Delegates, this bill was signed into law by the Governor on April 4, 2012.²⁸ Also during the 2012 Regular Session, Delegate Robert Bell introduced House Bill 971, which added the crimes of abduction for purposes of forced labor, felony violation of a protective order, and felony violation of a family abuse protective order to the four barrier crimes statutes, and the crime of extortion to the barrier crime statute of Va. Code § 63.2-1719.²⁹ After passing both the House of Delegates and the Senate, this bill was signed into law by the Governor on March 23, 2012.³⁰

¹ Kinship care is foster care that is provided by a relative of the child.

² Va. Comm’n. on Youth, Barriers to Kinship Care in Virginia, RD17, 21 (2011).

³ VA. CODE ANN. §§ 37.2-314, 37.2-408.1, 63.2-1719, 63.2-1726 (West 2011).

⁴ Va. Comm’n. on Youth, Barriers to Kinship Care in Virginia, RD17, 21 (2011).

⁵ VA. CODE ANN. § 63.2-901.1(E) (West 2011).

⁶ *Id.* The misdemeanor conviction for assault and battery must not have involved “abuse, neglect, moral turpitude, or a minor,” and ten years must have elapsed following the conviction.

⁷ VA. CODE ANN. § 63.2-901.1(F)–(G) (West 2011).

⁸ VA. CODE ANN. § 63.2-1721 (West 2011).

⁹ VA. CODE ANN. § 63.2-900.1(B) (West 2011).

¹⁰ Va. Comm’n. on Youth, Barriers to Kinship Care in Virginia, RD17, 16 (2011).

¹¹ *Id.* at 11.

¹² *Id.* at 14. *See also* 42 U.S.C. § 671(a)(19) (2011).

¹³ 42 U.S.C. § 671(a)(10) (2011).

¹⁴ 42 U.S.C. § 671(a) (2011).

¹⁵ 42 U.S.C. § 671(a)(10) (2011).

¹⁶ *Id.*

¹⁷ 42 U.S.C. § 671(a)(20)(A) (2011).

¹⁸ VA. CODE ANN. §§ 37.2-314, 37.2-408.1, 63.2-1719, 63.2-1726 (West 2011).

¹⁹ VA. CODE ANN. §§ 37.2-314, 37.2-408.1, 63.2-1719, 63.2-1726 (West 2011).

²⁰ For example, it is not clear if making a bomb threat in violation of Va. Code § 18.2-83, which is a Class 5 felony, would qualify, under a plain reading of the statute, as a barrier crime. While this serious crime is located in Article 1 of Chapter 5 of Title 18.2, it is not arson, and is arguably not an arson crime. Currently, state agencies interpret violations of Va. Code § 18.2-83 to be akin to arson, for purposes of applying the relevant barrier crime statutes.

²¹ S.B. 1243, 2011 Gen. Assemb., Reg. Sess. (Va. 2011).

²² 2009 Va. Acts ch. 662.

²³ VA. CODE ANN. § 18.2-47(B) (West 2011).

²⁴ VA. CODE ANN. § 18.2-60.4 (West 2011).

²⁵ VA. CODE ANN. § 16.1-253.2 (West 2011).

²⁶ VA. CODE ANN. § 18.2-59 (West 2011).

²⁷ S.B. 299, 2012 Gen. Assemb., Reg. Sess. (Va. 2012).

²⁸ 2012 Va. Acts ch. 568.

²⁹ H.B. 971, 2012 Gen. Assemb., Reg. Sess. (Va. 2012).

³⁰ 2012 Va. Acts ch. 383.