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Daddy, Will You Buy Me a College Education--Children of Divorce and the Constitutional Implications of Noncustodial Parents Providing for Higher Education

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Daddy, Will You Buy Me a College Education? Children of Divorce and the Constitutional Implications of Noncustodial Parents Providing for Higher Education

In re Marriage of Kohring[1]

I. INTRODUCTION

It is not surprising that in an age when obtaining a college education has become increasingly popular and necessary, litigation involving the responsibility of parents to pay for or contribute to the costs of their child's college education has also increased.[2] This Note discusses the controversial issues of whether a parent has such an obligation and whether this obligation extends to noncustodial divorced parents. The results of much of the litigation throughout the United States on this topic vary greatly depending on the facts and circumstances of each case.[3] In order to fully comprehend the current litigation involving noncustodial divorced parents' obligation to support their children's college education, it is imperative to study the origin of this controversy within our legal system. This Note analyzes the constitutionality of a statutory obligation imposed on noncustodial parents requiring them to contribute toward their child's college education.

II. FACTS AND HOLDING

In 1989, the marriage of Steven Snodgrass and Ellen Snodgrass (now Kohring) was dissolved in a proceeding before the Circuit Court of St. Louis County.[4] At that time, the couple had two minor children, Julie ("Daughter") and Michael.[5] The court awarded primary physical custody of both children to Ellen Snodgrass ("Mother").[6] Without primary physical custody Steven

1. 999 S.W.2d 228 (Mo. 1999).

2. Annotation, *Responsibility of Noncustodial Divorced Parent to Pay for, or Contribute to, Costs of Child's College Education*, 99 A.L.R.3d 322, § 2, at 329 (1980) [hereinafter *College Education*] According to the American Council on Education, the average annual tuition costs at a four-year college range from $10,900 to $23,650 depending on whether the institution is public or private. *See College? It's a Bargain!*, U.S.NEWS, Jan. 15, 2001, *available at* http://www.usnews.com/usnews/vstats/010115/main.htm (visited Feb. 2, 2001).

3. *College Education*, *supra* note 2, § 2, at 329.

4. *See In re* Marriage of Kohring, 999 S.W.2d 228, 231 (Mo. 1999).

5. *Id.*

6. *Id.*

Snodgrass ("Father") was required to pay child support.[7] The child support order was modified in 1994, when the court increased Father's child support payment to $900 per month.[8]

In 1997, Daughter applied to the University of Missouri-Columbia.[9] In order to compel Father to pay a portion of Daughter's college education expenses, Mother filed a motion to modify their current child support arrangement.[10] Father then filed a motion to dismiss and a cross-motion to terminate child support.[11]

The St. Louis County Circuit Court held an evidentiary hearing.[12] Judge Samuel J. Hais overruled Father's motions and ordered him to pay eighty percent of Daughter's college expenses.[13] In addition, the court ordered Father to pay a portion of Mother's attorney's fees.[14]

Father appealed to the Missouri Supreme Court alleging that the Missouri statute permitting child support awards for college expenses, Missouri Revised Statutes Section 452.340.5, violates the Equal Protection Clause of the United States Constitution and is therefore unconstitutional.[15] In addition, Father

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7. *Id.*

8. *Id.* Father was employed as an independent contractor for a computer consulting business. For the years 1994 through 1997, his annual income ranged from $78,000 to nearly $100,000. *Id.* at 234.

9. *Id.* at 231.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* In relevant part, Section 452.340.5 states:

> If when a child reaches age eighteen, the child is enrolled in and attending a secondary school program of instruction, the parental support obligation shall continue, if the child continues to attend and progresses toward completion of said program, until the child completes such program or reaches age twenty-one, whichever first occurs. If the child is enrolled in an institution of vocational or higher education not later than October first following graduation from a secondary school or completion of a graduation equivalence degree program and so long as the child enrolls for and completes at least twelve hours of credit each semester, . . . at an institution of vocational or higher education and achieves grades sufficient to reenroll at such institution, the parental support obligation shall continue until the child completes his or her education, or until the child reaches the age of twenty-two, whichever first occurs. To remain eligible for such continued parental support . . . the child shall submit to each parent a transcript . . . provided by the institution of vocational or higher education which includes the courses the child is enrolled in and has completed for each term, the grades and credits received for each such course, and . . . the courses which the child is enrolled in for the upcoming term and the number of credits for each course.

MO. REV. STAT. § 452.340.5 (Supp. 1999).

claimed that he should not be required to pay support payments or attorney's fees because Daughter did not comply with the reporting requirements of the statute[16] and the evidence did not support the disproportionate assessment of support payments or award of attorney's fees.[17]

The Missouri Supreme Court held that the statute permitting child support awards for college expenses did not violate the Equal Protection Clause, nor did it impinge upon a fundamental right.[18] The court upheld the statute as constitutional because it is rationally related to the legitimate state interest of "protecting the children of a marriage that is dissolved."[19]

III. LEGAL BACKGROUND

A. Child Support and College Education at Common Law

The general approach, at common law, for resolving whether parents had an obligation to fund their child's college education was based on the notion that parents are required to furnish "necessaries" for their minor children until such time as their children reach the age of majority, become self-supporting, or are emancipated.[20] Thus, early court decisions contemplating parents' obligations to fund their children's college education rest in large part on the courts' interpretation of whether a college education constituted a "necessity" at common law.[21]

Middlebury College v. Chandler,[22] decided in 1844, is probably the earliest reported case in the United States to consider whether a college education is a "necessity."[23] In a suit by the college to recover tuition from the son whose father was then deceased, the court refused to hold that a college education was a necessity.[24] The *Middlebury* decision explained that while necessaries were

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16. *See In re* Marriage of Kohring, 999 S.W.2d 228, 231 (Mo. 1999). Father argued that Daughter did not give him a transcript showing him the courses that she was enrolled in, her grades, and credits received. *Id.* at 233-34. Mother admitted that these requirements were not met until May 1998. *Id.* at 234.

17. *Id.* at 231.

18. *Id.* at 232.

19. *Id.* at 233.

20. *See* Calogeras v. Calogeras, 163 N.E.2d 713, 715 (Ohio Misc. 1959); *see also* Wynn v. Wynn, No. 441, 1928 WL 3177 (Ohio Ct. App. May 4, 1928); Middlebury Coll. v. Chandler, 16 Vt. 683 (1844).

21. *See, e.g.*, Morris v. Morris, 171 N.E. 386, 387 (Ind. Ct. App. 1930); Halstead v. Halstead, 239 N.Y.S. 422 (App. Div. 1930); *Wynn*, 1928 WL 3177, at *1; *Calogeras*, 163 N.E.2d at 715; *Middlebury*, 16 Vt. at 683; Esteb v. Esteb, 244 P. 264, 265-66 (Wash. 1926).

22. 16 Vt. 683 (1844).

23. *See Calogeras*, 163 N.E.2d at 716.

24. *See Middlebury*, 16 Vt. at 686.

not limited to things which were strictly essential to support life (i.e., food, clothing, medicine), the term did not extend so far as to include a college education.[25] By comparing a college education to a common school education, the court concluded that (in 1844, when the case was decided) a college education was not necessary in a legal sense, whereas a common school education was necessary because it was essential to one's overall usefulness in society and the ability to transact business.[26] An underlying basis for the court's determination was that most people did not have a college education, so it could not possibly be considered an essential necessity of life when so many people were able to manage without one.[27]

Almost a century after *Middlebury*, in *Wynn v. Wynn*,[28] the Ohio Court of Appeals reached a similar conclusion that the parental obligation to furnish "necessaries" does not include a college education. In *Wynn*, the court chose not to base its analysis on whether college was commonly accepted as necessary at that time, and instead focused on compulsory school laws that only required school attendance until age eighteen.[29] The court ruled that in a divorce case, there was no law requiring parents to send their child to college (as compared to education requirements under compulsory school laws), and thus, parents should not be obligated to pay for such a "laudable act."[30] The court reasoned that if parents wanted to send their children to college, that was the parents' decision and it was not the proper place for the court to interfere or substitute the court's judgment for that of a parent.[31]

In *Esteb v. Esteb*,[32] the Washington Supreme Court considered whether a college education was necessary under the common law rule and determined that given a change in conditions since *Middlebury*, a college education was necessary, and thus divorced parents should be obligated to pay for their children's college education.[33] The court concluded that when *Middlebury* was decided, college graduates were very rare, but by 1926, attending college had become much more common.[34] The court reasoned that without a college education a child would be severely restrained from pursuing most trades and professions because he would be forced to compete against people who

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25. *Id.* As compared to a college education, the court determined that a common school education was a necessity. A common school education is the preliminary education one receives before advancing to more extensive study in college. *Id.*

26. *Id.*

27. *Id.*

28. No. 441, 1928 WL 3177 (Ohio Ct. App. May 4, 1928).

29. *Id.* at *2; *see also* Calogeras v. Calogeras, 163 N.E.2d 713, 716 (Ohio Misc. 1959).

30. *Wynn*, 1928 WL 3177, at *2.

31. *Id.*

32. 244 P. 264 (Wash. 1926).

33. *Id.* at 265-66.

34. *Id.* at 266.

possessed greater skills as a result of such higher education.[35] The court noted that it was especially important for noncustodial parents to provide the opportunity for a higher education because "[p]arents, when deprived of the custody of their children, very often refuse to do for such children what natural instinct would ordinarily prompt them to do."[36] In concluding that a college education was a necessity, *Esteb* started a trend in which courts began to require noncustodial divorced parents to fund their children's college education.[37]

B. Child Support and College Education Under Missouri Law

In Missouri, under the common law, a parent has a duty and obligation to provide for the reasonable needs of his children.[38] Thus, in Missouri, the question at common law is whether a college education was a "reasonable need" for one's child.[39] Similar to the "necessity" analysis used in *Esteb*, the Kansas City Court of Appeals in 1969 held in *Anderson v. Anderson*[40] that the noncustodial parent would be required to pay child support so that his daughter could attend a private college, because the daughter's desire to attend college was a "reasonable" one.[41] Since *Anderson*, it has become settled law in Missouri that a noncustodial parent may be obligated to provide his children with an education beyond a secondary or high-school level.[42]

In *Sunderwirth v. Williams*,[43] the Missouri Court of Appeals for the Springfield District articulated a list of factors the court should consider to determine whether it is reasonable to require child support payments by the

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35. *Id.* at 266-267.

36. *Id.* at 267.

37. For an extensive discussion of whether the cost of a college education should be included in awarding child support, see *Calogeras v. Calogeras*, 163 N.E.2d 713, 718-19 (Ohio Misc. 1959); *Jackman v. Short*, 109 P.2d 860 (Or. 1941).

It should be noted that in *Jackman*, the Oregon Supreme Court reasoned that public policy favored awarding support for a child to pursue a college education, especially when the child displayed a sufficient capacity for learning. The court concluded, "[o]rdinarily, a child of divorced parents is in greater need of the help that a college education can give than one living in a home where marital harmony abides." *Jackman*, 109 P.2d at 872.

38. *See* Anderson v. Anderson, 437 S.W.2d 704, 709 (Mo. Ct. App. 1969) (citing Lodahl v. Papenberg, 227 S.W.2d 548 (Mo. 1955)).

39. *Id.*

40. 437 S.W.2d 704 (Mo. Ct. App. 1969).

41. *Id.* at 710. The court based its analysis on *Sportsman v. Sportsman*, 409 S.W.2d 787 (Mo. Ct. App. 1966), which held that the court had the authority to modify a divorce decree to require the noncustodial parent to provide for his child's college education because it was not unreasonable for the child to desire to go to college. *See Anderson*, 437 S.W.2d at 710.

42. *See* Sunderwirth v. Williams, 553 S.W.2d 889, 893 (Mo. Ct. App. 1977).

43. 553 S.W.2d 889 (Mo. Ct. App. 1977).

noncustodial parent for his child's college education.[44] A trial court should consider five factors when trying to determine if an allowance should be made for a college education and the amount of that allowance: "the financial ability of the father;[45] the ability and capacity of the child for college work;[46] the nearness of the child to his (or her) majority; whether the child is self-supporting or not,[47] and the father's willingness to provide for such education, as shown by some agreement or other indication on his part."[48] As is customary with allowances made in the dissolution of marriage, the trial court has considerable discretion in analyzing all five factors.[49] In effect, the five factor analysis provided by *Sunderwirth* limits the court's holding in *Anderson* so that noncustodial parents are not required to bear the full expense of a college education for their children, regardless of their financial means.[50] Rather, only when the court determines it reasonable, after considering all five factors, is a noncustodial parent obligated to pay full or part of the cost of his child's college education.[51]

The Missouri Dissolution of Marriage Act[52] became effective January 1, 1974 and provided that the court may order "parents owing a duty of support to a child of their marriage" to pay child support after the court considers all relevant factors.[53] One of the factors listed in the original Act was "the physical and emotional condition of the child, and his educational needs."[54] In 1974, the Act did not clarify whether "educational needs" included a child's college education. In 1988, the Missouri legislature amended Missouri Revised Statutes Section 452.340 by rewriting the entire section.[55] The 1988 amendment included

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44. *Id.* at 893-94.

45. Financial ability of a parent to pay for or contribute to the costs of higher education is a factor considered in many jurisdictions. *See College Education, supra* note 2, § 10, at 358.

46. Academic ability of the child to do college work is a factor considered in many jurisdictions. Academic ability may be demonstrated by "good grades, high rank in class, favorable examination results, and receipt of scholarships." *See College Education, supra* note 2, § 9, at 355.

47. Ability of the child to be self-supporting is a factor considered in many jurisdictions. *See College Education, supra* note 2, § 11, at 361.

48. *Sunderwirth*, 553 S.W.2d at 893-94 (citing E. Le Fevre, Annotation, *Education as Element in Allowance for Benefit of Child in Decree of Divorce or Separation*, 56 A.L.R.2d 1207, § 1[b], at 1209 (1957) (citations omitted)).

49. *See* Sunderwirth v. Williams, 553 S.W.2d 889, 893 (Mo. Ct. App. 1977).

50. *Id.*

51. *Id.*

52. MO. REV. STAT. § 452.340 (1974).

53. MO. REV. STAT. § 452.340 (1974).

54. MO. REV. STAT. § 452.340 (1974).

55. *See* MO. REV. STAT. § 452.340 (1988).

subsection 5, which pertains to college education as a form of child support.[55] In 1988, the legislature answered the question whether noncustodial parents could be required to pay child support for their children's college education by enacting statutory language to provide explicitly for this type of support obligation. The Missouri legislature has amended Missouri Revised Statutes Section 452.340.5 three times since 1988,[57] but the underlying premise remains the same: when a child is enrolled in an "institution of vocational or higher education," under certain circumstances detailed in Missouri Revised Statutes Section 452.340.5, the "parental support obligation shall continue until the child completes his or her education, or until the child reaches the age of twenty-two, whichever first occurs."[58] It should be noted that this provision does not automatically make a parent responsible for the actual costs of a child's post-secondary education.[59] The court must *consider* educational expenses, including the cost of college, when determining the proper child support amount, but is not *required* to hold a parent liable for his child's post-secondary education costs.[60]

C. Constitutional Analysis

Many states have attempted to resolve controversy over whether noncustodial divorced parents should have to provide post-secondary education for their children by enacting specific statutory provisions dealing with this

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56. *See* MO. REV. STAT. § 452.340 (1988). In 1988, subsection 5 provided:

> If the child is attending an institution of vocational or higher education, the parental support obligation shall continue until the child completes his education, or until the child reaches the age of twenty-two, whichever first occurs. If the child is attending such a school, the child or obligated parent may petition the court to amend the order to direct the obligated parent to make the payments directly to the child.

MO. REV. STAT. § 452.340.5 (1988).

57. Section 452.340.5 was amended in 1989, 1990, and 1998. In 1989, subsection 5 was amended to include the requirements that a child must meet in order for the parental support obligation to continue. In addition, the legislature defined the terms "institution of vocational education" and "higher education" as they are applied in the provision. MO. REV. STAT. § 452.340.5 (1994). The 1990 amendment extended the parental support obligation to secondary school for children over the age of eighteen. *See* MO. REV. STAT. § 452.340.5 (1994). The 1998 amendment makes a limited number of exceptions to the required number of credit hours a child must be enrolled in to qualify for the continued parental support obligation. *See* MO. REV. STAT. § 452.340.5 (Supp. 1999).

58. MO. REV. STAT. § 452.340.5 (Supp. 1999). For the statutory text, see *supra* note 15.

59. *See* Shiflett v. Shiflett, 954 S.W.2d 489, 493 (Mo. Ct. App. 1997) (citing Leahy v. Leahy, 858 S.W.2d 221, 225 (Mo. 1993)).

60. *Id.*

issue.[61] Since the enactment of these types of statutes, the constitutionality of those statutes requiring divorced parents to pay for or contribute to their child's college education has been challenged in many states.[62] The constitutional argument alleged is that a statutory provision making divorced parents liable for the post-secondary education costs of their children violates the Equal Protection Clause of the Fourteenth Amendment.[63]

When a court reviews the constitutionality of a statute, it does so under the presumption that the statute is constitutional.[64] The party challenging the constitutionality of the provision bears the burden of proving that the statute is unconstitutional.[65] For a court to invalidate a statute, it must determine that the statute "clearly and undoubtedly contravenes the constitution" and "plainly and palpably affronts fundamental law embodied in the constitution."[66] If a court is in doubt about the constitutionality of a statute, it will resolve the uncertainty by determining that the statute is valid.[67]

Equal protection mandates that persons who are similarly situated in relation to a statute must be treated in the same manner.[68] In other words, people cannot be *unfairly* discriminated against. In determining whether a statute violates the Equal Protection Clause, a court will first determine whether the statute in question "operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution."[69] If so, the court will evaluate the statute using strict judicial scrutiny to determine whether the "classification is necessary to accomplish a compelling state interest."[70] If the court determines that the classification neither burdens a suspect class, nor impinges upon a fundamental right, then instead of

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61. *See College Education, supra* note 2, § 2, at 329.

62. *See College Education, supra* note 2, § 2, at 329; *see, e.g., Ex Parte* Bayliss, 550 So. 2d 986 (Ala. 1989); Kujawinski v. Kujawinski, 376 N.E.2d 1382 (Ill. 1978); Neudecker v. Neudecker, 577 N.E. 960 (Ind. 1991); *In re* Marriage of Vrban, 293 N.W.2d 198 (Iowa 1980); LeClair v. LeClair, 624 A.2d 1350 (N.H. 1993); Curtis v. Kline, 666 A.2d 265 (Pa. 1995); Birchfield v. Birchfield, 417 N.W.2d 891 (S.D. 1988); Childers v. Childers, 575 P.2d 201 (Wash. 1978).

63. The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution in pertinent part provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. CONST. amend. XIV, § 1.

64. *See* Linton v. Mo. Veterinary Med. Bd., 988 S.W.2d 513, 515 (Mo. 1999).

65. *Id.*

66. *Id.*

67. *See* State v. Young, 695 S.W.2d 882, 883 (Mo. 1985).

68. *See* Rinaldi v. Yeager, 384 U.S. 305, 309 (1966).

69. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973); *see also* Missourians for Tax Justice Educ. Project v. Holden, 959 S.W.2d 100, 103 (Mo. 1998).

70. *Rodriguez*, 411 U.S. at 17.

strict judicial scrutiny, the court will determine whether the classification is "rationally related to a legitimate state interest."[71]

When a class within a group of persons has been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process," the classification is suspect and deserving of strict judicial scrutiny.[72] Traditionally, only classifications based on race, national origin, and illegitimacy have constituted "suspect classes" under the law of equal protection.[73] In some cases, discrimination based on sex is considered a suspect classification, but in these instances, the allegedly discriminatory statute is evaluated based on intermediate scrutiny, rather than strict scrutiny.[74]

If a statute impinges upon a fundamental right, the court will evaluate the statute under strict judicial scrutiny.[75] A fundamental right is a right that is guaranteed by the Constitution, either explicitly or implicitly.[76] The United States Supreme Court has held that fundamental rights include such basic liberties as: the right to free speech,[77] the right to vote,[78] freedom of interstate travel,[79] and the right to personal privacy.[80]

Legislation that does not create suspect classifications or impinge on fundamental rights is upheld against equal protection attack only when the legislation is "rationally related to a legitimate governmental purpose."[81] A party that challenges legislation has the obligation to present facts and arguments that demonstrate that the classification as applied is not rational.[82] The court will presume that social and economic legislation is rational because state legislatures

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71. Friedman v. Rogers, 440 U.S. 1, 17 (1979); *see also Missourians for Tax Justice*, 959 S.W.2d at 103.

72. *Rodriguez*, 411 U.S. at 28.

73. *See* Call v. Heard, 925 S.W.2d 840, 846 (Mo. 1996).

74. *See* Michael M. v. Super. Ct. of Sonoma County, 450 U.S. 464, 469 (1981); Craig v. Boren, 429 U.S. 190, 197 (1976); State v. Stokely, 842 S.W.2d 77, 79 (Mo. 1992).

75. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973); *see also* Missourians for Tax Justice Educ. Project v. Holden, 959 S.W.2d 100, 103 (Mo. 1998).

76. *See* Mahoney v. Doerhoff Surgical Servs., Inc., 807 S.W.2d 503, 512 (Mo. 1991).

77. *See* Whitney v. California, 274 U.S. 357, 378-79 (1927).

78. *See* Wesberry v. Sanders, 376 U.S. 1, 6-7 (1964).

79. *See* Dunn v. Blumstein, 405 U.S. 330, 338 (1972).

80. *See* Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891); *see also* Kramer v. Union Free Sch. Dist., 395 U.S. 621, 629 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Loving v. Virginia, 388 U.S. 1, 12 (1967); *Mahoney*, 807 S.W.2d at 512.

81. Hodel v. Indiana, 452 U.S. 314, 331 (1981).

82. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 153 (1938).

are presumed to have acted within their constitutional power.[83] This rationality presumption can only be overcome by a "clear showing of arbitrariness and irrationality."[84] Under rational basis scrutiny, a statutory classification is constitutional if any facts to justify it can be reasonably conceived.[85] When a court evaluates a statute to determine if it is rationally related to a legitimate governmental purpose, the court must not question the wisdom, social desirability, or economic policy on which a statute is based; these are matters for the legislature to determine.[86]

D. Application of Constitutional Analysis

Among states that have adopted a statutory provision requiring divorced parents to financially support their children by paying for their post-secondary education, very few statutes have been struck down as unconstitutional, either under the United States Constitution or under the individual state constitution.[87] Most states that have considered the issue have upheld the state statute under equal protection analysis by determining that the statute was rationally related to a legitimate state purpose.[88]

In *Childers v. Childers*,[89] the Washington Supreme Court held that a state statute that required a parent to support a child beyond the age of majority while the child pursued a college education was constitutional.[90] The court based its opinion on the long standing common law in the state of Washington that a divorced parent may have a duty of support for his child's college education if the child demonstrates an ability for college work and providing support does not

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83. *See* McGowan v. Maryland, 366 U.S. 420, 425 (1961).

84. Fust v. Attorney Gen. for Mo., 947 S.W.2d 424, 432 (Mo. 1997).

85. *See McGowan*, 366 U.S. at 425.

86. *See* Winston v. Reorganized Sch. Dist. R-2, Lawrence County, 636 S.W.2d 324, 327 (Mo. 1982).

87. *See, e.g.*, Curtis v. Kline, 666 A.2d 265 (Pa. 1995) (holding that a statute allowing the court to order separated, divorced, or unmarried parents to provide for the educational costs of their children over the age of eighteen was unconstitutional because it was not rationally related to a legitimate governmental purpose). Although not based on constitutional analysis, the following courts have held that separated, divorced, or unmarried parents have no legal duty to provide for their children after the age of majority: *Huckaba v. Huckaba*, 336 So. 2d 1363 (Ala. Civ. App. 1976); *In re Marriage of Plummer*, 735 P.2d 165 (Col. 1987); *Grapin v. Grapin*, 450 So. 2d 853 (Fla. 1984); *West v. West*, 312 A.2d 920 (Vt. 1973).

88. *See, e.g.*, Kujawinski v. Kujawinski, 376 N.E.2d 1382 (Ill. 1978); Neudecker v. Neudecker, 577 N.E. 960 (Ind. 1991); *In re* Marriage of Vrban, 293 N.W.2d 198 (Iowa 1980); LeClair v. LeClair, 624 A.2d 1350 (N.H. 1993); Birchfield v. Birchfield, 417 N.W.2d 891 (S.D. 1988); Childers v. Childers, 575 P.2d 201 (Wash. 1978).

89. 575 P.2d 201 (Wash. 1978).

90. *Id.* at 209.

cause the parent significant hardship.[91] The court determined that even though the statute in question did distinguish between married and unmarried parents, a rational basis existed for this distinction.[92] The statute was upheld because the court reasoned that children of divorced parents face many disadvantages when compared to children of married parents. In seeking to minimize those disadvantages whenever possible, the court found that the statute achieved a legitimate governmental interest.[93] Because the court determined that many married parents willingly make financial sacrifices for their child's education, regardless of their child's age, the statute merely allowed the courts to secure for children of divorced parents what they would have received from their parents had there not been a divorce.[94] Thus, divorced parents were not discriminated against in the process because they were only required to support their children in a way similar to what they would have done if they had remained married.[95]

Under analysis similar to that of the *Childers* court, the Iowa Supreme Court in *In re Marriage of Vrban*[96] upheld a statute requiring an obligation for child support to continue until the age of twenty-two for children who were full-time college students.[97] The court reasoned that the legislature could have found that most parents who remain married support their children through college, whereas, even well-intentioned parents who are deprived custody of their children, sometimes refuse to support their children in the same manner they would have had the family remained together.[98] The court also determined that the statute furthered the state's legitimate interest in higher education.[99] In the court's analysis of the statute, it noted that the statute did not require support in all cases and that the trial court could award support, in its discretion, after balancing several factors that were considered for child support in general.[100]

In *Kujawinski v. Kujawinski*,[101] the Illinois Supreme Court held that a statute allowing the court to order child support for a child's education, whether the child was of minor or majority age, was reasonably related to a legitimate

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91. *Id.* at 207. The *Esteb* case was decided in Washington in 1926 confirming the common law. *See supra* text accompanying notes 32-36.

92. *See Childers*, 575 P.2d at 209.

93. *Id.* at 208.

94. *Id.*

95. *Id.*

96. 293 N.W.2d 198 (Iowa 1980).

97. *Id.* at 202.

98. *Id.*

99. *Id.*

100. *Id.* The factors the Iowa court considered are similar to the *Sunderwirth* factors used in Missouri. *See supra* text accompanying notes 43-51. Factors to consider in Iowa include: the financial condition of the parent, the ability of the child to do college work, the age of the child, and whether the child is self-supporting. *Vrban*, 293 N.W.2d at 202.

101. 376 N.E.2d 1382 (Ill. 1978).

legislative purpose.[102] The court noted that in enacting the statute, the legislature must have been cognizant that the very nature of divorce has a major economic and personal impact on the lives of all those involved.[103] Because the court determined that noncustodial divorced parents often times could not be relied on to voluntarily support their children to the same extent they would have had they not divorced, the court concluded that the state had a legitimate interest in mitigating the potential harm to children of divorced families.[104] As a result, the court held that the statute was reasonably related to a legitimate state interest.[105]

IV. INSTANT DECISION

In determining the constitutionality of Missouri Revised Statutes Section 452.340.5 under the Equal Protection Clause, the Missouri Supreme Court undertook a three part analysis.[106] First, the court assessed whether the statute operated to the disadvantage of a suspect class.[107] Next, the court considered if the statute impinged on any fundamental right.[108] Finally, the court addressed whether the statute was rationally related to a legitimate state interest.[109]

For the first part of the court's analysis, it considered the standard set out by the United States Supreme Court for suspect classification.[110] The court attempted to determine whether unmarried, divorced, or legally separated parents constituted a suspect class requiring strict judicial scrutiny.[111] The court noted that traditionally, suspect classification was reserved for discrimination based on race, national origin, illegitimacy, and sex.[112] The court concluded that no authority recognized unmarried, divorced, or legally separated parents as a

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102. *Id.* at 1389-90.

103. *Id.* at 1389.

104. *Id.* at 1390. The court explained several reasons why divorced parents cannot always be relied on to voluntarily support their children after the divorce: when spouses go their separate ways and live independent lives they accrue additional expenses that they would not have had if the family remained one unit; noncustodial parents may have a loss of concern for children that are not in their immediate care and custody; and sometimes noncustodial parents will refuse to pay support to their children out of animosity directed at the custodial parent. *Id.* at 1389-90.

105. *Id.* at 1389.

106. *See In re* Marriage of Kohring, 999 S.W.2d 228, 232-33 (Mo. 1999).

107. *Id.* at 232.

108. *Id.* at 232-33.

109. *Id.* at 233.

110. *Id.* at 232; *see* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

111. *See Kohring*, 999 S.W.2d at 232.

112. *Id.*; *see* Call v. Heard, 925 S.W.2d 840, 846-47 (Mo. 1996); State v. Stokely, 842 S.W.2d 77, 79 (Mo. 1992).

suspect class.[113] Without any authority upon which to change the traditional analysis for suspect classification, the court declined to create a new suspect class for unmarried, divorced, or legally separated parents.[114]

In addition, the court analyzed whether Section 452.340.5 burdened a class other than unmarried, divorced, or legally separated parents who could be considered a suspect class.[115] The court considered whether the statute burdened illegitimate children and children from broken homes.[116] Noting that illegitimacy may constitute a suspect class, the court concluded that the statute did not *burden* illegitimate children.[117] While alienating children from their noncustodial parents may be an unfortunate result of the statute, the court found that the very purpose of the statute in question was to support children, not to burden them.[118] Thus, the statute did not impose a burden on illegitimate children creating an equal protection violation.[119]

Upon finding no equal protection violation of a suspect class, the court entered its second mode of analysis; the court analyzed whether Section 452.340.5 impinged on any fundamental rights.[120] Recognizing traditional fundamental rights such as the right to free speech, to vote, and to freedom of interstate travel,[121] the court searched for a fundamental right that might be implicated by the statute in question.[122] The court considered the fundamental right to parent, but determined that Section 452.340.5 only involved "economic"

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113. *See In re* Marriage of Kohring, 999 S.W.2d 228, 232 (Mo. 1999).

114. *Id.*

115. *Id.* Father argued (in the alternative to finding that the statute unfairly burdened unmarried, divorced, or legally separated parents) that the statute burdened a recognized suspect class: illegitimate children and children from broken homes. *Id.*

116. *Id.* Father argued that the statute burdened illegitimate children by alienating them from the parent who was required to provide support for them. *Id.*

117. *Id.* (emphasis added).

118. *Id.* In his dissenting opinion in *Curtis v. Kline*, 666 A.2d 265, 272 (Pa. 1995), Justice Montemuro mentioned that all child support distinguishes between children based upon their parents' marital status; yet this does not invalidate all child support statutes.

The Missouri Supreme Court did not consider whether all child support could be subject to the unfortunate result of noncustodial parents alienating their children when they are required to make support payments, but was only concerned with support payments for college expenses. *See In re* Marriage of Kohring, 999 S.W.2d 228, 231-32 (Mo. 1999).

119. *See Kohring*, 999 S.W.2d at 232.

120. *Id.* at 232-33.

121. *See* Mahoney v. Doerhoff Surgical Servs., Inc., 807 S.W.2d 503, 512 (Mo. 1991).

122. *See Kohring*, 999 S.W.2d at 232. Father argued that Section 452.340.5 impinged upon unmarried parents' fundamental right to decide whether to grant financial support to their children when they could not legally exert any control over their children because they had attained the age of majority. *Id.*

rights.[123] The court acknowledged that whether a parent has a fundamental right to avoid providing support for his or her children past the age of eighteen was a question of first impression in Missouri.[124] After looking to cases in other jurisdictions that had considered the question,[125] the court agreed with the uniformly held notion that a parent does not have a fundamental right to avoid providing support for his or her children past the age of eighteen.[126] Thus, the court held that Section 452.340.5 did not impinge on any fundamental right and was therefore not subject to strict scrutiny.[127]

Because the court determined that Section 452.340.5 did not involve a suspect classification, nor did it impinge upon a fundamental right, the court's final phase of analysis was whether the statute could withstand rational basis scrutiny.[128] The court considered whether the statute was "rationally related to a legitimate state interest."[129] In addressing this question, the court noted the presumption of rationality which legislation involving only economic rights carries.[130] The court concluded that the "state has a legitimate interest in securing higher education opportunities for children from broken homes."[131] As a basis for its decision, the court turned to earlier child support cases in Missouri that had recognized the special protection children of dissolved marriages require. Specifically, the court considered its decision from *Leahy v. Leahy*,[132] in which the unanimous court recognized that "children of an existing marriage derive many benefits that [children] of a dissolved marriage [are] deprived of sharing," therefore, the state has a legitimate interest in "protecting the children of a marriage that is dissolved."[133] By requiring financially capable parents to pay for or contribute to the college expenses of their children, the court

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123. *Id.* The court stated:

> The parent-child relationship is an associational right of basic importance in our society, however a parent's financial obligations to his or her child are considered merely economic consequences that do not critically affect associational rights. Because father's asserted "right" involves only his economic, rather than his associational interests with his daughter, section 452.340.5 is not subject to strict judicial scrutiny.

Id. (citations omitted).

124. *Id.*

125. *See, e.g., In re* Marriage of Vrban, 293 N.W.2d 198 (Iowa 1980); Curtis v. Kline, 666 A.2d 265 (Pa. 1995); Birchfield v. Birchfield, 417 N.W.2d 891 (S.D. 1988); Childers v. Childers, 575 P.2d 201 (Wash. 1978).

126. *See In re* Marriage of Kohring, 999 S.W.2d 228, 233 (Mo. 1999).

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*; *see supra* note 83 and accompanying text.

131. *Kohring*, 999 S.W.2d at 233.

132. 858 S.W.2d 221 (Mo. 1993).

133. *In re* Marriage of Kohring, 999 S.W.2d 228, 232 (Mo. 1999) (quoting *Leahy*, 858 S.W.2d at 230).

concluded that Section 452.340.5 was rationally related to the legitimate state interest of securing higher education opportunities for children of divorced parents.[134]

Thus, in *Kohring*, the Missouri Supreme Court held that Missouri Revised Statutes Section 452.340.5—the Missouri statute whereby noncustodial divorced parents may be required to lend support to their children wishing to pursue higher education—was constitutional because it did not burden a suspect class, did not impinge upon a fundamental right, and was rationally related to a legitimate state interest.[135]

V. COMMENT

The court's decision in *Kohring* to uphold statutory liability on unmarried, legally separated, and divorced parents to pay post-secondary education costs of their children is a natural progression of Missouri common law.[136] There are strong policy implications that support the court's finding. Unfortunately, for those opposed to Missouri Revised Statutes Section 452.340.5, the court was very brief in its rational basis analysis.[137] The court failed to include in its opinion any underlying reasons for upholding the statute besides the conclusory statement that Missouri has a legitimate interest in securing higher education opportunities for children of broken homes.[138] The court took for granted the assumption that children of dissolved marriages suffer many disadvantages that children of an intact marriage never encounter and offered no proof for this assumption.[139]

Pure rational basis scrutiny does not require the court to examine all justifications for a statute that discriminates based on classification so long as some rational basis existed for the legislature to have enacted the statute.[140] Of course, it is not the court's role to question the wisdom, social desirability, or economic policy on which a statute is based; these are matters for the legislature to determine.[141] But, without offering any support for its assumption that children of dissolved marriages suffer many disadvantages that children of an

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134. *Id.* The court also considered the fact that the statute only affected economic interests as an additional basis for finding that the statute was rationally related to a legitimate state interest. *Id.*

135. *Id.* at 232-33.

136. *See* Shiflett v. Shiflett, 954 S.W.2d 489 (Mo. Ct. App. 1997); Sunderwirth v. Williams, 553 S.W.2d 889 (Mo. Ct. App. 1977); Anderson v. Anderson, 437 S.W.2d 704 (Mo. Ct. App. 1969).

137. *See Kohring*, 999 S.W.2d at 232-33.

138. *Id.* at 233.

139. *Id.*

140. *See* McGowan v. Maryland, 366 U.S. 420, 425 (1961).

141. *See* Winston v. Reorganized Sch. Dist. R-2, Lawrence County, 636 S.W.2d 324, 327 (Mo. 1982).

intact marriage never encounter, the court calls into question the validity of its conclusion that the statute is rationally related to a legitimate state interest.

There are many strong policy arguments that justify treating the higher education needs of children of broken homes different from the needs of children from intact homes.[142] While it is not always true that children of divorce are deprived of parental support for higher education or that children of intact families are always provided financial support for college, children whose parents remain married most often continue to receive support past the age of majority when compared to children of divorce.[143] Children of divorce are often deprived of economic support that they would normally receive from nuclear families.[144] Several jurisdictions outside of Missouri that have upheld the constitutionality of post-secondary education support payments by divorced parents have done so based on these type of policy considerations.[145] In *Kohring*, the Missouri Supreme Court does not refer to any of these concerns nor does it cite to findings of the Missouri legislature as to the purpose of the statute. The court's conclusion that the statute is rationally related to a legitimate state interest would have been much stronger if it had explained the basis for its ultimate determination.

The natural question to ask after the court's decision in *Kohring* is whether Missouri has a legitimate interest in securing higher education opportunities for *all* children, not just children from broken homes. Under Missouri Revised Statutes Section 452.340, child support for post-secondary education is a continuation of an existing support obligation by the parent.[146] Thus, the court

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142. *See, e.g.*, Michael A. Smyer & Teresa M. Cooney, *ABA Nat'l Symp. on Alimony and Child Support: Family Relations Across Adulthood: Implications for Alimony and Child Support Decisions*, Apr. 24-25, 1987, at 1; Judith S. Wallerstein & Shawna B. Corbin, *Father Child Relationships After Divorce; Child Support and Educational Opportunity*, 20 FAM. L.Q. 109 (1986).

143. *See* Robert M. Washburn, *Post-Majority Support: Oh Dad, Poor Dad*, 44 TEMPLE L.Q. 319, 329 n.55 (1971). Most young adults attending college receive parental support for a substantial percentage of the cost of their college education. *See* SEYMOUR E. HARRIS, A STATISTICAL PORTRAIT OF HIGHER EDUCATION 100, 114-23 (1972).

144. *See* LENORE J. WEITZMAN, THE DIVORCE REVOLUTION 278 (1985). A divorce decree awarding child support might not alleviate these problems. *See* Curtis v. Kline, 666 A.2d 265, 272 (Pa. 1995) (Montemuro, J., dissenting). When the noncustodial parent is reluctant to provide financial support, the custodial parent (who traditionally has less money than the noncustodial parent) often becomes the sole bearer of the child's educational expenses, even where the noncustodial parent would have shared in this burden, had the couple remained married. *See* WEITZMAN, *supra*, at 278.

145. *See, e.g.*, Kujawinski v. Kujawinski, 376 N.E.2d 1382, 1389-90 (Ill. 1978); Childers v. Childers, 575 P.2d 201, 207 (Wash. 1978); *see also supra* note 104 and accompanying text.

146. MO. REV. STAT. § 452.340.5 (Supp. 1999) (stating that when certain conditions relating to the child's admittance and attendance in college are met the "parental support obligation shall continue . . .", thus implying that the parental support

is already involved in the family dissolution, as evidenced by the prior support obligation. Modification of a support obligation is allowed under Section 452.370. By comparison, intact families do not ordinarily suffer intervention by the courts, unless their children are abused or neglected.[147] In addition, the right to privacy limits the legislature's ability to intervene in matters concerning children's education.[148] It can reasonably be inferred that a statute requiring *all* parents to finance their children's education would be unconstitutional because it would impinge on the right to privacy.[149]

VI. CONCLUSION

As most professional occupations now require an extensive education beginning with undergraduate studies, it is not surprising to find more and more parents sending their children to college to prepare for successful future careers.[150] Even though a college education is not something all children may be capable of achieving, courts are reluctant to deprive children of divorce the opportunity to attend college merely because divorce has changed their financial situation. In addition, the rationale behind child support payments is to provide financial support for children until such time as they are capable of providing for themselves; a time that in many cases occurs after college.[151] As a result of the court's decision in *Kohring*, courts can require noncustodial divorced parents to support their children after the age of majority by contributing to their child's college education. In Missouri, such an obligation does not violate equal protection.[152]

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obligation already existed).

147. *See, e.g.*, Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1835-39 (1985); Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2406-07 (1995).

148. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Soc'y of the Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

149. *See* Curtis v. Kline, 666 A.2d 265, 273-74 (Pa. 1995) (Montemuro, J., dissenting).

150. *See* Jay M. Zitter, Annotation, *Postsecondary Education As Within Nondivorced Parent's Child-Support Obligation*, 42 A.L.R. 819, § 2 (1985).

151. *Id.*

152. *See In re* Marriage of Kohring, 999 S.W.2d 228, 232-33 (Mo. 1999).