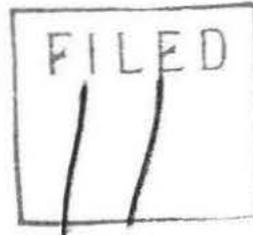


NONSUPPORT: A criminal action for nonsupport of children  
CHILDREN: brought against a father pursuant to Section  
WIFE: 559.350, RSMo 1959, can be instituted in the  
VENUE: county wherein the father resides even  
though the children are nonresidents of the  
state.

July 17, 1961



Honorable F. M. Brady  
Prosecuting Attorney  
Benton County  
Warsaw, Missouri

Dear Mr. Brady:

This is in reply to your request wherein you seek an opinion from this office as to the possibility of a non-resident divorcee prosecuting her former husband, a resident of Missouri, under Section 559.350, RSMo 1959, for nonsupport of their two children who are and have been residents of Arizona.

The facts as outlined by you are as follows:

"Complaint has been made to me by a resident of the State of Arizona that a resident of Benton County, Missouri, has unlawfully and willfully, without good cause, failed, neglected and refused to provide adequate food, clothing, lodging and medical attention for his two children, aged 6 years and 12 years.

"She wants to have her former husband prosecuted in Benton County, Missouri, for nonsupport of his two children under Section 559.350 R.S.Mo., as amended Laws 1953.

"The complaint is the former wife of the man she wishes to prosecute and the facts as I understand them are as follows:

"Complainant and her former husband were living in the State of Arizona,

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with their family, and separated some four or five years ago. The husband came to Benton County, Missouri, and filed suit for a divorce, which was granted, and the wife was given the custody of their then three minor children and \$150.00, per month for support of the three children. Later the older boy grew up and went into service and the father filed motion in the circuit court to reduce the amount of support he was required to pay for the support of child now 12 years of age and the child now 6 years of age to \$80.00 per month. This was several months ago, and the father has paid nothing toward the support of the two children since then.

"The mother of the two children and the two children live and have lived in and been residents of the State of Arizona since and before the separation of the parents. The father is now a resident of Benton County, Missouri.

"I would like to have your opinion as to whether or not a prosecution can be maintained against the father in Benton County, Missouri, under Section 559.350, as amended by laws of 1953, for his nonsupport of his two children who are residents of the State of Arizona."

Succinctly, Section 559.350, RSMo 1959, is a criminal statute whereby a man or woman is guilty of a misdemeanor if he or she, without good cause, abandons or deserts or without good cause fails, neglects or refuses to provide adequate food, clothing, lodging, medical or surgical attention for his or her children under the age of sixteen years. Said section further provides that it shall be no defense to the charge that the father does not have the care and custody of the child or that some person or organization other than the defendant has furnished food, clothing, lodging, medical or surgical atten-

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tion for said child.

Generally speaking, it is a fundamental rule of criminal procedure that one who commits a crime is answerable therefor only in the jurisdiction where the crime is committed, and in all criminal prosecutions, in the absence of statutory provision to the contrary, venue must be laid in the county of the offense.

However, in criminal prosecutions of fathers for non-support or desertion of their children, the courts have looked to the intent and purpose of the desertion and abandonment statutes in order to determine the proper venue.

As stated in Annotation, 44 A.L.R. 2d 886, at 891:

"In determining venue under statutes penalizing nonsupport a distinction is sometimes made according to whether the primary purpose of a statute is to prevent the neglected child from becoming a charge upon the county, in which case venue may be properly laid in that county, notwithstanding the father's nonresidence, or whether it is to punish the delinquent father, in which case the venue is properly laid in the county of his residence, notwithstanding the child's nonresidence."

Prior to its amendment in 1947, the courts of Missouri interpreted the statute making it a misdemeanor for a father to abandon or neglect his child as not punitive in purpose but rather to prevent the child from becoming a public charge. Thus, if a defendant, in a nonsupport or desertion case, could prove that a third party was adequately providing for said child, he would be acquitted of such charge. As early as 1911, the Supreme Court of Missouri, in *State v. Thornton*, 134 S. W. 519, 1.c.521, construing Section 4492, RSMo 1909, stated:

"The Legislature did not enact this law for the purpose of punishing parents for failure to do their duty as such. Such a purpose would smack too strongly of

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paternal government. The only legitimate object of the statute is to secure to infants, who are in future to become citizens of the state, proper care; such care as is necessary to protect their lives and health. In other words, to prevent destitution. It follows from the foregoing that if infant children are receiving necessary food, clothing, and lodging from any source, there is no occasion for the state to interfere by penal law or otherwise. Construing section 4492 in the light of the above reasoning, and as applied to the facts in this case, it denounces a penalty for refusal or neglect to supply an infant child with such food, clothing, and lodging as it actually needs."

Again, in 1929, the St. Louis Court of Appeals gave the same meaning and interpretation to Section 4026, RSMo 1929, in the case of State v. Barcikowsky, 143 S. W. 2d 341, l. c. 342. In doing so, the court quoted the language used in State v. Thornton, supra.

Thus, under the Missouri Statute prior to its amendment in 1947, the proper venue for criminal action of child abandonment or desertion was the residence of the child. In 1927, in the case of State v. Hobbs, 220 Mo.App.622, 291 S.W. 184, defendant was charged with willfully and unlawfully and without good cause failing and neglecting to maintain and provide necessities for his two children, who resided with their mother in Cape Girardeau County. Defendant was a resident of Stoddard County. Although stating that no hard and fast rule could be laid down which would categorically fix the venue for every case of a failure to support children by a parent, the court stated:

"In the instant case, we think, the venue may be properly laid in Cape Girardeau county where the children were residing, and where, it is alleged, they were being neglected by the father in the necessities of life. It was there that they were receiving no such contribution as the law requires the parent to furnish them."

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The Hobbs case was cited with approval by the Supreme Court in State v. Winterbauer, 318 Mo. 693, 300 S.W. 1071.

In 1947 the statute was amended by adding two important features to the act (Section 559.350, RSMo 1959). The first feature was that a father was guilty of a misdemeanor if he, without good cause, failed, neglected or refused to provide adequate food, clothing, lodging, medical or surgical attention for his children, "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; . . ."

Therefore, this eliminated the defense available under the statute prior to its amendment, that it was necessary for the state to prove destitution or physical or material want of the child.

The second feature was to eliminate the defense by the father that a third party was adequately caring for the needs and wants of the child. This language stated, "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; . . ."

By adding these two features, the legislature clearly indicated its intention to remove the purpose of the statute from the category of one designed to prevent a child from becoming a public charge and a burden on society to the category of deterring fathers from abandoning or neglecting their children and punishing fathers in the event they did so.

In view of these amendments, the question is whether the foregoing cases are still in point. We are of the view that by reason of the statutory changes, a Missouri father who fails to support his children residing in another state has violated Section 559.350 and may be prosecuted in the county of his residence.

In Commonwealth v. Acker, 197 Mass.93, 83 N.E. 312, the Supreme Court of Massachusetts held that a father, a resident of Massachusetts, could be prosecuted for failure

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to support his child who was born in Nova Scotia, residing there at time of trial, and had never been in Massachusetts:

"While one of the objects of the statute is doubtless to prevent wives and children from becoming a charge upon the public for their support, this is not its chief purpose. The higher and more important purpose of the Legislature in passing the law was to provide directly for neglected wives and children, and to punish the infliction of this kind of wrong upon them, and, by the fear of punishment, to deter husbands and fathers from leaving their families to endure privation. There is nothing either in the words or the object of the statute that should limit its application to cases where the neglected person happens to be in this commonwealth at the time of the neglect, or at the time of the prosecution for it. A person domiciled in this commonwealth is amenable to the statute, whether his minor child is here when the wrong upon him is committed, or has been carried out of the commonwealth by his father, or has been left by him in another state or country; if, while residing and having his domicile here, he unreasonably neglects to provide for the child. The offender is here, within our jurisdiction. While residing here he ought to make provision for the support of his wife and minor children, whether they are here or elsewhere. If he fails to do this, his neglect of duty occurs here, without reference to the place where the proper performance of his duty would confer benefits."

In the case of *Poindexter v. State*, 193 S. W. 126, 1.c. 129, the Supreme Court of Tennessee, in holding that a father could be tried in the county of his residence, for failure to support his child who resided in another county, stated:

"There is an apparent conflict in the

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decisions on the question of venue in proceedings under statutes such as the one upon which this prosecution is based . . . .

"It is said in Ruling Case Law that this conflict may be explained by the different provisions of the statutes; that some of the statutes have for their chief and primary purpose to prevent the neglected wife or child from becoming a charge upon the county; that prosecutions under such statutes should be brought in the county where the wife or child resides, since the purpose is to prevent that county from having to support the wife or child. Other statutes have for their primary purpose the protection of the dependent wife or child by punishing the delinquent husband and father to deter others from being guilty of the same wrong. Under the latter statutes the venue should be laid in the county where the husband or father resides and where he is under legal as well as moral obligation to provide for his family. . . .

"Our statutes are of the last-named class."

In *State v. James*, 203 Md. 113, 100 A. 2d 12, the Supreme Court of Maryland, in holding that a father, residing in Maryland, could be prosecuted under a Maryland statute for nonsupport of his children, who were residents of Delaware, stated:

"There is another line of cases . . . holding that the purpose of a nonsupport statute is not only to prevent a neglected wife or child from becoming a public charge, but that the higher and more important purpose of the Legislature was to assist deserted or neglected wives or children in directly procuring support, to punish the infliction of this

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kind of wrong upon them, and by the fear of such punishment to deter husbands or fathers from leaving their families to endure privation. The cases so reading the statutes hold that one within the State is amenable to the statute, whether his wife or children are in the state or not. On the theory of these cases, the offender within the jurisdiction must make provision for the support of his wife or children while residing there, whether they reside there or elsewhere."

In further support of its position, the Court stated:

"There is no doubt that a State has the legislative power to make a resident subject to criminal prosecution for failure to support a dependent who lives outside of the State. Restatement, Conflicts of Laws, Section 457. . . 'Thus, a State in which a minor child is domiciled may impose a duty upon a parent who is for any reason subject to the jurisdiction of that state irrespective of whether the parent is domiciled there or in another state. Conversely, a state may impose a duty upon a parent who is domiciled in the state although a child is neither domiciled in the state nor otherwise subject to the jurisdiction thereof.' "

In 1957, the Missouri Supreme Court, in *Ivey v. Ayers*, 301 S. W. 2d 790, was called upon to determine the constitutionality of Missouri Uniform Reciprocal Enforcement of Support Law (Sections 454.010-454.360, RSMo 1959). In said case, the Court used the following language, l. c. 795:

"It has long been the rule in this state that a father has the duty to support his minor children . . . . We know of no reason why this duty does not extend to a minor child across a state line."

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As a result of the conclusion hereinafter stated, the opinion of this office to the contrary, dated March 17, 1951, to Stanley Wallach, Prosecuting Attorney, St. Louis County, Clayton, Missouri, is herewith withdrawn for the reason that, in our view, the former opinion does not take into account the legislative intent of the 1947 amendment to change the purpose of the statute so that, as presently worded, its purpose is primarily to punish parents for neglect of their duty as such and to deter others from committing like offenses. That being so, State v. Hobbs, 291 S.W. 184, and State v. Winterbauer, 300 S. W. 1071, are no longer in point, since they construed the former statute, the purpose of which was to prevent children from becoming public charges. The former opinion cites these cases as authority for holding that prosecution can be maintained only in the county of the childrens' residence (which would preclude any prosecution at all when the child is a nonresident). However, neither of these cases ruled this point. All that was held therein was that in the circumstances of those cases, prosecution was maintainable in the county where the child resided. They did not decide (nor could they, since the question was not presented) that even under the former statute prosecution in the county of the father's residence would be improper. In fact, the Hobbs case specifically ruled that the circumstances of each case must be considered in order to reach a reasonable and just conclusion on the issue of venue, and the circumstance that the child is a nonresident should impel the conclusion, which is both just and reasonable, that venue in the county of the father's residence is proper. Moreover, since both Hobbs and Winterbauer involved the statute prior to its 1947 amendment (when the purpose was to prevent the child from becoming a public charge), it was reasonable under that statute to require prosecution in the county where the child had become a public charge.

#### CONCLUSION

It is, therefore, on the basis of the foregoing, the conclusion of this office that a criminal action for non-support of children brought against a father pursuant to Section 559.350, RSMo 1959, can be instituted in the county wherein the father resides even though the children are

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nonresidents of the state.

The foregoing opinion, which I hereby approve, was prepared by my assistant, George W. Draper, II.

Very truly yours,

THOMAS F. EAGLETON  
Attorney General

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