

OP. NO. 03-105

WELFARE (SOCIAL SERVICES): CHILD ABUSE AND NEGLECT — FOSTER CARE.

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING MORALS AND DECENCY – FAMILY OFFENSES; CRIMES AGAINST CHILDREN, ETC.

CIVIL REMEDIES AND PROCEDURE: ACTIONS.

LABOR AND EMPLOYMENT: CHILD LABOR.

Chapter 816 creates affirmative defense to criminal acts, but not civil findings, of child abuse and neglect.

The Honorable Martin E. Williams
Member, Senate of Virginia
December 16, 2003

Issue Presented

You ask whether Chapter 816, which was enacted by the 2003 Session of the General Assembly and approved by the Governor, creates an affirmative defense to criminal acts of child abuse, as well as to civil findings of child abuse.

Response

It is my opinion that Chapter 816 creates an affirmative defense to criminal acts of child abuse and neglect, but does not provide an affirmative defense to civil findings of child abuse and neglect.

Background

You have been advised that local departments of social services interpret Chapter 816 to mean that parents may be free from criminal prosecution, but not civil liability. You question whether Chapter 816 provides an affirmative defense to criminal and civil proceedings against the parent.

Applicable Law and Discussion

The 2003 Session of the General Assembly enacted Chapter 816, relating to the protection of infants.¹ Abandoning a newborn child falls within the definition of child abuse and neglect.² Chapter 816 amends § 18.2-371.1(B), a portion of Virginia's criminal child abuse and neglect statutory framework, to include the following language:

2. If a prosecution under this subsection is based solely on the accused parent having left the child at a hospital or rescue squad, it shall be an affirmative defense to prosecution of a parent under this subsection that such parent safely delivered

the child to a hospital that provides 24-hour emergency services or to an attended rescue squad that employs emergency medical technicians, within the first 14 days of the child's life.^[3]

Chapter 816 adds the same language in § 18.2-371.1(B)(2) as a second paragraph in § 18.2-371 and as subsection B in § 40.1-103.⁴ Chapter 816 also grants civil and criminal immunity to hospitals and rescue squads accepting abandoned newborns.⁵ Finally, Chapter 816 grants local departments of social services the authority to take custody of abandoned children, arrange appropriate placement for the child, and institute proceedings to terminate parental rights.⁶

Depending upon the act, child abuse or neglect is a Class 4 felony under § 18.2-371.1(A) or a Class 6 felony under § 18.2-371.1(B)(1). Violation of § 18.2-371 is a Class 1 misdemeanor, and violation of § 40.1-103 is a Class 6 felony.⁷ Thus, in cases of safe delivery of a child not more than 14 days old to a rescue squad or to a hospital that provides 24-hour services, Chapter 816 creates an affirmative defense to criminal prosecution under §§ 18.2-371, 18.2-371.1 and 40.1-103. Absent proof of an affirmative defense, violation of these statutes subjects the guilty party to punishment of jail time and fines.

The Code does not contemplate civil prosecution for child abuse and neglect. Rather, under Chapter 15 of Title 63.2,⁸ local departments of social services investigate complaints of child abuse and neglect and determine if such complaints are "founded" or "unfounded."⁹ The names of those found to have committed child abuse or neglect are placed in the central registry.¹⁰

Whereas the purpose of §§ 18.2-371, 18.2-371.1 and 40.1-103 is to deter conduct and punish those found guilty of violating the respective statute, the purpose of a finding of abuse or neglect under Chapter 15 of Title 63.2 is the protection of children. Section 63.2-1500 sets forth the general policy of the Commonwealth regarding suspected child abuse and neglect. Specifically, the General Assembly has declared in § 63.2-1500 that

it is the policy of this Commonwealth to require reports of suspected child abuse and neglect for the purpose of identifying children who are being abused or neglected, of assuring that protective services will be made available to an abused or neglected child in order to protect such a child and his siblings and to prevent further abuse or neglect, and of preserving the family life of the parents and children, where possible, by enhancing parental capacity for adequate child care.^[11]

I am aware of no statute or case law which states that the purpose of Chapter 15 of Title 63.2 is to punish one found to have committed child abuse or neglect. Moreover, while Chapter 816 provides an affirmative defense to several criminal statutes, findings of abuse and neglect under Chapter 15 of Title 63.2 are not included.

Conclusion

Accordingly, it is my opinion that Chapter 816 creates an affirmative defense to criminal acts of child abuse and neglect, but does not provide an affirmative defense to civil findings of child abuse and neglect.

¹2003 Va. Acts ch. 816, at 1129 (amending and reenacting §§ 18.2-371, 18.2-371.1, and 40.1-103, and adding §§ 8.01-226.5:2 and 63.2-910.1).

²See Va. Code Ann. § 63.2-100 (LexisNexis Supp. 2003) (defining "abused or neglected child" as any child "[w]hose parents or other person responsible for his care abandons such child"); see also Va. Code Ann. § 16.1-228 (LexisNexis Repl. Vol. 2003) (defining "abused or neglected child" as any child "[w]hose parents or other person responsible for his care abandons such child").

³Chapter 816 designated a subdivision 1, and added a subdivision 2, to existing subsection B of § 18.2-371.1. See 2003 Va. Acts, *supra* note 1, at 1129.

⁴See *id.* Section 18.2-371 pertains to crimes against children, and § 40.1-103 pertains to child labor.

⁵Section 8.01-226.5:2 grants civil and criminal immunity to rescue squad and hospital personnel "receiving a child under the circumstances described in" the second paragraph of § 18.2-371, § 18.2-371.1(B)(2), or § 40.1-103(B), except when injury to the child "is the result of gross negligence or willful misconduct."

⁶See 2003 Va. Acts, *supra* note 1, at 1129 (citing § 63.2-910.1); § 63.2-910.1 (LexisNexis Supp. 2003).

⁷See Va. Code Ann. § 40.1-103(A) (LexisNexis Supp. 2003).

⁸Chapter 15 of Title 63.2 is entitled "Child Abuse and Neglect" and sets forth the state requirements for reporting incidences of suspected child abuse or neglect.

⁹See § 63.2-1505(A)(7) (LexisNexis Repl. Vol. 2002). Pursuant to § 63.2-1503(A), the State Board of Social Services has adopted regulations pertaining to child protective services. The regulations define "founded" to mean "that a review of the facts shows by a preponderance of the evidence that child abuse and/or neglect has occurred. A determination that a case is founded shall be based primarily on first source evidence; in no instance shall a determination that a case is founded be based solely on indirect evidence or an anonymous complaint." 22 Va. Admin. Code 40-705-10 (West 2003). "'Unfounded' means that a review of the facts does not show by a preponderance of the evidence that child abuse or neglect occurred." *Id.*

¹⁰See § 63.2-1515 (LexisNexis Repl. Vol. 2002). "'Central registry' means a subset of the child abuse and neglect information system and is the name index with identifying information of individuals named as an abuser and/or neglector in founded child abuse and/or neglect complaints or reports not currently under administrative appeal, maintained by the [Virginia Department of Social Services]." 22 Va. Admin. Code 40-705-10.

¹¹2002 Va. Acts ch. 747, at 1108, 1197 (quoting § 63.2-1500, not set out in Virginia Code) (emphasis added); see also 2003 Op. Va. Att'y Gen. 02-148 (Feb. 11, 2003), available at <http://www.vaag.com/media%20center/Opinions/2003opns/02-148.htm>.

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