

IN THE SUPREME COURT OF MISSOURI

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SC89159

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

Petitioner-Respondent,

v.

JEFFREY M. EDWARDS,

Respondent-Appellant.

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APPEAL FROM THE TRIAL COURT OF JEFFERSON COUNTY

The Honorable Troy Cardona

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BRIEF OF MISSOURI ATTORNEY GENERAL AS AMICUS CURIAE

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## ARGUMENT

In this case, appellant Edwards does not challenge the assertion that he owes a substantial amount – more than \$10,000 – in past-due child support. Though he suggests that there was an infirmity in the proceeding in which custody and child support were adjudicated, he concedes that “those problems are not before this Court.” App. Br. at 9. Indeed, he makes no claim that he was deprived of the ability to fully litigate the questions of custody and child support.

Despite his concession that the 2004 order is not at issue here, Edwards argues that he is constitutionally entitled to have a circuit court revisit that order – while he continues to thumb his nose at that order by declining to become current in his support payments. But the statute that he challenges, § 452.455.4<sup>1</sup>, does not impose some new, unconstitutional burden. Rather, it buttresses the existing court order by insisting that if Edwards is going to benefit from renewed judicial review, he must first demonstrate his respect for judicial decrees by complying, to some degree, with the one already in place. In fact, it merely specifies and codifies a long-standing rule of equity in family law proceedings. Edwards has no constitutional right – fundamental or otherwise – to have a court consider modifying an order while he continues to disobey it.

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<sup>1</sup> All statutory references are to RSMo 2000 unless otherwise noted.

## I. Burdens.

Recently, in *Missouri Prosecuting Attorneys and Circuit Attorneys Retirement System v. Pemiscot County*, 256 S.W.3d 98, 102 (Mo. banc 2008), this Court reiterated the approach it must take when considering a claim that a statute is unconstitutional:

This Court’s review begins with the recognition that all statutes are “presumed to be constitutional and will not be held unconstitutional unless [they] clearly and undoubtedly contravene[ ] the constitution.” *United C.O.D. v. State*, 150 S.W.3d 311, 313 (Mo. banc 2004). A statute will be enforced “unless it plainly and palpably affronts fundamental law embodied in the constitution.” *Id.* Doubts will be resolved in favor of the constitutionality of the statute. *Id.*

Who bears the burden of showing that the statute “plainly and palpably affronts fundamental law” is well-established – even in domestic relations cases such as this one: “... Parents, as the party bringing the challenge, bear the burden to prove the statute is unconstitutional.” *Blakely v. Blakely*, 83 S.W.3d 537, 541 (Mo. banc 2002).

To prevail, then, Edwards bears the burden of demonstrating that the General Assembly “plainly and palpably” violated some provision of the

Missouri or United States constitution by requiring someone who seeks modification of a long-final custody and support order to first either post a bond or pay any amount owed that exceeds \$10,000.

Edwards argues, of course, that § 452.455.2 is unconstitutional both on its face and as applied. The nature of his challenge also affects his burden.

“In order to mount a facial challenge to a statute, the challenger must establish ‘that no set of circumstances exists under which the Act would be valid.’” *Artman v. State Bd. of Registration for the Healing Arts*, 918 S.W.2d 247, 251 (Mo. banc 1996), quoting *United State v. Salerno*, 481 U.S. 739, 745 (1987). To succeed in a facial challenge, then, Edwards, must demonstrate not that he is personally hurt by the statute, but that it cannot be constitutionally applied to any person at any time.

He does not have to make that broad showing to prevail on his as-applied challenge. But he does have to show how the statute affects him personally – *i.e.*, why he, because of his own circumstances, cannot or should not be required to post a bond or reduce the size of his arrears before requiring a court to hear him.

## **II. Issue.**

Before addressing the three constitutional rights that Edwards invokes, we must clarify what Edwards is really asking. Edwards argues his appeal as if what he seeks to protect is his parental interest. And ultimately he does

seek a change in a custody and support order that did not give him visitation with his children. But key to understanding the real issue his brief presents is the word “modify” – which Edwards carefully avoids emphasizing. The interest Edwards is really asserting is one in modifying an existing order that he apparently did contest and could have appealed. In other words, he is not trying to protect an existing parental interest, but to belatedly modify a judicial decision so that he can have a parental relationship that he now lacks.

The pertinent facts are set out in Edwards’ own Motion to Modify Decree of Dissolution as to Child Support and Custody and in the circuit court’s docket.

The Dissolution was entered in 1998. That decree included child support for Edwards’ daughter and visitation. Edwards did not appeal.

In 2000, the Division of Child Support Enforcement filed an order seeking to establish an arrearage amount.

In 2003, mother Carolyn Wiegand (petitioner below, respondent here, “Wiegand” herein) filed a motion to modify the 1998 decree. On January 12, 2004, the circuit court entered a modified judgment, awarding sole physical and legal custody to Wiegand. As Edwards describes it, that order “further

limit[ed his] visitation rights.” Motion at 1. Again, Edwards did not appeal; that chapter of the child custody and support saga was over.<sup>2</sup>

Edwards began this chapter when he filed a Motion to Modify on June 27, 2007, asserting changes in circumstances since the last modification in 2004. But by that time, Edwards apparently concedes, he was well behind in making child support payments under the existing order.<sup>3</sup> Thus Weigand moved to dismiss Edwards’ motion pursuant to § 452.455.4.

Section 452.455.4 bars those who egregiously to flout an existing child support order from asking the court to modify that order. It does not apply to everyone who is a bit behind in payments, but only to those who have accrued substantial arrears:

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<sup>2</sup> The circuit court docket shows that over the course of the next three years, the parents and grandparents – apparently Edwards’ parents – worked through a proceeding that led, on January 17, 2006, to a consent judgment of modification addressing grandparent visitation. But there is no indication that the 2006 order changed the 2004 limits on Edwards’ own visitation or the support requirement.

<sup>3</sup> If Edwards were not – or is not – still in arrears in excess of \$10,000, he could file a new motion to modify and a responding motion under § 452.455.4 would be denied.

4. When a person filing a petition for modification of a 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 as ascertained by the division of child support enforcement or reasonable legal fees of the custodial parent, whichever is greater, before the filing of the petition. The court shall hold the bond in escrow until the modification proceedings pursuant to this section have been concluded wherein such bond shall be transmitted to the division of child support enforcement for disbursement to the custodial parent.

The statute, then, gives the person who owes more than \$10,000 two options, should they wish to have the court modify the custody and support order: (1) pay the arrears that exceed \$10,000; or (2) post a bond, either in the amount of the arrears or in the amount of the legal fees of the custodial parent.

Edwards did not respond by paying his arrears down to \$10,000. Nor did he post a bond. He thus sought to obtain a modification without demonstrating that he was willing to pay the existing debt, and without demonstrating that he could or would pay the costs that the custodial parent,

already suffering by loss of court-awarded child support, would incur in responding to the modification motion. Instead he opposed the motion to dismiss on constitutional grounds.

The question here is not whether Edwards is entitled to have a circuit court hear him before is ordered to pay child support and given (or not given) custody or visitation. He does not dispute that he had a full and fair opportunity to be heard prior to the 2004 order that resolved those questions. The question is not even whether someone whose circumstances change, making a support award unfair or a custody order inappropriate, can ask for or obtain a modification. They certainly can, if they remain near-current in their payments or act with appropriate dispatch. The question here, rather, is whether a noncustodial parent must constitutionally be allowed to flout the support requirement for 22 months or more and still be entitled to drag the custodial parent back into court to obtain a modification.

There is no “fundamental right” to demand that courts consider modifying decisions on behalf of those who refuse to comply with them. And that, not the preservation of a parent-child relationship, is what Edwards demands here.

### **III. Due process.**

Edwards invokes three constitutional rights. First, he cites the “due process” clauses of the U.S. (Amendments 5 & 14) and Missouri (Art. I § 10)

constitutions. He asserts that due process protects a citizen's rights not just to litigate a question to final judgment, but to return to court to obtain a new and different answer. But due process protection is not nearly so broad, as shown by two lines of cases.

The first consists of cases that deal with the right to appeal – *i.e.*, with the ability to take a question already finally decided by one court and demand its consideration by another. It is now well-established that “[t]he Due Process Clause of the Fifth Amendment does not establish any right to an appeal.” *U. S. v. MacCollom*, 426 U.S. 317, 323 (1976), citing *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (plurality opinion). This Court has endorsed that conclusion: “Nor is the right of appeal essential to due process of law.” *Ex parte Williams*, 139 S.W.2d 485, 488 (Mo. 1940), citing *Reetz v. Michigan*, 188 U.S. 505 (1903). *See also State ex rel. Hermitage R-IV School Dist. v. Hickory County R-I School Dist.*, 558 S.W.2d 667, 670 (Mo. 1977) (“Right of appeal in such cases is not essential for due process,” citing *Ex parte Williams*, 139 S.W.2d 485 (1940)); *State v. Madison*, 519 S.W.2d 369, 370 (Mo.App. StL 1975) (“The right of appeal is purely statutory .... There is no due process requirement of the existence of a direct appeal.”). That the State can constitutionally open a door to a court yet close the door once the court rules is well established.

But more pertinent here is another line of cases, one where a litigant who is subject to a court judgment is barred from seeking judicial relief from that judgment in a form normally allowed: the cases recognizing the “escape rule.” That rule applies when a litigant, after an opportunity to fully litigate a question in a trial court, flouts the court’s authority by refusing to comply with the court’s orders. In fact, there is a rough parallel in the criminal context to the kind of relief Edwards seeks here: the filing of post-conviction motions under Rules 24.035 and 29.15 – motions that seek to modify a final circuit court judgment. Missouri courts have applied the “escape rule” to bar efforts to obtain post-conviction relief without even a hint that in doing so they could be violating due process rights. *E.g.*, *Dobbs v. State*, 229 S.W.3d 651, 654-55 (Mo.App. S.D. 2007); *Pradt v. State*, 219 S.W.3d 858 (Mo.App. S.D. 2007); *Echols v. State*, 168 S.W.3d 448 (Mo.App. W.D. 2005); *Harvey v. State*, 150 S.W.3d 128 (Mo.App. E.D. 2004).<sup>4</sup> Edwards, of course, has done the same thing that someone who escapes is doing: flouting judicial authority, then seeking to invoke it.

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<sup>4</sup> Ultimately some persons subject to the “escape rule” may obtain relief through a writ of habeas corpus. We take no position here as to whether a person unable to seek modification via § 452.455 might obtain relief via some writ.

Edwards, of course, attempts to avoid entirely the impact of an existing, valid order by characterizing his motion for modification as if he were approaching the court for the first time. His position is perhaps best exemplified by this statement: “Section 452.455(4) is so deficient it requires a circuit court to deprive a parent of his/her fundamental right based solely on a monetary standard.” App. Br. at 12-13. That statement is problematic because the circuit court, in the decision on appeal here, did not deprive Edwards of any aspect of his rights as a parent. Similarly, the circuit court was not “forced to presume that [Edwards] is unfit due to his unpaid child support.” App. Br. at 13. Nor has he been threatened with “the dismemberment of his family.” App. Br. at 14, quoting *Stanley v. Illinois*, 405 U.S. 645, 657 (1972). Assuming Edwards is fairly characterizing what happened, it happened in 2004, not as a result of the circuit court’s compliance with § 452.455.4.

Of course, the chapter of the proceeding that ended when Edwards did not appeal from the 2004 order, was opened by Wiegand. Thus, § 452.455.4 did not apply to Edwards; that statute, even if he was already well behind in paying child support, did not inhibit him in any way from opposing the proposed end of visitation – *i.e.*, from opposing “the dismemberment of his family.” *See Richman v. Richman*, 350 S.W.2d 733, 735 (Mo. 1961) (distinguishing between right to defend and right to seek affirmative relief).

Every ill that Edwards cites in his due process argument is the result of that prior proceeding.

#### IV. “Open courts.”

In an argument that largely parallels his due process claim, Edwards asserts that to require those who are behind on court-ordered child support to pay up or post a bond before asking a court to take up an order again violates the Missouri Constitution’s promise “[t]hat 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.” Art. I § 14. But Edwards’ invocation of the “open courts” provision is an entirely novel one; so far as we have been able to discern, that provision has never been applied to an effort to modify a final court decision, and seldom outside the context of tort liability.

The “open courts” provision does not mean that everyone who at any time wants any relief from court has a constitutional right to demand that court’s attention. Indeed, this Court has recognized that the “open courts” provision cannot be read to require the courts to be open to “an abuse of their process.” *Loftus v. Lee*, 308 S.W.2d 654, 660 (Mo. 1958). Moreover, the provision has seldom been applied outside the context of actions for damages. Indeed, the Court has described the provision in those terms: “The constitutional right of access means simply the right to pursue in the courts

the causes of action the substantive law recognizes.” *Wheeler v. Briggs*, 941 S.W.2d 512, 514 (Mo. banc 1997). *See also Ahern v. P & H, LLC*, 254 S.W.3d 129, 134 (Mo.App. E.D. 2008) (same), citing *Missouri Highway and Trans. Comm'n v. Merritt*, 204 S.W.3d 278, 285 (Mo.App. E.D. 2006).

A motion to modify a long-final court order is not a “cause of action,” as that term has traditionally been used in the Missouri “open courts” cases. Rather than “entitl[ing] one person to obtain a remedy in court from another person” (BLACK’S LAW DICTIONARY (7th ed. 1999) at 314), it seeks a remedy from the court itself. We have been unable to find any Missouri case in which the “open courts” provision was construed to provide a right to such a remedy.

Here, of course, we are not talking about a complete bar to Edwards’ invocation of court jurisdiction. It is merely a financial requirement – and not even a new one, but one based on a three-year-old judgment. We do not suggest that financial requirements, prerequisites, or risks cannot be so unreasonable as to violate the “open courts” provision. But so long as financial requirements are reasonable, they have been consistently upheld. For example, “Missouri cases which have long allowed attorneys' fees awards without concern for impeding access to courts. *Farmland Industries, Inc. v. Frazier-Parrott Commodities*, 111 F.3d 588, 591 (8<sup>th</sup> Cir. 1997), citing *McPherson Redev. Corp. v. Shelton*, 807 S.W.2d 203, 206 (Mo.App. E.D. 1991). This Court has said the same about court costs. *Harrison v. Monroe*

*County*, 716 S.W.2d 263, 267 (Mo. 1986). And this Court has never suggested that filing and docket fees, though financial prerequisites to filing, are “open courts” violations.

This Court’s “open courts” jurisprudence is perhaps highlighted by *Kilmer v. Mun*, 17 S.W.3d 545 (Mo. banc 2000). But § 455.455.4 is not like the statute at issue in *Kilmer*, though both impose a prerequisite for suit. The statute at issue there was problematic because it made access to the courts completely dependent on the acts of a third party – the prosecutor. Here, Edwards’ access to the court to plead for a modification is dependent solely on his actions.

But again, we are not aware of any precedent suggesting that the “open courts” provision means that courts are always open to those who want to modify existing, final court orders. And the Court should not open the door that far – for to do so could have significant consequences to the workload of the courts and the finality of judgments.

#### **V. Equal protection.**

Finally, Edwards asserts that the statute violates his equal protection rights. He begins by looking to whether the statute “impinges upon a fundamental right,” App. Br. at 14, quoting *Missourians for Tax Justice Educ. Project v. Holden*, 959 S.W.2d 100, 103 (Mo. banc 1998). But there again, he speaks as if the dismissal of his motion to modify itself “*deprive[ed]*”

a parent of visitation and custody,” App. Br. at 15 (emphasis added), when that already happened in a prior chapter of the proceedings. Indeed, he confirms that when he says that he “had a parent/child relationship with [his daughter] *until the time the decree of dissolution was modified*” (emphasis added) – *i.e.*, until 2004. We do not here dispute his claim that the original proceeding affected a fundamental right. But the result of that proceeding is not at issue now.

Because Edwards is wrong when he invokes “fundamental rights,” he is wrong when says that the “burden now shifts to [Wiegand] 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.” App. Br. at 16. Had § 452.255.4 been applied to the motion that set the existing terms of his relationship, that claim would make sense. But again, no one now seeks a court order that interferes in any way with Edwards’ existing relationship with his daughter. And he cites no authority, in logic or law, for the proposition that strict scrutiny of that sort applies to statutes that regulate the ability of parents to modify the results in long-final judicial proceedings – *i.e.*, to change their relationship with their children.

## **VI. Line.**

Edwards’ principal argument, whether invoking his due process, “open courts,” or especially equal protection rights, is that § 452.255.4 fails because

drawing the \$10,000 line – *i.e.* allowing someone who owes \$9,999 to seek modification but not someone who owes \$1 more – is entirely arbitrary.

There is some superficial appeal to that claim. After all, any specific amount is arbitrary to some degree. As the U.S. Supreme Court observed, “every line drawn by a legislature leaves some out that might well have been included.”

*Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974). Whether the General Assembly drew the line at \$1 in arrears or at \$1 million, there will always be two people whose debts are pennies apart who are treated differently. But Edwards cites no support for the proposition that the state has to prove that a specific dollar amount is the only right one – even under the strict scrutiny that he claims applies here.

The logical result of Edwards’ view is that here, there cannot be a line, *i.e.*, that the legislature must allow motions to modify filed by everyone or by no one at all. That makes no sense. As Justice Holmes explained, the legislature must be given the freedom to draw lines such as the one at issue here:

When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place.

Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the Legislature must be accepted unless we can say that it is very wide of any reasonable mark.

*Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32, 41 (1928) (Holmes, J. dissenting).

A constitutional requirement for justification of a particular, specific dollar figure would have doomed Missouri's recently repealed limits on the size of campaign contributions. Yet the U.S. Supreme Court upheld those limits in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), just as it had upheld the federal limits – similarly without proof that they were set at precisely the right level – in *Buckley v. Valeo*, 424 U.S. 1 (1976). The Court did so despite the fact that both of those cases arose, of course, in the First Amendment context – where heightened scrutiny applies. The Court's decisions conform to Justice Holmes' observation: that there is a point at which the legislature simply must be trusted to make the decision.

Here, having *some* line is certainly not arbitrary, but entirely rational. It makes eminent sense to bar from the courts those who blatantly flout the

courts' authority – much as we do with the “escape rule.” But that does not mean that the legislature must bar a motion to modify when a noncustodial parent falls a few dollars behind – *i.e.*, when the debt is one that could presumably be paid in short order, and more important, when the debt is not so much that the children can be presumed to be suffering greatly as a result of non-payment. Indeed, Edwards makes no logically persuasive argument that the State lacks a compelling interest in ensuring that its children are properly supported, and certainly does not argue that the \$10,000 line does not serve that goal.

Nor does Edwards makes any attempt to say that the \$10,000 line is “wide of the mark.” His own facts demonstrate its meaning. The support order requires him to pay \$455.70 per month. App. Br. at 4. It took him, then, 22 months – nearly two years – in which to accrue enough arrears to bar his efforts to obtain judicial relief without catching up or posting a bond. It cannot be fairly said that the legislature was “wide of the mark” in deciding that 22 months without support – or a longer period with inadequate support – was too long for the welfare of Edwards' child, and more than long enough for Edwards to be able to see the impact of the decree and return to court to ask for relief.

## VII. Equity.

Finally, we note that Edwards' constitutional claims threaten more than just the validity of § 452.455.4. The courts, too, have held that one who is in arrears on child support or maintenance may be denied the opportunity to obtain a modification of the award they are flouting. *See, e.g., Blevins v. Blevins*, 249 S.W.3d 871 (Mo.App. W.D. 2008); *Matlock v. Fuhrmann*, 945 S.W.2d 686 (Mo. App. E.D. 1997); *Markovitz v. Markovitz*, 945 S.W.2d 598 (Mo. App. E.D. 1997); *O'Neal v. Beninate*, 601 S.W.2d 657 (Mo.App. E.D. 1980); *But see Richman*, 350 S.W.2d 735 (distinguishing between precluding a person in arrears from seeking affirmative relief and defending against a claim for relief).

Those decisions are based on the rule, accepted by this Court long ago, that to obtain equity, one must approach the court with "clean hands":

"He that hath committed inequity shall not have equity." A court of equity is a court of conscience. It searches the consciences of the complainant and defendant, and will give the former no relief where he occupies a wrongful or unjust attitude toward the transaction for which he prays relief, and it also looks into the conscience of the defendant and compels him to do equity.

*Seaman v. Cap-Au-Gris Levee Dist.*, 117 S.W. 1084, 1094 (Mo. 1909). The Court of Appeals, Eastern District more recently explained :

It is a well recognized rule that equity will not aid a party who comes into court with unclean hands.

*Mahaffy v. City of Woodson Terrace*, 609 S.W.2d 233, 238 (Mo.App.1980). Furthermore, such conduct as will disqualify a party from equitable relief need not be fraudulent, but simply indicative of a lack of good faith in the subject matter of the suit. *Moore v.*

*Carter*, 201 S.W.2d 923, 929 (Mo.1947).

*Hardesty v. Mr. Cribbin's Old House, Inc.*, 679 S.W.2d 343, 348 (Mo.App. E.D. 1984). *See also State ex rel Sasnett v. Moorhouse*, 2008 WL 2966094 (Mo.App. W.D. 2008) (decision not yet final).

A motion to modify invokes the circuit court's equitable jurisdiction. It is entirely appropriate for the courts to refuse equity to one with unclean hands. And Edwards cites no authority for the proposition, implicit in his argument, that the legislature is constitutionally barred from, in essence, compelling that exercise of discretion when the arrearage becomes particularly egregious.

## CONCLUSION

For the reasons stated above, the constitutionality of § 452.455.4 should be upheld.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage pre-paid this 18<sup>th</sup> day of September, 2008, to:

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James R. Layton

**CERTIFICATE OF COMPLIANCE WITH RULES 84.06(b) and (c)**

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b), and that the brief contains 4,691 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copy of the brief has been scanned for viruses and is virus-free.

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State Solicitor