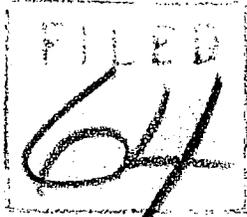


CRIMINAL LAW: Under the provisions of Section 559.350, RSMo. Cum. Supp. 1953, a man may be charged and convicted for failure to support his children born out of wedlock notwithstanding the fact that he does not have the legal right to the care and custody of said child or children, and that paternity as an element of the offense, may be established in such criminal proceedings.



August 29, 1955

Honorable J. P. Morgan  
Prosecuting Attorney  
Livingston County  
Chillicothe, Missouri

Dear Mr. Morgan:

Reference is made to your request for an official opinion of this office, which request reads as follows:

"As Prosecuting Attorney I am continually requested by the local Office of the Welfare Department at the apparent insistence of their State Headquarters to file criminal charges against alleged fathers for the support of their purported children.

"I would appreciate your opinion on the following question:

"1. What provision is made, if any, in the criminal laws of the State of Missouri relative to establishing the paternity of a child and what is the proper charge to file?"

We understand your question, in the broad sense, to be: "May a man be charged, convicted and punished for failure to support an illegitimate child."

Your attention is directed to Section 559.350, RSMo. Cum. Supp. 1953, which provides:

"If any man shall, without good cause, fail, neglect or refuse to provide adequate food, clothing, lodging, medical or surgical attention for his wife; or if any man or woman shall, without good cause, abandon or desert or shall without good cause fail, neglect or refuse to

Honorable J. P. Morgan

provide adequate food, clothing, lodging, medical or surgical attention for his or her child or children born in or out of wedlock, under the age of sixteen years, or if any other person, not the father or mother, having the legal care or custody of such minor child, shall without good cause, fail, refuse or neglect to provide adequate food, clothing, lodging, medical or surgical attention for such child, whether or not, in either such case such child or children, by reason of such failure, neglect or refusal, shall actually suffer physical or material want or destitution; or if any man shall leave the state of Missouri and shall take up his abode in some other state, and shall leave his wife, child or children in the state of Missouri, and shall, without just cause or excuse, fail, neglect or refuse to provide said wife, child or children with adequate food, clothing, lodging, medical or surgical attention, then such person shall be deemed guilty of a misdemeanor; and it shall be no defense to such charge that the father does not have the care and custody of the child or children or that some person or organization other than the defendant has furnished food, clothing, lodging, medical or surgical attention for said wife, child or children, and he or she shall, upon conviction, be punished by imprisonment in the county jail not more than one year, or by fine not exceeding one thousand dollars or by both such fine and imprisonment. No other evidence shall be required to prove that such man was married to such wife than would be necessary to prove such fact in a civil action." (Underscoring ours.)

This section is identical with Section 559.350, as contained in the 1949 revision, with the exception of the underscored portions. The underscored portions were added in 1953, House Bill 309, Laws 1953, page 424. The legislative history of said section, prior to the 1953 amendment, insofar as it might be related to the question at hand, may be found in the cases of, State ex rel. Canfield vs. Porterfield, 222 Mo. App. 553, 292 S.W. 85, and State vs. White, 248 S.W. 2d. 841.

In the case of State vs. White, 248 S.W.2d. 841, the Supreme

Honorable J. P. Morgan

Court had before it for determination on the then existing statute the precise question here involved. The defendant was charged under the provisions of Section 559.350, RSMo. 1949, with failure to support his alleged child born out of wedlock. In holding that the defendant could not be convicted under said section, absent a showing that defendant had the legal care and custody of said child, the court said:

"Strict construction of criminal statutes is a fundamental principle of our law. Criminal statutes are to be construed strictly; liberally in favor of the defendant, and strictly against the state, both as to the charge and the proof. No one is to be made subject to such statutes by implication." State v. Bartley, 304 Mo. 58, 263 S. W. 95, 96. See also State v. Lloyd, 320 Mo. 236, 7 S. W. 2d. 344; State v. Taylor, 345 Mo. 325, 133 S.W. 2d. 336; State v. Dougherty, 358 Mo. 734, 216 S.W.2d. 467; Tiffany v. National Bank of Missouri, 18 Wall. 409, 85 U.S. 409, 21 L.Ed. 862. A defendant should not be held to have committed a crime by any act which is not plainly made an offense by the statute. The question here is: Has the legal duty to support an illegitimate child been imposed upon its father? As pointed out in the Canfield case, there is no other statute which has changed the common law rule and specifically imposed upon the father of an illegitimate child the legal duty to support it. Certainly, Section 559.350 does not specifically do so. Therefore, we do not think that Section 559.350, a criminal statute, can be reasonably construed as creating this legal duty especially in view of the words 'any other person having the legal care or custody of such minor child'. As said in the Canfield case, 'The use of the words "or any other person," etc., in these sections, which statutes must be strictly construed, shows that the words apply to persons who are charged with the care and custody of the child whether it be a parent or other person so charged.' Furthermore, we have no statutory bastardy proceedings, as some states do, to determine paternity and establish liability for support. However, see

Honorable J. P. Morgan

100.C.J.S., Bastards, Sec. 20, p. 96. For a thorough discussion of the situation throughout the country see Ploscowe--Sex and the Law, Chap. IV, Illegitimacy.

" 'The rule is universally adopted that a mother is the natural guardian of her bastard child, and, as such, has a legal right to its custody, care, and control superior to the right of the father or any other person unless it is otherwise expressly provided by statute.' 7 Am. Jur. 668, Sec. 61. See also 10 C.J.S., Bastards, Sec. 17. 'The duty of the mother to support her bastard child seems to be inferred as an incident to her right to its custody.' 10 C.J.S., Bastards, Sec. 18, p. 85. See also 7 Am. Jur. 673, Sec. 68 and Sec. 71. Likewise, as shown by these authorities, the mother is entitled to the child's services and earnings and may recover their value from a third person who employs the child. Under Section 468.060 only the mother may inherit from her illegitimate children and they may inherit only from her. Section 559.350 must be construed in the light of this historical background and we hold that its construction must be that the crime of abandonment of and failure to support a child is made by it an offense of the person who has the legal care and custody of the child and thus has the legal duty to support it. We think this was the intended and logical result of the Amendment of 1921."

We wish to note the reasoning employed by the court in arriving at their decision, first, at common law and absent a statute providing otherwise the mother is the natural guardian of her bastard child and as such has a legal right to its custody, care and control together with the inferential duty of support. Second, at common law there was no legal duty upon the father of a child born out of wedlock to support it. Third, there is no other statute which has

Honorable J. P. Morgan

changed the common law rule and specifically imposed upon the father of an illegitimate child the legal duty to support. Further, Section 559.350, RSMo. 1949, does not specifically do so and should not, giving due deference to the rule that a person should not be made subject to a criminal prosecution by implication and that criminal statutes are construed liberally in favor of a defendant and strictly against the state, be so construed, especially in view of the words of the statute "any other person having the legal care and custody of such minor child." The court indicated that these words evidenced the legislative intent to make it an offense only for a person having the legal care and custody, whether it be the parent or other person, to fail to support.

Having examined the reasoning employed in construing Section 559.350, RSMo. 1949, in the White case, what then is the effect of the 1953 amendment to this section upon the liability of a putative father to support a child born out of wedlock? There is still no other statute which changes the common law rule and specifically imposes upon the father of an illegitimate child the legal duty to support him. Does Section 559.350, as amended, impose this duty? Said section states: "If any man\* \* \* shall, without good cause abandon or desert or shall without good cause fail, neglect or refuse to provide adequate food, clothing, lodging, medical or surgical attention for his \* \* \* child or children born \* \* \* out of wedlock, under the age of 16 years \* \* \* ." Then said section concludes: "or if any other person, not the father or mother, having the legal care or custody of such minor child shall without good cause, fail, \* \* \* ." Bearing in mind the reasoning in the White case as noted in Point 4, supra, it would seem that the words "not the father or mother" were added to preclude a construction that the father must have the legal care and custody of such child or children in order to be chargeable with failure to support and to reserve such limitation to persons other than the parents. For what other purpose could it be said that this addition was intended to serve?

None of the cases decided by the appellate courts of this state, involving a construction or interpretation of this section, either directly or by inference, negate the idea that persons other than the parents might be charged thereunder if other necessary elements were present and to hold that the words were added to clarify this unquestioned proposition would indeed require a fertile imagination. We cannot convict the Legislature of a useless and futile effort if any other reasonable construction giving effect to their acts may be indulged in.

The above interpretation is further strengthened by the additional

Honorable J. P. Morgan

amendment added by the 67th General Assembly to-wit: "And it shall be no defense to such charge that the father does not have the care and custody of the child or children." While it would have been a complete defense to a charge of nonsupport under this section as construed in the White case and prior to amendment, that the father did not have the care and custody of a child born out of wedlock, such fact is now unequivocally eliminated as a defense. Reading and construing together, as we must, these two amendments and bearing in mind the time of their passage following the court's decision in the White case, it appears that it was the intention of the Legislature to make the father of an illegitimate child subject to the provisions of said section notwithstanding the fact that he does not have the legal right to care and custody. While this duty is not as specifically set forth as might be desirable in a statute of this nature we are of the opinion that it does not now rest solely upon implication and would, we believe, withstand the rule that a defendant should not be held to have committed a crime by any act which is not plainly made an offense by statute.

You further inquire what provision is made, if any, in the criminal laws of the State of Missouri relating to establishing the paternity of a child. Such procedure is commonly referred to as bastardy proceedings, the purpose of which are to determine paternity and establish liability for support. Suffice it to say that although such a statutory proceeding has been recommended to the General Assembly for adoption the General Assembly has failed to enact it into law. See State v. White, 248 S.W. 2d. 841, l.c. 843.

While, of course, under a charge of failure to support an illegitimate child, or children, the relationship of the defendant father must be shown, we know of no reason why this parentage cannot be proved as any other element of the offense in a criminal proceeding, without infringing upon the rights reserved to a defendant in such proceedings. In regard to establishing paternity in a criminal proceeding, see C.J.S. Bastards, Section 20, page 96. See also State v. Smith, 259 S.W. 506.

#### CONCLUSION

It is, therefore, the opinion of this office that under the provisions of Section 559.350, RSMo. Cum. Supp. 1953, a man may be charged and convicted for failure to support his children born out of wedlock notwithstanding the fact that he does not have the legal right to the care and custody of said child, or children, and that paternity, as an element of the offense, may be established in such criminal proceedings.

This opinion, which I hereby approve, was prepared by my assistant, Mr. Donal D. Guffey.

Yours very truly,

John M. Dalton  
Attorney General