

IN THE SUPREME COURT OF MISSOURI

NO. SC89159

CAROLYN S. WEIGAND f/k/a CAROLYN S. EDWARDS,

Petitioner-Respondent.

v.

JEFFREY M. EDWARDS,

Respondent-Appellant,

APPEAL FROM THE TRIAL COURT OF JEFFERSON COUNTY

The Honorable Troy Cardona

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES.....	iii
INTRODUCTION AND SUMMARY	1
JURISDICTIONAL STATEMENT.....	2
STATEMENT OF FACTS	3
POINTS RELIED ON.....	5
I. The Trial Court Erred In Granting Carolyn’s Motion To Dismiss Because Section 452.455(4) Was The Sole Basis For The Motion To Dismiss And Section 452.455(4) Is Unconstitutional, In That It Violates Both The United States Constitution And The Constitution Of The State Of Missouri By Depriving Appellant Of His Fundamental Right To A Relationship With His Child And Denying Him Access To The Courts.	
STANDARD OF REVIEW	6
ARGUMENT	7
I. The Trial Court Erred In Granting Carolyn’s Motion To Dismiss Because Section 452.455(4) Was The Sole Basis For The Motion To Dismiss And Section 452.455(4) Is Unconstitutional, In That It Violates Both The United States Constitution And The Constitution Of The State Of Missouri By Depriving Appellant Of His Fundamental Right To A Relationship With His Child And Denying Him Access To The Courts.	

- A. Section 452.455(4) Violates The Due Process Clauses Of The United States Constitution And The Missouri Constitution.
- B. Section 452.455(4) Violates The Equal Protection Clauses Of The United States Constitution And The Missouri Constitution.
- C. Section 452.455(4) Violates Article I, § 14 Of The Missouri Constitution – Equal Access To Courts.

CONCLUSION.....19

APPENDIX.....A1-A18

TABLE OF AUTHORITIES

PAGE(s)

CASES

Blaske v. Smith & Entzeroth Inc.,

821 S.W. 2d 822, 832 (Mo. banc 1991).....18, 19

Burson v. Freeman,

504 U.S. 191 (1992).....14

California Motor Transport Company v. Trucking Unlimited,

404 U.S. 508, 510 (1972).....17

DeMay v. Liberty Foundry Co.,

327 Mo. 495, 37 S.W.2d 640, 645 (1931).....17

Goodrum v. Asplundh Tree Expert Co.,

834 S.W.2d 6, 9 (Mo. banc 1992).....17,18

Griswold v. Connecticut,

381 U.S. 479, 493 (1965).....7

Harrell v. Total Health Care, Inc.,

781 S.W.2d 58, 62 (Mo. banc 1989).....18

Jackson County v. State,

207 S.W. 3d 608, 611 (Mo. banc 2006).....6

Keeney v. Mo. Highway & Transp. Comm'n,

70 S.W.3d 597, 599 (Mo. App. 2000).....	9
<i>Lehr v. Robertson,</i>	
463 U.S. 248 (1983).....	12, 15, 16
<i>Mahoney v. Doerhoff Surgical Services, Inc.,</i>	
807 S.W.2d 503, 510 (Mo. banc 1991).....	18
<i>Missourians for Tax Justice Education Project v. Holden,</i>	
959 S.W.2d 100 (Mo. banc 1997).....	14
<i>M.L.B v. S.L.J.,</i>	
519 U.S. 102 (1996).....	11, 19
<i>Powell v. Alabama,</i>	
287. U.S. 45, 67 (1932).....	7
<i>Quilloin v. Walcott,</i>	
434 U.S. 246 (1978).....	10
<i>San Antonio Independent School District v. Rodriguez,</i>	
411 U.S. 1 (1973).....	6, 7, 8
<i>Stanley v. Illinois,</i>	
405 U.S. 645 (1972).....	5, 12, 13, 14, 16
<i>State ex rel. Danforth v. State Environmental Improvement Authority,</i>	
518 S.W.2d 68, 72 (Mo. banc 1975).....	6
<i>StopAquila.org v. City of Peculiar</i>	
208 S.W. 3d 895, 899 (Mo. 2006).....	6
<i>Troxel v. Granville,</i>	

530 U.S. 57 (2000).....5, 6, 8, 10, 11, 14

STATUTES

Mo. Rev. Stat. § 452.375(4)..... 9, 12, 18

Mo. Rev. Stat. § 452.400(1)9, 12, 13, 17, 18

Mo. Rev. Stat. § 452.455(4).....1, 2, 3, 4, 5, 7, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20

OTHER AUTHORITIES

U.S. Const. amend. V..... 2, 3, 5, 10, 11, 19

U.S. Const. amend. XIV § 1..... 2, 3, 14, 19

Article I, Section 2 of the Missouri Constitution2, 3, 14, 19

Article I, Section 10 of the Missouri Constitution2, 3, 5, 10, 11, 19

Article I, Section 14 of the Missouri Constitution2, 3, 7, 17, 18, 19

Article V, Section 3 of the Missouri Constitution.....3

INTRODUCTION AND SUMMARY

This case comes before the Court because Section 452.455(4) of the Revised Statutes of Missouri¹ runs afoul of both the United States Constitution and the Missouri Constitution. The right to foster a relationship with your child is a fundamental right recognized by the United States Supreme Court. As such, it is afforded great protection from government interference. Once it is established that a fundamental right is being infringed upon by a statute, the burden shifts to the State or those relying on the provision to prove: (i) there is a legitimate state interest; (ii) the interference is necessary to achieve that interest; and (iii) that the interference is in the least intrusive way possible. The statute at issue in this matter, Section 452.455(4), restricts the modification of a child custody decree if a movant is in arrears of his/her child support in an amount that exceeds ten thousand dollars (\$10,000.00).²

In this matter, Appellant (Jeffrey Edwards) and Respondent (Carolyn Weigand f/k/a Carolyn Edwards) were married for several years when in 1995 a child was born of that union. The parties divorced; and, initially Appellant was afforded liberal custody and visitation. However in 2004, Appellant was stripped of all rights to custody and visitation after a modification of the original decree. Seeking to rectify this deprivation of custody and visitation, Appellant sought another modification of the decree, but

¹ All statutory citations will be to R.S. Mo. (2006) unless otherwise noted.

² The Section authorizes modification if the movant pays the arrearage or posts bond in an amount equivalent to the arrearage.

Respondent countered by moving to dismiss the Appellant's motion citing Section 425.455(4).³ Over the objection of Appellant – that Section 425.455(4) violated the Equal Protection and Due Process Clauses of the United States Constitution and the Constitution of the State of Missouri and that Section 425.455(4) violated the Open Access provision of the Missouri Constitution – the Trial Court granted the Motion to Dismiss.

By dismissing Appellant's motion to modify, the Trial Court impermissibly and unconstitutionally deprived Appellant of his fundamental right to foster a relationship with his daughter. In addition, the action of the Trial Court denied Appellant his constitutionally protected access to the court.⁴ The action of the Trial Court was a violation of both the Constitution of the United States and the Constitution of the State of Missouri.

We pray that the Court reverse the ruling of the Trial Court, and find Section 425.455(4) unconstitutional.

JURISDICTIONAL STATEMENT

Appellant Jeffery M. Edwards ("Jeff") filed a Motion to Modify ("2007 motion") his divorce decree on June 27, 2007. Jeff was significantly in arrears of his child support

³ Appellant was in arrears of his child support obligation in an amount in excess of ten thousand dollars (\$10,000.00) and failed to post bond in the amount of his arrearage.

⁴ In short, Appellant was not afforded an opportunity to determine if custody and/or visitation would in any way harm the emotional or physical health of his daughter.

and did not post a bond before filing his 2007 motion. In response to the 2007 motion, Respondent Carolyn Weigand (“Carolyn”) filed a motion to dismiss based on the requirements of Section 452.455(4). Appellant objected to the motion to dismiss, alleging that Section 452.455(4) violated various provisions of the Constitution of the United States and the Constitution of the State of Missouri – including the Equal Protection and Due Process clauses and the Open Courts provision. Despite the strenuous objection of the Appellant, the Trial Court granted Respondents motion to dismiss.

Because this action involves the validity of a state statute, as well as the interpretation of the Missouri Constitution, this appeal is within the exclusive appellate jurisdiction of the Missouri Supreme Court pursuant to Article V, Section 3 of the Missouri Constitution.

STATEMENT OF FACTS

The facts of this case are not complicated. The facts of this case are not atypical. Jeff and Carolyn were married for several years, and this union was blessed with a daughter, Brooke Edwards (“Brooke”), born on September 7, 1995. L.F.07. As is too often the case, the marriage was unsuccessful and the couple was divorced on February 12, 1998. L.F. 08. The original decree of dissolution entered by the Trial Court of Jefferson County, Missouri was a relatively standard decree. L.F. 06-11. In addition to ordering the dissolution of the marriage, this original decree ordered a standard custody and visitation arrangement – Carolyn was awarded primary physical and legal custody of

Brooke and Jeff was granted liberal rights of temporary custody and visitation. L.F.07. Jeff was also ordered to pay child support in the amount of \$455.70 per month. L.F. 08.

The original decree proved unsatisfactory; and Carolyn filed a Motion to Modify (“2004 motion”) the original decree. L.F.12. The 2004 motion progressed through the circuit court process and a hearing was scheduled for January 12, 2004. L.F.12. Jeff failed to appear at the January 12 hearing and Respondent was granted her requested modification.⁵ L.F. 12-13. This modification was extraordinary; without finding that Jeff was unfit or otherwise posed a risk to Brooke, the court stripped Jeff of any right to custody or visitation,⁶ L.F. 12-13, effectively destroying any chance at a father/child relationship. In short, Jeff’s parental rights were eviscerated. The child support obligation, however, remained.⁷ L.F.13.

Jeff never stopped trying to have a relationship with Brooke, but he was constantly thwarted in his efforts. SUPP.L.F. 1-2. Finally, on June 27, 2007, Jeff filed a motion to

⁵ Jeff was not represented by counsel during the 2004 motion procedure.

⁶ The prohibition of contact was absolute. The court did not even entertain supervised visitation.

⁷ There is no dispute that Jeff was less than vigilant in his support obligations. His arrearage reached amounts in excess of \$20,000.00 on occasion. However, Jeff was in the equivalent of parental purgatory – his financial obligations continued, but he neither received nor was entitled to any of the care, love, affection and/or companionship of his daughter.

modify the court's order of January 12, 2004, seeking to formally reestablish his legal right to a relationship with Brooke. L.F.05. This effort by Jeff was met with a motion to dismiss. SUPP.L.F 5-6. This motion to dismiss, filed on or about October 17, 2007, relied exclusively on Section 452.455(4) claiming that Jeff had failed to satisfy the requirements of that section by failing to become current in his child support obligation or posting a bond. SUPP.L.F. 5-6. At all times relevant to this matter, Jeff was more than ten thousand dollars (\$10,000.00) in arrears of his child support obligation; and, at no time did Jeff post bond in the amount of the arrearage.

Carolyn's motion to dismiss was granted on or about December 11, 2007. L.F.16.

POINTS RELIED ON

- I. The Trial Court Erred In Granting Carolyn's Motion To Dismiss Because Section 452.455(4) Was The Sole Basis For The Motion To Dismiss And Section 452.455(4) Is Unconstitutional, In That It Violates Both The United States Constitution And The Constitution Of The State Of Missouri By Depriving Appellant Of His Fundamental Right To A Relationship With His Child And Denying Him Access To The Courts.**

Troxel v. Granville, 530 U.S. 57 (2000)

Stanley v. Illinois, 405 U.S. 645, 651 (1972)

U.S. Const. amend. V

Article I, Section 10 of the Missouri Constitution

STANDARD OF REVIEW

This Court reviews the Trial Court’s interpretation of the Missouri Constitution *de novo*. *StopAquila.org v. City of Peculiar*, 208 S.W. 3d 895, 899 (Mo. 2006). Likewise the Trial Court’s ruling on the constitutionality of a statute is reviewed *de novo*. *Jackson County v. State*, 207 S.W. 3d 608, 611 (Mo. banc 2006). While the party challenging a legislative enactment bears the burden of proving that it runs afoul of a constitutional provision, *State ex rel. Danforth v. State Env’tl. Improvement Auth.*, 518 S.W.2d 68, 72 (Mo. banc 1975), rights which are explicitly or implicitly guaranteed by the Constitution are considered fundamental rights. Fundamental rights are reviewed under the strict scrutiny standard of review. *San Antonio Indep. Sch. Dist., v. Rodriguez*, 411 U.S. 1, 33 (1973). The present matter presents an issue of fundamental rights. It is clear that “the interest of parents in the care, custody, and control of their children-is perhaps the oldest of the fundamental liberty interests recognized by this Court.” *Troxel*, 530 U.S. 57, 65 (2000).

Moreover, because this matter involves an issue of fundamental rights, it is subject to the strict scrutiny standard of review. *San Antonio Indep.*, 411 U.S. at 16. “Strict-scrutiny means that the State is not entitled to the usual presumption of validity, that the State rather than the complainants must carry a heavy burden of justification”. *Id.* If a statute infringes on a fundamental right or freedom it must be established that the statute at issue is “not merely rationally related to a valid public purpose, but necessary to the achievement of a compelling state interest.” *Id.* at 34. Even when a statute is necessary, it must be demonstrated that the statute has been “structured with precision, tailored

narrowly to serve legitimate objectives, and it has selected the less drastic means for effectuating its objectives.” *Id.* at 17.

ARGUMENT

I. The Trial Court Erred In Granting Carolyn’s Motion To Dismiss Because Section 452.455(4) Was The Sole Basis For The Motion To Dismiss And Section 452.455(4) Is Unconstitutional, In That It Violates Both The United States Constitution And The Constitution Of The State Of Missouri By Depriving Appellant Of His Fundamental Right To A Relationship With His Child And Denying Him Access To The Courts.

In our constitutional system, certain rights have been described and determined as fundamental. These fundamental rights have special significance. Laws restricting those fundamental rights must serve both a compelling state purpose and be narrowly tailored to that compelling purpose. As such, those laws are subject to strict scrutiny.

Rights which are explicitly or implicitly guaranteed by the United States Constitution and/or the Missouri Constitution are considered fundamental rights and therefore are reviewed under the strict scrutiny standard of review. *San Antonio Indep.*, 411 U.S. at 33. In the determination of which rights are fundamental, judges “must look to the traditions and collective conscience of our people to determine whether a principle is so rooted there as to be ranked as fundamental.” *Griswold v. Connecticut*, 381 U.S. 479, 493 (1965); see also *Powell v. Alabama*, 287. U.S. 45, 67. “The interest of parents in

the care, custody, and control of their children-is perhaps the oldest fundamental liberty interest recognized by the Court”. *Troxel*, 530 U.S. at 65.

Being subject to strict-scrutiny means that the “state system is not entitled to the usual presumption of validity” and it is the state that carries the heavy burden of justification. *San Antonio Indep.*, 411 U.S. at 16-17. If a Court concludes that the statute impinges upon a fundamental freedom, “the statutory classification would have to be not merely rationally related to a valid public purpose but necessary to the achievement of a compelling state interest.” *Id.* at 34. Even if a statute is considered necessary, it must be demonstrated that the statute “has been structured with precision and is tailored narrowly to serve legitimate objectives and that it has selected the less drastic means for effectuating its objectives.” *Id.* at 17.

In the present matter, the parties were divorced in 1998 and a decree of dissolution of was entered. This original decree granted Jeff liberal rights of visitation and custody. Jeff was also required to pay child support. This original decree proved to be problematic; and Carolyn filed a motion to modify. The matter progressed, and the court scheduled a hearing for January 2004. Jeff failed to appear at the January hearing and the court awarded Carolyn sole custody of Brooke, the only child of the couple. There is no record of any evidence being presented at the January hearing and there were no findings that Jeff was unfit. The court simply stated that it was in the “best interests of the minor child” that Jeff be denied any temporary custody or visitation with his child.

The ruling by the court at the January 2004 hearing is troubling for several reasons. First, to be in compliance with Section 452.375(4) the court should have entered specific findings establishing facts sufficient to determine why it was in the best interest of the minor child to not have contact with her father. No such findings were entered. Second, the court failed to adhere to the mandates of Section 452.400(1) which requires, before relinquishing visitation, that a court must find “after a hearing” that visitation would impair the emotional or physical health of the child. No such hearing was held.

As troubling and problematic as the January 2004 findings were, those problems are not before this Court. Instead, those problems were compounded by the issue that is before this Court – Section 452.455(4). Section 452.455(4) prohibits Jeff from addressing the improprieties in the January 2004 hearing or seeking any modification of that order.

Jeff sought redress and modification of the January 2004 order by filing his motion to modify in June 2007. However, the Trial Court dismissed his motion to modify based solely on Section 452.455(4). As in January 2004, there was no finding that Jeff is an unfit parent or that visitation would in some way harm the emotional or physical well being of his daughter.⁸ See, Sections 452.375(4) and 452.400(1). Jeff has

⁸ Because Jeff appeals the Trial Court’s grant of Carolyn’s motion to dismiss, all allegations in the motion to modify are taken as true. *Keeney v. Mo. Highway & Transp. Comm'n*, 70 S.W.3d 597, 599 (Mo. App. 2002).

never been adjudicated as an unfit parent or a dangerous character; he did not commit any violent crime or endanger his daughter; Jeff is in arrears of his child support obligation.

But the Trial Court really had no option. Section 452.455(4) has the effect of denying a movant his/her right to a parent/child relationship by preventing the movant from seeking redress solely based on an arbitrary dollar amount. In short, not all persons who are arrears are unworthy of due process, but only those who reach an arbitrary dollar figure. This presumption is unconstitutional, unwise, and completely arbitrary.⁹

A. Section 452.455(4) Violates The Due Process Clauses Of The United States Constitution And The Missouri Constitution.

Before a parent can be deprived of his/her fundamental interest to foster a parent/child relationship, a court must afford the parent due process of law. *Troxel*, 530 U.S. at 65. This is especially true with the issue of child rearing. In fact, the United States Supreme Court has noted that “[t]he history and culture of Western civilization reflects a strong tradition of parental concern for the nurture and upbringing of ... children. *Id.* at 66; see also *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978). With this

⁹ The arbitrariness of Section 452.455(4) is painfully obvious by asking a few simple questions: How was the figure of ten-thousand dollars (\$10,000.00) reached? How is a person who is nine-thousand dollars (\$9,000.00) in arrears worthy of receiving judicial review of his/her motion, but someone who is ten-thousand dollars (\$10,000.00) is not? Is the amount adjusted for inflation? These questions could go on ad infinitum.

judicial and historical precedent in mind, the decision to deprive Jeff of this fundamental right to foster a relationship and participate in the nurturing of his daughter – based solely on the fact that he has fallen behind in his child support payment – is repugnant and unconstitutional.

The Due Process Clause of the Fourteenth Amendment of the United States Constitution and the Due Process Clause of the Missouri Constitution contained in Article I, §10 guarantee that no person shall be deprived of life, liberty, or property without due process of law. These Due Process Clauses “include a substantive component that provides the heightened protection against government interference with certain fundamental rights.” *Troxel*, 530 U.S. at 65. The United States Supreme Court has gone on to hold, unanimously, “that the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment.” *M.L.B v. S.L.J.*, 519 U.S. 102, 119 (1996). Section 452.455(4) not only fails to ensure this fundamental right, it hastens its deterioration. In pertinent part, Section 452.455(4) provides, “when a person filing a petition for modification of child custody decree owes past due child support to a custodial parent in an amount in excess of ten thousand dollars, such person shall post a bond in the amount of past due child support owed...before the filing of the petition.” Both on its face and as applied in this matter, Section 452.455(4) violates due process.

The United States Supreme Court has held that to conceive and to raise one’s child is so essential as to be a basic civil right of man, a right more precious than property

rights. *Stanley*, 405 U.S. at 651. “The integrity of the family unit has found protection in the Due Process Clause.” *Id.* The state must not willy-nilly interfere with the family relationship. In addition to being required to have a legitimate interest before interfering with the integrity of the family unit, the state must also establish that “the means used to achieve these ends are constitutionally defensible.” *Id.* at 652. “The relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection. State intervention to terminate such relationship must be accomplished by procedures meeting the requisites of the Due Process Clause”. *Lehr v. Robertson*, 463 U.S. 248, 258 (1983).

In addition to its Constitutional protection, the importance of a parent/child relationship is statutorily recognized in Missouri. Section 452.375(4) states that frequent, continuing, and meaningful contact with both parents is in the best interest of the child. Further, Section 452.400(1) provides, in pertinent part, that a parent who is “not granted custody of the child is entitled to reasonable visitation rights *unless the court finds, after a hearing, that visitation would endanger the child’s physical health or impair his or her emotional development.*” [Emphasis added.] Therefore the determining factor as to whether a parent should or should not have visitation with his/her child must be based solely on the best interest of the child; and, if visitation is denied it must be based on the fact that said visitation would in some way harm the child. In other words, this right of relationship can only be impinged under such circumstance where the court specifically finds that contact is not in the best interest of the child. Section 452.455(4) is so deficient that it requires a circuit court to deprive a parent of his/her fundamental right based solely

on a monetary standard. In addition to flying in the face of the constitutional guarantee of a parent/child relationship, Section 452.455(4) is inconsistent with the statutory mandate that visitation and custody of a child cannot be restricted unless the parent is found to be unfit. See, Section 452.400(1).

While it is true that “Due Process does not require a hearing in every conceivable case of government impairment of private interest,” in order to determine what procedures due process may require we “must begin with a determination of the precise nature of the government function involved as well as the private interest that has been affected by governmental action”. *Stanley*, 405 U.S. at 650. The private interest that a father has in the children “undeniably warrants deference and, absent a powerful countervailing interest, protection”. *Id.* at 651. Instead of relying on the facts of the case and/or the best interest of the child., the Trial Court was forced to presume that Jeff is unfit due to his unpaid child support. In a situation markedly similar to *Stanley*, the State of Missouri, through Section 452.455(4), “insists on presuming rather than proving unfitness solely because it is more convenient.” *Id.* at 658. Moreover, by granting Carolyn’s motion to dismiss based on Section 452.455(4) the Trial Court allowed procedure by presumption. This does not meet the strict scrutiny required to impinge a fundamental right. In fact, “although procedure by presumption is always cheaper and easier than individual determination, when the procedure forecloses the determinative issues of competence and care, it needlessly risks running afoul of the fundamental interest of both parents and children and cannot stand.” *Stanley*, 405 U.S. at 656-57. “Under the Due Process Clause

that advantage is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family.” *Id.*

B. Section 452.455(4) Violates The Equal Protection Clauses Of The United States Constitution And The Missouri Constitution.

When considering claims that a law violates the Equal Protection Clauses of the United States Constitution and the Missouri Constitution “the first step is to determine whether the statutory scheme impinges upon a fundamental right which is explicitly or implicitly protected by the Constitution.” *Missourians for Tax Justice Educ. Project v. Holden*, 959 S.W. 2d 100, 103 (1998). “If so, the statutory scheme receives strict judicial scrutiny to determine whether the classification is necessary to accomplish a compelling state interest.” *Id.* Legislation will fail a strict scrutiny analysis if the statute is unnecessary to accomplish a compelling state interest. *Id.* When the state is interfering with a fundamental right the state has a heavy burden; and, the state must show that the “regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.” *Burson v. Freeman*, 504 U.S. 191, 198 (1992).

While the right to raise and rear a child is not explicitly guaranteed in the Constitution, it is, however, among the oldest fundamental rights to be recognized by the United States Supreme Court. *Troxel*, 530 U.S. at 65. As such, the parent/child relationship is entitled to highest level of equal protection and is subject to strict judicial scrutiny. *Missourians for Tax Justice Educ. Project*, 959 S.W. at 103.

While it is true that a mere DNA match alone does not invoke the protections of the constitution, the biological connection between a parent and child offers that parent an opportunity to develop a relationship with his child. *Lehr v Robertson*, 463 U.S. 248, 262 (1983).¹⁰ “The importance of the familial relationship, to the individuals involved and to society, stems from the emotional attachments that derive from the intimacy of daily association.” *Id.* at 261. In the present matter, Jeff grasped the opportunity to have a relationship with Brooke. He was married to her mother when she was conceived and born and initially had liberal custody and visitation – therefore he clearly accepted “some measure of responsibility for the child’s future”. *Id.* In doing so, Jeff should “enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child’s development.” *Id.*

In short, depriving a parent of visitation and custody of his/her child invokes Constitutional protection; and, the strict scrutiny standard must be applied to test the validity of any such deprivation. Equal justice under the law requires that the state govern

¹⁰ The *Lehr* case dealt with an adoption of a minor child where the father did not receive notice of the adoption of his daughters. The court held that because he failed to take any of the steps which would have required the state to give notice (e.g. file with the registry, marry the mother, be named on the child’s birth certificate, live openly with the child and the child’s mother, hold himself out as the child’s father, or write out a sworn statement saying he was the father) that DNA alone was not enough to invoke his fundamental rights; and, therefore notice was not required.

impartially, and in order to do so it may not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective. *Id.* at 265. There is simply no legitimate government objective that could be served by denying Jeff a relationship with his daughter because his child support arrearage.

As noted above, in the present case, Jeff has established that a relationship exists between him and his daughter. Not only was Jeff married to his child's mother at the time she was born, he also had a parent/child relationship with her until the time the decree of dissolution of marriage was modified. Jeff has met the burden identified in *Lehr*, by establishing that this relationship exists; and, therefore the protection of a fundamental right is required. The burden now shifts to the Carolyn to prove, not only that a legitimate state interest exists, but that Section 452.455(4) is the least intrusive way to meet that interest. This is an impossible task. While Section 452.455(4) may have a legitimate purpose (to recover child support obligations), depriving a parent of his/her relationship with his/her child is a fundamentally flawed, even cruel, means to reach such an end, and cannot withstand constitutional scrutiny.¹¹ See, *Stanley*, 405 U.S. at 652. It is apparent that the Missouri Legislature, in its zeal to recover outstanding child support,

¹¹ The cruelty and illegitimacy of such an approach are even more profound when the interests of the child are concerned. In addition to the parent, a child, innocent of any transgression, is being denied and deprived of his/her parent because of the financial condition of the parent. Such a Dickensian system surely cannot withstand strict scrutiny.

has effectively stripped Jeff of his fundamental right. However, as is so often in the case of a zealot, the Legislature has ignored logic, reason, legislative mandate and constitutional protections. The Legislature has not determined that all persons who are arrears are unworthy of the fundamental right to a parent/child relationship, but only those who reach an arbitrary dollar figure. Section 452.455(4) creates a shell game – it seeks to refocus the debate from fundamental rights to the size of a parent’s debt. The size of a debt is an illegitimate and irrelevant consideration in determining the fundamental rights invoked in a parent/child relationship.

C. **Section 452.455(4) Violates Article I, § 14 Of The Missouri Constitution – Equal Access To Courts.**

This Court has noted that Art. I, §14 of the Missouri Constitution, provides that "the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay." *Goodrum v. Asplundh Tree Expert Co.*, 834 S.W.2d 6, 9 (Mo. banc 1992). Further, this Court has noted that the right of access to the courts is said to trace back to the Magna Charta. *DeMay v. Liberty Foundry Co.*, 37 S.W.2d 640, 645 (1931). It has been held to be an aspect of the right to petition the government contained in the First Amendment to the United States Constitution. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). Most importantly, and as noted above, it is explicitly preserved in the Constitution of Missouri. *Id.*

However, in construing Art. I, §14, this Court has also stated:

Art. I, §14 does not create rights, but is meant to protect the enforcement of rights already acknowledged by law. The right of access "means simply the right to pursue in the courts the causes of action the substantive law recognizes." *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503, 510 (Mo. banc 1991); see also, *Harrell v. Total Health Care, Inc.*, 781 S.W.2d 58, 62 (Mo. banc 1989).

Therefore, while Art. I, §14 does not create rights, it does protect the enforcement of rights already acknowledged by law.

Section 452.455(4) violates Article I, §14 by creating a condition precedent to the use of courts. *Goodrum v. Asplundh Tree Expert Co.*, 834 S.W.2d 6, 9 (Mo. banc 1992). It is clear, that the right to have a parent/child relationship is a fundamental right. Jeff Edwards does not seek to use Art. I, §14 to create a new right, he merely seeks access to the courts to enforce a fundamental right guaranteed him by the United States Constitution, the Missouri Constitution and various other statutory provisions of the State of Missouri.¹²

There is an important distinction between those causes of action which have the right to equal access to courts and those that do not. And while a legislature has the prerogative/right to modify substantive law to eliminate or restrict a cause of action, this prerogative/right is not unlimited. *Blaske v. Smith & Entzeroth Inc.*, 821 S.W. 2d 822, 832 (Mo. banc 1991). An individual also has a right to access the courts in order to obtain a remedy available under the substantive law. *Id.*

¹² See, for instance, Section 452.375(4) and Section 452.400(1)

A statute will be held to violate Art. I, §14 if it creates a condition precedent to the use of the courts to enforce a valid cause of action. *Id.* The United States Supreme Court “has never held that the States are required to establish avenues of appellate review, but it is now fundamental that once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts”. *M.L.B.*, 519 U.S. at 111. Section 452.455(4) is an invalid and unconstitutional impediment, in this matter, to Jeff’s access to the courts. It created a condition precedent to the use of courts when Jeff sought to enforce a fundamental right.¹³

CONCLUSION

The Circuit Court erred in granting Carolyn’s Motion to Dismiss. Section 452.455(4) is an unconstitutional violation of the Due Process Clauses and the Equal Protection Clauses of the United States Constitution and the Missouri Constitution. It further violates Art. I, §14 – the Access to Open Court Provision – of the Missouri Constitution. Section 452.455(4) unconstitutionally infringes upon the fundamental right to raise his child and/or establish a parent/child relationship, Infringing on this, or any other fundamental right, requires proof by the state that the intrusion was necessary to

¹³ Further, the Supreme Court of the United States has held that in “a narrow category of civil cases” the state must “provide access to its judicial process without regards to a party’s ability to pay court fees”. *M.L.B.*, 519 U.S. at 113. Section 452.455(4) affords no provision to allow insolvent parents to bring a claim despite being in arrears in child support payments.

achieve a legitimate state interest and that said intrusion was the least possible. Section 452.455(4) does not withstand the inquiry.

For all the reasons set forth above, this Court should reverse the order of the Circuit Court dismissing this action.

Respectfully submitted,

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RULE 84.06(c) CERTIFICATION AND CERTIFICATE OF SERVICE

I hereby certify that this brief complies with the type-volume limitation of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief was prepared in Microsoft Word 2000 and contains no more than 5,091 words, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure (less than the 31,000 limit in the rules). The font is Times New Roman, proportional spacing, 13-point type. A CD-ROM (which has been scanned for viruses and is virus free) containing the full text of this brief has been served on each party separately represented by counsel and is filed herewith with the clerk.

I hereby certify that one true and correct copy of the foregoing and a CD-ROM containing the same was mailed, postage prepaid, this 2nd day of July, 2008, addressed to the following:

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