

CHILDREN: The putative father of an illegitimate child may
DEPENDENTS: be prosecuted for abandonment of the child under
CHILD ABANDONMENT: either Section 559.353 or Section 559.356, 1965
Cum. Supp., whether he has legal custody of the
child or not.

November 22, 1966

OPINION NO. 378

Honorable Donald E. Dalton
Prosecuting Attorney
St. Charles County
St. Charles, Missouri



Dear Mr. Dalton:

This is in response to your request for an opinion concerning your continued ability to successfully prosecute the putative father of an illegitimate child under Section 559.-353, RSMo Cum. Supp. 1965, where the father has never had legal custody. That section and Section 559.356, RSMo 1965 Cum. Supp., must be read together. They are as follows:

Section 559.353 -

"Any man who, without good cause, fails, neglects or refuses to provide adequate food, clothing, lodging, or medical or surgical attention for his wife; or any man or woman who, without good cause, abandons or deserts or, without good cause, fails, neglects or refuses to provide adequate food, clothing, lodging, or medical or surgical attention for his child born in or out of wedlock, under the age of sixteen years, or if any person, not the father or mother, having the legal care or custody of such minor child, without good cause, fails, refuses or neglects to provide adequate food, clothing, lodging, or medical or surgical attention for the child, whether or not in either such case the child by reason of such failure, neglect or refusal actually suffers physical or

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material want or destitution, is guilty of a misdemeanor and upon conviction thereof shall be punished as provided by law."

Section 559.356 -

"Any man who leaves the state of Missouri and takes up his abode in some other state and leaves his child under the age of sixteen years in the state of Missouri, and, without just cause or excuse, fails, neglects or refuses to provide his child with adequate food, clothing, lodging, or medical or surgical attention shall be guilty of a felony and upon conviction thereof shall be imprisoned by the department of corrections for a term of two years. It shall be no defense to such charge that some person or organization other than the defendant has furnished food, clothing, lodging, medical or surgical attention for said child or children, nor shall this statute be construed so as to relieve said person from the criminal liability defined herein for such omission merely because the mother of such child or children, in case of the father, is legally entitled to the custody of such child or children, nor because the mother of such child or children, or any other person, or organization, voluntarily or involuntarily furnishes such necessary food, clothing shelter or medical or surgical attention, or undertakes to do so."

The difficulty is that prior to the 1965 amendment, the provisions of Section 559.353 and Section 559.356 existed in one statute, Section 559.350, RSMo 1959. That statute was enacted in 1953 in the wake of the decision in *State v. White*, 248 S.W.2d 841, which held that the putative father could not be prosecuted if he did not have legal custody of the child.

Prior to 1953, Section 559.350, was as follows, except that the underscored words were not included:

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"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 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.)

The underscored words were added in the 1953 amendment to meet the objections of the Supreme Court in the White case.

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The decision in the White case was predicated on a previous decision in State ex rel. Canfield v. Porterfield, 292 S.W. 85, which held:

"* * * 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.' * * *"
(Emphasis the Court's)

As can be seen above, two parts were added to the statute in 1953 so as to make it clear that the legislature meant that putative fathers be charged whether they had legal custody or not, i.e., that mothers and fathers were to be charged with the care of the child regardless and the phrase "not the father or mother" was included so as to indicate that the phrase "having the legal care or custody of such minor child" was to apply to persons other than mothers and fathers only. Then, to make doubly certain, the phrase "and it shall be no defense to such charge that the father does not have the care and custody of of the child or children" was added. The latter provision now is contained only in Section 559.356, which makes it a felony to abandon a child and leave the state. Doubtless, this is an inadvertent consequence of the legislative attempt to make a logical division between misdemeanor and felony charges, but unfortunately, it leaves the waters somewhat muddied.

Nevertheless, the phrase "not the father or mother" is still contained in the misdemeanor section (559.353) and may be deemed to have the same effect. Furthermore, the offending word "other" as referred to in the Canfield case above has been expunged and consequently the point upon which the Canfield and White cases turned has been removed from the statute. Thus, we believe it amply clear that the legislative intent to charge putative fathers with abandonment regardless of legal custody is present in the language employed in the misdemeanor section, Section 559.353, as well as the felony section, Section 559.356, 1965 Cum. Supp.

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CONCLUSION

The putative father of an illegitimate child may be prosecuted for abandonment of the child under either Section 559.353 or Section 559.356, 1965 Cum. Supp., whether he has legal custody of the child or not.

The foregoing opinion which I hereby approve was prepared by my Assistant, Howard L. McFadden.

Very truly yours,



NORMAN H. ANDERSON
Attorney General