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# Fundamental, but Not Fundamental Enough: Missouri's Balancing Test in the Area of Parental Rights

*Weigand v. Edwards*<sup>1</sup>

## I. INTRODUCTION

Until 2009, Missouri Revised Statute section 452.455.4 required a parent with child support arrears of more than \$10,000 to post bond in the amount of the past due child support or reasonable legal fees of the custodial parent before modifying a previous custody order.<sup>2</sup> Due to questions about its constitutionality, it was recently repealed by the Missouri General Assembly.<sup>3</sup> Shortly before the repeal became effective, the Supreme Court of Missouri, in *Weigand v. Edwards*, determined that application of the statute was constitutional.<sup>4</sup> The statute's repeal nearly makes the decision in *Weigand* moot and makes one question why the court chose to hand down a decision at all. Nonetheless, *Weigand* is important because the court clarified its approach to due process challenges in the area of child custody disputes and explained the current test for determining whether there has been a violation of the open courts provision of the Missouri Constitution.<sup>5</sup>

In *Weigand*, the petitioner argued that the statute infringed on his due process and equal protection rights to the care, custody and control of his child and that it violated the open courts provision of the Missouri Constitution.<sup>6</sup> This Note argues that the "balancing-of-interests" test applied by the

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1. 296 S.W.3d 453 (Mo. 2009) (en banc).

2. MO. REV. STAT. § 452.455.4 (Supp. 2008), *repealed by* H.B. 481, 95th Gen. Assem., 1st Reg. Sess. (Mo. 2009). The repealed statute provided,

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.

*Id.*

3. *See* H.B. 481.

4. *Weigand*, 296 S.W.3d at 462.

5. *See id.* at 456-62.

6. *Id.* at 454. *See* MO. CONST. art. I, § 14 ("That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property

Supreme Court of Missouri does not give parental rights the heightened scrutiny they deserve. In addition, the balancing test is problematic because it is extremely subjective and leaves the decision of constitutionality entirely up to judicial discretion. This Note also suggests that the court failed to give full weight to the procedural nature of the statute in holding that the statute did not violate the state constitution's open courts provision. The procedural, rather than substantive, nature of a statute is a factor that normally has considerable weight in open court challenges. Instead, the Supreme Court of Missouri applied a reasonableness standard that weakens the protection provided by the open courts provision found in Article I, section 14 of the Missouri Constitution.

This Note concludes that the court should have applied strict scrutiny, or at least a form of heightened scrutiny, to the due process and equal protection claims and probably should have struck down the statute because it was not narrowly tailored to achieve the state's interest. Also, the court should have found that the statute was arbitrary and unreasonable because it was mainly procedural in nature and therefore violated the open courts provision.

## II. FACTS AND HOLDING

For several years, Carolyn Weigand was married to the petitioner, Jeffrey Edwards.<sup>7</sup> They had a child together in 1995 while they were married, but their marriage dissolved in 1998.<sup>8</sup> The court awarded primary physical and legal custody of the child to Ms. Weigand at a hearing at which Mr. Edwards failed to appear.<sup>9</sup> Despite his default, the court awarded Mr. Edwards temporary custody and visitation rights.<sup>10</sup> Mr. Edwards also was ordered to pay \$455.70 in monthly child support.<sup>11</sup>

Mr. Edwards failed to comply with the child support order, and in 2000 the division of child support enforcement instigated an action to determine the amount of his arrearage.<sup>12</sup> It is unclear from the court's opinion whether Mr. Edwards paid any of the ordered child support. In 2003, Ms. Weigand filed a motion to amend the custody agreement, and Mr. Edwards failed to appear at the hearing held in January 2004.<sup>13</sup> The court granted Ms. Weigand sole custody of the child and ordered that Mr. Edwards was not to have any

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or character, and that right and justice shall be administered without sale, denial or delay.”).

7. *Weigand*, 296 S.W.3d at 454.

8. *Id.*

9. *Id.* at 454-55.

10. *Id.*

11. *Id.* at 455.

12. *Id.*

13. *Id.* Mr. Edwards was notified of the hearing by publication. *Id.*

custody or visitation.<sup>14</sup> The child support award was not changed at that time.<sup>15</sup>

Several years later, however, Mr. Edwards filed a motion to modify the 2004 custody order.<sup>16</sup> He requested that the original custody agreement be reinstated, arguing that circumstances had changed and that it was now in the child's best interest for him to have custody and visitation.<sup>17</sup> Ms. Weigand filed a motion to dismiss Mr. Edwards's request for custody modification because he was more than \$10,000 behind in his child support.<sup>18</sup> According to Missouri Revised Statute section 452.455.4, an individual who owed more than \$10,000 in child support was required to post bond in the amount of child support owed or the cost of reasonable legal fees for the custodial parent before he or she was able to seek a change in the custody order.<sup>19</sup> Mr. Edwards did not dispute the fact that he owed more than \$10,000 in child support, but he claimed that the law was unconstitutional because it violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution; the due process provision of Article I, section 10 of the Missouri Constitution; the equal protection provision of Article I, section 2 of the Missouri Constitution; and Article I, section 14 of the Missouri Constitution, which guarantees access to the courts.<sup>20</sup>

The trial court was not receptive to Mr. Edwards's constitutional challenge and granted Ms. Weigand's request for dismissal.<sup>21</sup> The Supreme Court of Missouri had exclusive appellate jurisdiction over the case because Mr. Edwards challenged the constitutional validity of the statute.<sup>22</sup> In his appeal to the court, Mr. Edwards argued that section 452.455.4 was unconstitutional because it violated his rights to due process and equal protection by

14. *Id.*

15. *Id.* Neither the motion to modify nor a transcript of the custody hearing was part of the record on appeal, so it is unclear why Ms. Weigand sought modification of the original custody order and why the trial court chose to deny visitation to Mr. Edwards.

16. *Id.*

17. *Id.* Specifically, Mr. Edwards alleged that he had maintained long-term, full-time employment and that he wanted his daughter to have a relationship with her newborn brother. *Id.* at n.3. However, the court's opinion does not analyze the merits of Mr. Edwards's claims.

18. *Id.*

19. MO. REV. STAT. § 452.455.4 (Supp. 2008), *repealed by* H.B. 481, 95th Gen. Assem., 1st Reg. Sess. (Mo. 2009). See *supra* note 2 for the language of the statute. See also *Weigand*, 296 S.W.3d at 455 n.4.

20. *Weigand*, 296 S.W.3d at 456, 461. See also Brief of Appellant at 10-19, *Weigand*, 296 S.W.3d 453, No. SC89159 (Mo. Aug. 4, 2009).

21. *Weigand*, 296 S.W.3d at 454.

22. *Id.* "The Supreme Court [of Missouri has] exclusive appellate jurisdiction in all cases involving the validity of a treaty or statute of the United States, or of a statute or provision of the constitution of this state . . ." MO. CONST. art. V, § 3.

denying him the fundamental right to have a relationship with his child.<sup>23</sup> Mr. Edwards contended that the statute could not withstand the strict scrutiny review that is required when a fundamental right is at stake.<sup>24</sup> In addition to the due process and equal protection violations, he also argued that section 452.455.4 deprived him of his right to access the courts of Missouri, which is guaranteed by the Missouri Constitution.<sup>25</sup> Edwards claimed that his right to seek modification of the custody order was found in Article I, section 14 of the Missouri Constitution, which guarantees “[t]hat the courts of justice shall be open to every person.”<sup>26</sup>

The Supreme Court of Missouri determined that the due process and equal protection challenges against section 452.455.4 should be analyzed under a “balancing-of-interests” test.<sup>27</sup> The court then held that the statute did not violate Mr. Edwards’s rights to due process and equal protection and that it did not arbitrarily or unreasonably deprive him of access to the courts.<sup>28</sup>

### III. LEGAL BACKGROUND

#### A. Due Process and Equal Protection

The Supreme Court of the United States has long acknowledged that parents have a fundamental interest in the care, custody and control of their children.<sup>29</sup> In fact, the Supreme Court has noted that this is perhaps one of the oldest fundamental rights that it recognizes.<sup>30</sup> In the 1920s the Court acknowledged in *Meyer v. Nebraska* and *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary* that parents have the due process right to control the upbringing and education of their children.<sup>31</sup> Since that time, the

23. *Weigand*, 296 S.W.3d at 455.

24. *Id.*

25. *Id.*

26. *Id.* at 461 (quoting MO. CONST. art. I, § 14).

27. *Id.* at 458. The balancing-of-interests test takes into account “the private interests that will be affected, the risks of erroneous deprivation of the affected interests, and the government’s administrative and fiscal burden.” *Id.* Applying the test to statutes that effect custody and visitation thus requires the court to consider the interests of both parents, the child and the state. *Id.* at 458-61.

28. *Id.* at 461-62.

29. *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

30. *Id.*

31. *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (holding that a Nebraska law prohibiting the teaching of any language other than English to students below the eighth grade violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution); *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534-35 (1925) (holding that the Oregon Compulsory Educa-

Court has made numerous decisions that confirm this fundamental right and recognize that a parent's right to "the care, custody and control of" his or her children is clearly protected by the United States Constitution.<sup>32</sup> As with many substantive due process claims, however, it is unsettled what level of scrutiny courts will apply when a statute infringes the constitutional right.

In *Meyer* and *Pierce*, the Court examined state statutes that restricted the ability of parents to make certain decisions regarding their children's education.<sup>33</sup> The Court considered whether the statutes were arbitrary or if the legislature had a *reasonable basis* for the restriction.<sup>34</sup> The Court used this minimal test because the decisions were made prior to the development of the modern three-tiered analysis that is applied to due process claims.<sup>35</sup> In 1972, the Court reaffirmed the constitutional right of parents to control the education and upbringing of their children and suggested that heightened scrutiny is required for statutes that infringe on that right.<sup>36</sup> In *Wisconsin v. Yoder*, the Court examined a statute that allegedly violated both parental rights and the free exercise of religion.<sup>37</sup> In that situation, the Court recognized that "more than . . . a 'reasonable relation to some purpose within the competency of the State' [wa]s required to" impede a parent's ability to control the upbringing of his or her child(ren).<sup>38</sup> However, the parent's rights, even under the Free Exercise Clause, could be limited if parental decisions would "jeopardize the health or safety of the child" or create a significant social burden.<sup>39</sup> The same year, the Court recognized in *Stanley v. Illinois* that the right of a parent – wed or unwed – in the care, custody and control of his or her child(ren) is fundamental and that such a right requires more respect than liberties that arise merely from economic arrangements.<sup>40</sup> The Court held that the unwed father in *Stanley* was entitled to a hearing before his parental rights were terminated, and while it did not address what level of scrutiny applied to the substantive due process claim, the Court concluded that the father's rights demanded protection "absent a powerful countervailing interest."<sup>41</sup>

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tion Act, requiring attendance at public schools, was unconstitutional under the Fourteenth Amendment).

32. *Troxel*, 530 U.S. at 65. See also *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Quilloin v. Walcott*, 434 U.S. 246, 248 (1978).

33. *Meyer*, 262 U.S. at 399-400; *Pierce*, 268 U.S. at 535.

34. *Meyer*, 262 U.S. at 399; *Pierce*, 268 U.S. at 534-35.

35. The Court first suggested that some claims might require a stricter level of scrutiny in *United States v. Carolene Products Co.*, 304 U.S. 144, 153 & n.4 (1938).

36. *Wisconsin v. Yoder*, 406 U.S. 205, 207, 228-29 (1972) (holding that the First and Fourteenth Amendments prevent the state from requiring Amish children to attend a formal high school until age sixteen).

37. *Id.*

38. *Id.* at 233-34 (emphasis added) (quoting *Pierce*, 268 U.S. at 535).

39. *Id.* at 233-34.

40. 405 U.S. 645, 651 (1972).

41. *Id.* at 651-53.

In 1978, the Supreme Court of the United States decided *Zablocki v. Redhail*, a case that contained significant similarities to the instant case.<sup>42</sup> Both dealt with child support enforcement techniques that the parents in arrears claimed violated their fundamental constitutional rights. In *Zablocki*, the Court invalidated a Wisconsin statute that prohibited individuals from marrying if they were behind in child support or if their child was on public assistance.<sup>43</sup> The Court found that every law regulating marriage does not have to pass “rigorous scrutiny.”<sup>44</sup> “[R]easonable regulations that do not significantly interfere with” the right to marry can be imposed.<sup>45</sup> However, the Court found that the Wisconsin statute did interfere “directly and substantially” with the right to marry.<sup>46</sup> The Court appeared to apply a hybrid test that was more rigorous than intermediate scrutiny but less stringent than strict scrutiny.<sup>47</sup> The Court held that “[w]hen a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.”<sup>48</sup>

Since the 1970s there has been little direct discussion of parental rights by the Court, however, it has equated the interests of parents with other fundamental rights that receive heightened or strict scrutiny, such as marriage. For instance, in *Washington v. Glucksberg*, the 1997 case that upheld Washington’s prohibition against aiding or assisting suicide, the Court noted that the Due Process Clause requires heightened protection of certain fundamental liberty interests, “includ[ing] the rights to marry, to have children, to direct the education and upbringing of one’s children, to marital privacy, to use contraception, to bodily integrity and to [have an] abortion.”<sup>49</sup> It is important to note that many of these rights have been recognized by the Court as fundamental for a much shorter period of time than parental rights.<sup>50</sup>

The Court’s most recent discussion of parental rights occurred in 2000 in *Troxel v. Granville*.<sup>51</sup> In the instant case, the Supreme Court of Missouri relied heavily on the Supreme Court’s decision in *Troxel* to determine that, although parental control over the upbringing of one’s child(ren) is a funda-

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42. 434 U.S. 374 (1978).

43. *Id.* at 375.

44. *Id.* at 386.

45. *Id.*

46. *Id.*

47. *See id.* at 388.

48. *Id.*

49. 521 U.S. 702, 705, 709, 720 (1997) (citations omitted).

50. For instance, the right to marry a person of another race was not recognized by the Supreme Court until 1967. *Loving v. Virginia*, 388 U.S. 1 (1967). And the right of single individuals to use contraception was not recognized by the Court until 1972. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

51. 530 U.S. 57 (2000).

mental right, it is not subject to *strict scrutiny*.<sup>52</sup> *Troxel* involved a Washington statute that allowed the court to grant visitation rights to “[a]ny person” at “any time” if it was in the “best interest of the child.”<sup>53</sup> The Troxels brought suit to obtain visitation rights with their grandchildren after the children’s mother limited the amount of time the Troxels could spend with them.<sup>54</sup> The Supreme Court affirmed the decision of the Washington Supreme Court and held that the Washington statute unconstitutionally infringed on the fundamental rights of Granville, the mother.<sup>55</sup> The Court held that the non-parental visitation statute was “breathtakingly broad” and that it allowed courts to review a parental determination of what was in the best interest of the child.<sup>56</sup> The statute did not require the trial court to give any deference to a decision made by a fit custodial parent, and in *Troxel* the court merely substituted its judgment for Granville’s regarding the best interest of the children.<sup>57</sup> While the Supreme Court found that the statute was unconstitutional as applied, it declined to find that it was unconstitutional per se or to define the scope of parental due process rights in the context of visitation.<sup>58</sup> The Court hesitated to reach a clear decision because much adjudication in the area of custody and visitation is done on a case-by-case basis, and “the constitutionality of any standard for awarding visitation” depends on how it is applied.<sup>59</sup> The Court did not make its standard of review explicit; however, it stated that courts must give special weight to the decisions of fit custodial parents.<sup>60</sup>

In a recent decision, the Supreme Court of Missouri cited *Troxel* as support for the position that custody and visitation issues only require *heightened scrutiny*, not strict scrutiny.<sup>61</sup> In *Cannon v. Cannon*, James Cannon moved for unsupervised visitation with his biological children after he was convicted of first-degree statutory rape and sodomy of his twelve-year-old step-

52. *Weigand v. Edwards*, 296 S.W.3d 453, 457-58 (Mo. 2009) (en banc) (citing *Troxel*, 530 U.S. at 80 (Thomas, J., concurring)).

53. *Troxel*, 530 U.S. at 60 (quoting WASH. REV. CODE § 26.10.160(3) (1997) (invalidated as unconstitutional in 2000)).

54. *Id.* at 61. The Washington Superior Court for Skagit County granted visitation because it felt that it was in the children’s best interests. *Id.* The Washington Court of Appeals reversed the decision, holding that the Troxels lacked standing to bring the petition for visitation because nonparents may only seek visitation if a custody action is pending. *Id.* at 62. The Washington Supreme Court disagreed with the lower court’s statutory conclusion that the Troxels lacked standing and held that the visitation statute unconstitutionally infringed on the right of parents to raise their children. *Id.* at 62-63, 67.

55. *Id.* at 67.

56. *Id.*

57. *Id.*

58. *Id.* at 73.

59. *Id.* at 73.

60. *Id.* at 69-71.

61. *Cannon v. Cannon*, 280 S.W.3d 79, 86 (Mo. 2009) (en banc) (citing *Troxel*, 530 U.S. at 80 (Thomas, J., concurring)).



daughter.<sup>62</sup> Missouri Revised Statute section 452.375 “expressly prohibit[ed] a court from awarding unsupervised visitation or custody to a parent convicted of such sexual offenses against a child.”<sup>63</sup> The trial court held that the law violated the Missouri Constitution and the Fifth and Fourteenth Amendments of the United States Constitution because the law hindered Cannon’s fundamental right to have a relationship with his children.<sup>64</sup> The Supreme Court of Missouri reversed the trial court’s decision and found that the statute did not deprive Mr. Cannon of his fundamental right to associate with his children because he was still permitted supervised visitation, and the legislature’s restriction provided a reasonable balance between his rights and the state’s *parens patriae* obligation to promote the welfare of children.<sup>65</sup>

The court recognized that the right of parents to the care, custody and control of their children can conflict in some cases with the state’s duty to protect children.<sup>66</sup> The court applied a balancing test that considered the private interests affected, the risk of erroneous deprivation of those interests and the administrative and fiscal burdens of the government.<sup>67</sup> This test was originally developed by the Supreme Court in *Mathews v. Eldridge*, a procedural due process case that upheld the administrative procedure for terminating disability benefits.<sup>68</sup> Based on this test, the Supreme Court of Missouri held that the limitation on Mr. Cannon’s visitation with his children was reasonable and did not infringe on his right to associate with his children.<sup>69</sup>

In the instant decision, handed down only a few months after *Cannon*, the court addressed the constitutionality of section 452.455.4, a Missouri statute also affecting parental rights.<sup>70</sup> Missouri lawyers, judges and legislators had questioned the constitutionality of section 452.455.4 for several years.<sup>71</sup> However, until *Weigand*, Missouri courts had not addressed the constitutional issue, choosing to decide cases on other grounds.<sup>72</sup> In fact, litigation on the

62. *Id.* at 81.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 86.

67. *Id.*

68. *Id.* (applying the test developed in *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976)).

69. *Id.* at 87.

70. See *Weigand v. Edwards*, 296 S.W.3d 453, 455 (Mo. 2009) (en banc).

71. See Joy Simmons, *Missouri Court Rules Bond Must Be Paid to Modify Parental Custody Agreement*, MO. LAW. WKLY., Jan. 8, 2007, available at 2007 WLNR 26325705; Allison Retka, *Missouri Supreme Court Upholds Bond Requirement in Child Support Case*, MO. LAW. WKLY., Aug. 7, 2009, available at 2009 WLNR 15496923.

72. See *Miller v. Miller*, 210 S.W.3d 439, 450 (Mo. App. W.D. 2007), *abrogated in part*, 275 S.W.3d 249 (Mo. 2009) (en banc) (“[B]ecause the appellant failed to raise the issue of the constitutionality of Section 452.455.4 at the earliest opportunity,

statute in question has been sparse. In *Miller v. Miller*, the Missouri Court of Appeals, Western District, interpreted the statute to apply to all determinations of visitation and child custody.<sup>73</sup> The court held that if the parent in arrears did not post bond as required by the statute, the court lacked personal jurisdiction over the non-movant to hear the claim.<sup>74</sup> The court did not address the appellant's claim that the bond required by section 452.455.4 violated the equal protection and due process rights of both himself and his children.<sup>75</sup> The appellant failed to raise the constitutional issue at the trial court level, and the court found that the issue was not appropriate for appellate review.<sup>76</sup>

In *Webb v. Wyciskalla*, the Supreme Court of Missouri overruled *Miller*'s holding that courts lack personal jurisdiction to hear a claim if the parent does not comply with the statute.<sup>77</sup> The court noted that statutory limits on a cause of action are subject to the right to access the courts found in Article I, section 14 of the Missouri Constitution.<sup>78</sup> Also, the court suggested that such statutory restrictions on judicial remedies may violate the principle of separation of powers and the Fourteenth Amendment of the United States Constitution.<sup>79</sup> Despite these concerns, the court did not address the constitutional issues in *Webb* because it found that the statutory challenge was not ripe.<sup>80</sup>

After *Webb*, Larry Swall, chairman of the Missouri Bar's Family Law Section, as well as family court commissioners and other concerned parties, brought the constitutional issue to the attention of Missouri legislators.<sup>81</sup> Although some legislators defended the constitutionality of the statute, they thought that it was problematic because it limited judicial discretion.<sup>82</sup> The Missouri General Assembly repealed section 452.455.4 by slipping the repeal

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the issue is not preserved for appeal."); *Webb v. Wyciskalla*, 275 S.W.3d 249, 256-58 ("Because it is unclear from the record whether section 452.455.4 applies, this Court cannot consider Father's challenge to the constitutional validity of the statute.").

73. 210 S.W.3d at 444-45.

74. *Id.* at 444.

75. *Id.* at 450.

76. *Id.*

77. *Webb*, 275 S.W.3d at 252-54. The appellate court in *Webb* characterized the issue as one of subject matter jurisdiction rather than personal jurisdiction. *Id.* at 252. The Supreme Court of Missouri held that the statute was not jurisdictional in nature at all. *Id.* The court held that where a statute appears to speak in jurisdictional terms, it "merely set[s] statutory limits on remedies or elements of claims for relief that courts may grant." *Id.* at 255.

78. *Id.* at 255.

79. *Id.*

80. *Id.* at 255, 258. The court held that there was not enough evidence to determine the amount of child support owed by the father; therefore, it could not determine whether section 452.455.4 would actually bar his claim. *Id.* at 257-58.

81. Retka, *supra* note 71.

82. *Id.* (reporting comments made by Representative Bryan Stevenson, chairman of the Missouri House Judiciary Committee).

into late term amendments to House Bill 481 in the 2009 legislative session.<sup>83</sup> The bill was signed by Governor Jay Nixon, and the statute was repealed as of August 28, 2009.<sup>84</sup> The state supreme court's decision to uphold the constitutionality of the statute was handed down only twenty-four days before the statute's repeal became effective, leaving many to question the timing of the court's decision and effectively making the decision moot.<sup>85</sup> However, the decision nonetheless remains important because the Supreme Court of Missouri clarified its approach to due process challenges in the area of child custody disputes and explained the current test for determining whether there has been a violation of the open courts provision of the Missouri Constitution.

### B. Open Courts Claim

Article I, section 14 of the Missouri Constitution provides “[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.”<sup>86</sup> The Supreme Court of Missouri has interpreted this provision on numerous occasions, but it has had trouble formulating a consistent approach in its decisions.<sup>87</sup> The court has determined that the open courts provision does not prohibit the legislature from modifying or eliminating common law or statutorily based claims.<sup>88</sup> The problem, therefore, has been to identify a standard that ensures that the open courts provision maintains its strength but also gives adequate respect to legislative decisions.<sup>89</sup>

In 2000, the Supreme Court of Missouri partially invalidated Missouri Revised Statute section 537.053.3, which allowed a civil cause of action against a liquor licensee only when the licensee had previously been convicted of providing liquor to an intoxicated person.<sup>90</sup> The court held that the conviction requirement was invalid because it created a “barrier” to accessing the courts.<sup>91</sup> In *Kilmer v. Mun*, the widow and children of Thomas Kilmer, a man killed by a drunk driver, brought a wrongful death action against a res-

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83. *Id.* House Bill 481 repealed provisions of Missouri law generally relating to courts and judicial proceedings and enacted 125 new provisions in lieu of the ones repealed. H.B. 481, 95th Gen. Assem., 1st Reg. Sess. (Mo. 2009).

84. H.B. 481.

85. Retka, *supra* note 71. The Supreme Court of Missouri handed down its decision in *Weigand v. Edwards* on August 4, 2009. 296 S.W.3d 453 (Mo. 2009) (en banc). The repeal of section 452.455.4 was set to become effective on August 28, 2009. H.B. 481.

86. MO. CONST. art. I, § 14.

87. *Kilmer v. Mun*, 17 S.W.3d 545, 548 (Mo. 2000) (en banc).

88. *Id.* at 549-50.

89. *Id.*

90. *Id.* at 546, 550 (partially invalidating MO. REV. STAT. § 537.053.3 (2000)).

91. *Id.* at 550.

restaurant that allegedly served beer to the driver after he was already intoxicated.<sup>92</sup> The prosecuting attorney declined to prosecute the restaurant, and, consequently, there was no conviction to sustain an action under the statute.<sup>93</sup>

The Supreme Court of Missouri noted in *Kilmer* that its prior decisions regarding the open courts provision provided a variety of approaches and resulted in holdings that “seem irreconcilable.”<sup>94</sup> However, the court found that there was a “coherent line of reasoning that c[ould] be distilled from various opinions[, and,] if followed,” this line of reasoning “w[ould] ensure that [A]rticle I, section 14 retain[ed] its validity while permitting proper deference to legislative enactments.”<sup>95</sup> The court found this line of reasoning to be best described by the dissenting opinion of Chief Justice Holstein in *Wheeler v. Briggs*.<sup>96</sup> In *Wheeler*, Holstein argued that the open courts provision “prohibits any law that arbitrarily or unreasonably bars individuals or classes of individuals from accessing our courts in order to enforce recognized causes of action for personal injury.”<sup>97</sup> The *Kilmer* court reasoned that this standard was the most appropriate for recognizing the ability of the legislature to “design the framework of the substantive law” while maintaining a meaningful ability to obtain a remedy when a right has been impaired.<sup>98</sup> Under this standard, the court found that the conviction requirement of section 537.053.3 was unconstitutional because it erected an arbitrary and unreasonable barrier to a wrongful death claim.<sup>99</sup> The ability to bring a cause of action was dependent upon the prosecuting attorney’s decision to press charges, which was susceptible to political and other pressures.<sup>100</sup>

In 2003, the court again addressed the open courts provision in *Etlings v. Westport Heating & Cooling Services, Inc.*<sup>101</sup> The Etlings claimed that they were entitled to sue for workers’ compensation benefits under the open courts

92. *Id.* at 545.

93. *Id.* at 546. The trial court granted summary judgment to the restaurant. *Id.*

94. *Id.* at 548-49. For example, the court invalidated a medical malpractice statute of limitations as applied to a minor, *Strahler v. St. Luke’s Hospital*, 706 S.W.2d 7, 11-12 (Mo. 1986) (en banc), but upheld the statute of limitations as applied to a mentally handicapped person. *Wheeler v. Briggs*, 941 S.W.2d 512, 515 (Mo. 1997) (en banc). See *Kilmer*, 17 S.W.3d at 549 (noting the apparent incongruity of the holdings in *Strahler* and *Wheeler*).

95. *Id.* at 549.

96. *Id.* at 549 (citing *Wheeler*, 941 S.W.2d at 515 (Holstein, J., dissenting in part and concurring in part)).

97. *Wheeler*, 941 S.W.2d at 515.

98. *Kilmer*, 17 S.W.3d at 550 (quoting *Harrell v. Total Health Care, Inc.*, 781 S.W.2d 58, 62 (Mo. 1989) (en banc)).

99. *Id.* at 553.

100. *Id.* at 552.

101. 92 S.W.3d 771 (Mo. 2003) (en banc).

provision of the Missouri Constitution after the death of their son.<sup>102</sup> The court reiterated the *Kilmer* “arbitrary and unreasonable” test.<sup>103</sup> The court went on to say, however, that a statute’s arbitrary or unreasonable nature “[o]ften . . . turns on whether a statute imposes a procedural bar to access the courts or whether the statute substantively changes or limits the right to recovery.”<sup>104</sup> According to the court, the Etlings’ argument failed because it attacked the substance of the statute “rather than alleging a viable procedural hurdle,”<sup>105</sup> such as the conviction requirement attacked in *Kilmer*.<sup>106</sup> In *Etling*, there was no right to a wrongful death action against the employer apart from the workers’ compensation statute.<sup>107</sup> Consequently, the court held that because there was no right to recover, barring the appellants from maintaining a cause of action did not violate their right to access the courts and was not arbitrary or unreasonable.<sup>108</sup>

More recently, the court examined the open courts provision in *Snodgras v. Martin & Bayley, Inc.*<sup>109</sup> The plaintiff alleged that Missouri Revised Statute section 537.053.2, which bars claims against sellers of packaged alcohol but allows claims against persons licensed to sell alcohol on the premises by the drink, violates the open courts provision of the Missouri Constitution.<sup>110</sup> Snodgras argued that the legislature had unfairly eliminated a cause

102. *Id.* at 773. Mr. and Mrs. Etling were the nondependent parents of James Etling, Jr., an adult who was killed in an accident while employed for Westport Heating & Cooling Services, Inc. *Id.* at 772-73. The Etlings sought death benefits under Missouri Revised Statute section 287.240(1), which provided for workers’ compensation assistance. *Id.* Their claim was denied by the Labor and Industrial Relations Commission because they were not dependants. *Id.* In addition to their claim regarding the open courts provision, the Etlings also claimed that the statute violated their right to equal protection under the Fourteenth Amendment of the United States Constitution. *Id.* at 773.

103. *Id.* at 773 (citing *Kilmer*, 17 S.W.3d at 549).

104. *Id.*

105. *Id.*

106. See *supra* notes 90-91 and accompanying text.

107. *Etling*, 92 S.W.3d at 773.

108. *Id.*

109. 204 S.W.3d 638 (Mo. 2006) (en banc).

110. *Id.* at 639-40. Snodgras filed a lawsuit against Martin & Bayley, Inc., the operator of a convenience store, alleging that it negligently sold alcohol to her minor son, who was killed in a one-vehicle accident after consuming the alcohol. *Id.* at 639. Unfortunately for Snodgras, Missouri Revised Statute section 537.053.2 specifically provided that a cause of action was available only against a person licensed to sell liquor by the drink for consumption on the premises. *Id.* at 640. No exception was made for claims against sellers of prepackaged liquor, regardless of whether the individual who purchased the liquor was a minor. *Id.* The plaintiff also argued that the statute violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Id.* at 640-41.

of action.<sup>111</sup> In other words, the plaintiff was substantively attacking the statute. The court reviewed Snodgras's open courts claim under a three-part test developed from the holding in *Kilmer*.<sup>112</sup> Under the three part test, "[a]n open courts violation is established [by] showing that: (1) a party has a recognized cause of action; (2) . . . the cause of action is being restricted; and (3) the restriction is arbitrary and unreasonable."<sup>113</sup> The court reiterated, however, that the open courts provision does not prevent the legislature from abolishing or modifying common law or statutory claims.<sup>114</sup> The court then held that section 537.053.2 "does not impose any barriers to pursuing a recognized cause of action."<sup>115</sup> The statute merely defines what the existing cause of action entails and thus is not arbitrary or unreasonable.<sup>116</sup> Essentially, the statute is not a procedural bar to the cause of action; therefore, it does not violate the open courts provision of the Missouri Constitution.<sup>117</sup>

#### IV. INSTANT DECISION

##### A. Due Process and Equal Protection

In *Weigand v. Edwards*, the Supreme Court of Missouri considered the due process, equal protection and open court claims of a father who was denied the opportunity to litigate his parental rights because he failed to post a bond for child support arrears exceeding \$10,000.<sup>118</sup> The court began its constitutional analysis by addressing the father's due process and equal protection claims.<sup>119</sup>

Mr. Edwards alleged that section 452.455.4, as it existed at the time of his claim, denied him his required due process and did not pass strict scrutiny.<sup>120</sup> In support of his due process claim, Mr. Edwards argued that the order denying him custody or visitation rights was unlawful because there had not been a hearing, nor had there been a finding that he was an unfit parent or that granting him custody or visitation would harm his child's mental or physical health.<sup>121</sup> The court found the alleged problems with the prior custody modification to be irrelevant to the current case because the statute in question

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111. *Id.* at 640.

112. *Id.* (citing *Kilmer v. Mun*, 17 S.W.3d 545, 549-50 (Mo. 2000) (en banc)).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. 296 S.W.3d 453, 454 (Mo. 2009) (en banc).

119. *Id.* at 456.

120. *Id.*

121. *Id.*

was not directly responsible for the denial of his parental rights.<sup>122</sup> According to the court, Mr. Edwards “frame[d] his constitutional challenge to section 452.455.4 as though that statute was the basis for him being denied any custody or visitation with his child.”<sup>123</sup> Mr. Edwards argued that the statute forced the trial court to presume that he was an unfit parent because he failed to pay child support rather than considering the facts of the particular case and considering the best interests of the child.<sup>124</sup>

The court rejected Mr. Edwards’s argument, finding that section 452.455.4 did not create “a presumption of unfitness.”<sup>125</sup> The statute merely required the parent who was in arrearage to post bond before the parent sought to modify the custody judgment that was already in place, whatever that judgment entailed.<sup>126</sup> Essentially, the court assumed that the individual received adequate due process when the original child support order was entered and that, therefore, the circumstances and nature of the parent-child relationship were responsible for the denial of custody, not the statute.<sup>127</sup> The court reiterated that the issue before it was “whether the requirement for posting a bond before proceeding on a motion to modify violates the due process rights of a parent with an arrearage in excess of \$10,000.”<sup>128</sup>

Concerning his equal protection claim, Mr. Edwards again argued that any statute that hinders a parent’s right to have a relationship with his or her child must pass strict scrutiny.<sup>129</sup> Strict scrutiny involves a determination “of whether the classification [contained in the statute] is necessary to accomplish a compelling state interest.”<sup>130</sup> According to the court, Mr. Edwards did not state clearly what classification was created by the statute.<sup>131</sup> Despite Mr. Edwards’s lack of clarity, the court found that the classification at issue was the distinction between parents who owe more than \$10,000 in child support and those who do not.<sup>132</sup>

After clarifying the issues before it, the court examined Mr. Edwards’s right to have care, custody and control of his child.<sup>133</sup> Here, the court essentially combined the equal protection and due process claims into one analysis of parental rights and the appropriate level of scrutiny.<sup>134</sup> The court conceded that normally strict scrutiny is required when a fundamental interest is at

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122. *Id.* at 456-57.

123. *Id.* at 456.

124. *Id.* at 456-57.

125. *Id.* at 457.

126. *Id.*

127. *See id.* at 460.

128. *Id.* at 457.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *See id.* at 457-61.

stake.<sup>135</sup> When the fundamental right that allegedly has been violated is a parent's right to the care, custody and control of a child, however, the court found that a different level of scrutiny is appropriate, based upon the holding of the Supreme Court of the United States in *Troxel v. Granville*.<sup>136</sup> According to the Supreme Court of Missouri, the Supreme Court used a "balancing-of-interests standard" to determine the constitutionality of the third-party visitation statute in *Troxel*.<sup>137</sup> The court adopted this standard in *Cannon*, where it balanced the interest of a convicted parent in having a relationship with his children with the state's interest in protecting children.<sup>138</sup> The *Cannon* court held that, when applying the balancing-of-interests standard, consideration should be given to "the private interests that will be affected, the risk of erroneous deprivation of the affected interests, and the government's administrative and fiscal burden."<sup>139</sup>

In the instant case, Mr. Edwards argued that, by requiring a parent to post bond in the amount of past due child support or reasonable attorney's fees for the other parent, the state was attempting to promote its own interest in collecting unpaid child support.<sup>140</sup> The court dismissed this argument because "the plain and ordinary language" of the statute suggested that the legislature's purpose was primarily to protect the parent who was not receiving the ordered child support.<sup>141</sup> The balancing-of-interests test is particularly appropriate, according to the court, when the private interests at stake are those of two parents in a proceeding to modify child custody or visitation.<sup>142</sup> Both parents have a fundamental right to the care, custody and control of their child, and the court must consider their competing interests.<sup>143</sup> Each parent has an interest in the amount of time he or she is able to spend with the child, and the parent who is owed the child support also has an interest in receiving the money.<sup>144</sup>

According to the court, the statute sought to protect a custodial parent who bore the cost of providing for the child.<sup>145</sup> The court reasoned that, due to unpaid child support, the custodial parent had less financial resources available and was at a distinct disadvantage in defending against a motion to modify custody.<sup>146</sup> The statute prevented the parent in arrears from filing a

135. *Id.* at 457.

136. *Id.* at 457-58 (citing *Cannon v. Cannon*, 280 S.W.3d 79, 86 (Mo. 2009) (en banc)); *Troxel v. Granville*, 530 U.S. 57, 80 (2000) (Thomas, J., concurring)).

137. *Id.* at 458 (citing *Troxel*, 530 U.S. at 88 (Stevens, J., dissenting)).

138. *Cannon*, 280 S.W.3d at 86-88. See also *Weigand*, 296 S.W.3d at 458.

139. *Cannon*, 280 S.W.3d at 86. See also *Weigand*, 296 S.W.3d at 458.

140. *Weigand*, 296 S.W.3d at 458.

141. *Id.*

142. *Id.*

143. *Id.* at 458-59.

144. *Id.*

145. *Id.* at 459.

146. *Id.*



petition to modify custody but allowed him or her to respond to a motion made by the custodial parent.<sup>147</sup> This arrangement protected the custodial parent from being forced to defend a claim he or she could not afford and possibly from being forced to appear without an attorney.<sup>148</sup> The statute also attempted to protect the legal interest of the custodial parent by providing for an alternative bond sufficient to pay for the custodial parent's attorney's fees if they were greater than the amount of past due child support.<sup>149</sup> While the court could order attorney's fees in domestic relations cases under section 452.355, attorney's fees are hard to collect, and many attorneys will not represent a client who cannot pay the attorney's fees on his or her own.<sup>150</sup> According to the court, section 452.455.4 attempted to solve this problem by requiring that the funds be held in escrow and ensuring that the custodial parent had the funds to hire an attorney.<sup>151</sup>

Next, the court concluded that it also must consider the interests of the child when applying the balancing test.<sup>152</sup> The Missouri legislature generally recognizes that a child has an interest in having a "significant and meaningful relationship" with a parent.<sup>153</sup> Nonetheless, whether the relationship is truly in the child's best interest must be determined by the facts and circumstances of the particular parent and child.<sup>154</sup> Section 452.455.4 protected the interests of the child by ensuring that one parent was not at an advantage in a proceeding to modify custody and visitation.<sup>155</sup> The statute gave both parties the opportunity to be represented by counsel and attempted to ensure that any change in the custody judgment was really in the best interest of the child.<sup>156</sup>

The court concluded that Ms. Weigand had been deprived of a significant sum of child support.<sup>157</sup> She had a valid interest in being represented by counsel and in not paying unnecessary legal fees to defend the motion to modify.<sup>158</sup> The child's best interest also required that Ms. Weigand be able to adequately defend the motion to modify custody and that her ability to hire counsel not be hindered by Mr. Edwards's arrearage.<sup>159</sup>

The court next noted that section 452.455.4 furthered the state's interest in administering justice.<sup>160</sup> It observed that the statute was in line with the

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147. *Id.* at 460.

148. *Id.* at 459.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 460.

158. *Id.*

159. *Id.* at 461.

160. *Id.* at 460.

general rule recognized by the court requiring one who seeks relief to show that he or she is willing to abide by the decisions of the court.<sup>161</sup> The court credited this alignment to the fact that the statute denied relief to a person who had not complied with a judicial order, and thereby it encouraged the individual to respect and obey judicial decisions.<sup>162</sup>

The court then pointed out that, when applying the balancing test, it is important to have a clear understanding of a statute's scope.<sup>163</sup> It found that the scope of section 452.455.4 was limited to modification proceedings and did not affect the custody and visitation rights of the parent under a previously entered judgment.<sup>164</sup> The court further noted that, at any time before the arrearage reached \$10,000, the delinquent parent could move to modify the custody and visitation order.<sup>165</sup> Also, the parent was not prohibited from seeking to reduce the amount of child support he or she was required to pay, and the parent could still defend a motion to modify custody or visitation brought by the other parent.<sup>166</sup>

The court pointed out that the impact of the statute in the instant case was significant because there was a prior judgment against Mr. Edwards that denied him all custody and visitation rights.<sup>167</sup> However, the court concluded that it was the prior judgment, not the statute itself, that denied him the rights of custody and visitation.<sup>168</sup> The court placed great significance on the fact that Mr. Edwards did not defend his rights in the earlier custody proceeding and did not file a motion to modify the amount of child support that he was required to pay.<sup>169</sup> The court assumed that, because Mr. Edwards did not attempt to modify the child support order or contend that he could not pay it, the child support order was still "a fair and reasonable amount."<sup>170</sup>

The court held that section 452.455.4 was constitutional, "[c]onsidering the private interests affected, the risks of erroneous deprivation of the affected interests, and the government's administrative and fiscal burden."<sup>171</sup> The statute reasonably balanced the interests of the parent who owed more than \$10,000 in child support and the custodial parent to whom the support was

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161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* Under Missouri Revised Statute section 452.400.1(1) (Supp. 2008), a court may deny custody and visitation to a parent only if harm to the child would result. In *Weigand*, the Supreme Court of Missouri did not review the 2004 modification order but assumed the statute was correctly applied by the trial court. 296 S.W.3d at 461.

171. *Id.* at 461.

owed with the state's interest in protecting the best interest of the child.<sup>172</sup> Because the statute reasonably balanced the interests of all the parties, Mr. Edwards's due process and equal protection rights were not violated.<sup>173</sup>

### B. Open Courts Claim

Next, the court addressed Mr. Edwards's contention that section 452.455.4 violated the open courts provision of the Missouri Constitution.<sup>174</sup> The court noted that statutes that procedurally bar access to the courts are unconstitutional.<sup>175</sup> The court also recognized, however, that the individual is not constitutionally entitled to access the courts for all grievances; the right to access the courts simply means the ability to pursue a cause of action recognized by the substantive law.<sup>176</sup> The court then outlined the test to determine whether an open courts violation has occurred as follows: "(1) [that] a party has a recognized cause of action; (2) that the cause of action is being restricted; and (3) [that] the restriction is arbitrary or unreasonable."<sup>177</sup>

The court recognized that a motion to modify a custody order is an independent cause of action and that the cause of action was restricted by the bond requirement of section 452.455.4.<sup>178</sup> According to the court, the only question in the case was "whether the restriction was arbitrary or unreasonable."<sup>179</sup> For the same reasons put forth in the analysis of the balancing test, the court concluded that "the bond requirement of section 452.455.4 [w]as not arbitrary or unreasonable."<sup>180</sup>

The court recognized that in *Kilmer* it had found the statute's conviction requirement to be an arbitrary and unreasonable barrier because it "required a successful prosecution for the offense of providing liquor to an intoxicated person as a prerequisite to a wrongful death action."<sup>181</sup> The court distinguished *Kilmer* from the instant case because the statute in *Kilmer* required the action of a third person, whereas the statute in the instant case depended solely on the action of the parent who failed to pay the child support.<sup>182</sup> Therefore, the court found that section 452.455.4 was not an arbitrary and unreasonable barrier to accessing the courts.<sup>183</sup> Finally, the court held that

172. *Id.*

173. *Id.*

174. *Id.* See MO. CONST. art I, § 14.

175. *Id.* (citing *Wheeler v. Briggs*, 941 S.W.2d 512, 514 (Mo. 1997) (en banc)).

176. *Id.* (citing *Kilmer v. Munn*, 17 S.W.3d 545, 549).

177. *Id.* (quoting *Snodgras v. Martin & Bayley, Inc.*, 204 S.W.3d 638, 640 (Mo 2006) (en banc)).

178. *Id.* at 461-62.

179. *Id.* at 462.

180. *Id.*

181. *Id.* (citing *Kilmer*, 17 S.W.3d at 552).

182. *Id.*

183. *Id.*

Mr. Edwards's claims that section 452.455.4 violated his federal and state due process and equal protection rights and the Missouri Constitution's open courts provision were without merit, and it affirmed the trial court's finding that the statute was constitutional.<sup>184</sup>

## V. COMMENT

### A. *Due Process, Equal Protection and the Balancing Test*

By expanding and modifying Missouri precedent in several areas, *Weigand* stands as an important case, even in light of the fact that section 452.455.4 has since been repealed. *Weigand* provided an opportunity for the Supreme Court of Missouri to reiterate its newly created balancing test and to clarify the standard for parental rights in a case that was not extremely contentious. However, the court's reasoning for finding the statute to be constitutional is somewhat vague. The court decided that the statute did not violate due process or equal protection because it appropriately balanced all of the interests involved, including the fundamental rights of the parents.<sup>185</sup> However, the court also seemed to suggest that the statute did not infringe upon Mr. Edwards's parental rights because its scope was limited to the modification of a pre-existing court order.<sup>186</sup> As a result, there are several distinct issues that must be discussed when analyzing this opinion. First, is the balancing test applied by the court appropriate for determining if a fundamental parental right has been infringed? Second, was the court correct in determining that Mr. Edwards's fundamental right was not restricted by the statute? Or, in the alternative, was infringement of the right justified when considering the interests involved?

In formulating its balancing test, the Supreme Court of Missouri clearly was attempting to be considerate of all interests involved and also to avoid setting any standards that would obstruct the state's duty to protect children. The Supreme Court of the United States noted in *Troxel* that child custody decisions often occur on a case-by-case basis rather than according to fixed standards<sup>187</sup> and that it is important for the law to be somewhat flexible where children are concerned. Flexibility, it seems, has been achieved at the expense of clarity and consistency in Missouri.

The court's decision to apply a balancing test, while logical, is a break from normal due process and equal protection analysis. The balancing test also fails to give appropriate consideration to the interests of parents. This standard is extremely subjective and does not require the heightened scrutiny that fundamental rights deserve. The Supreme Court of Missouri's balanc-

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184. *Id.*

185. *Id.* at 461.

186. *Id.*

187. *Troxel v. Granville*, 530 U.S. 57, 73 (2000).

ing-of-interests test does not require that the state's interests meet any particular standard in order to overcome parental rights, and it does not take into consideration how well a statute actually achieves its alleged purpose. As a result, judges are not required to closely scrutinize state intrusions into parental rights. Rather, they are able to give the state's interest the same weight as the parents' interests.

At the very least, *Troxel* suggests that parental rights are entitled to intermediate scrutiny, if not something more. The balancing test created by the Supreme Court of Missouri is arguably less protective than even intermediate scrutiny, and it is far less stringent than the form of heightened review used by the Supreme Court in other due process cases like *Zablocki v. Redhail*.<sup>188</sup> The court in *Zablocki* suggested that while the state's interest need not be compelling, the statute must at least be "closely tailored" to effectuate only the state's "sufficiently important" interests.<sup>189</sup> As noted above, the balancing-of-interests test does not require the court to consider any of those factors. Strict scrutiny review seems to be mandated by the longstanding fundamental nature of parental rights; however, in the alternative, a standard of review similar to that used in *Zablocki* seems most appropriate.<sup>190</sup> The rights to marry and to raise one's children are part of the same general right to privacy in family life.<sup>191</sup> According to the Court, these rights must receive "equivalent protection" to other fundamental privacy rights,<sup>192</sup> which is not guaranteed by the balancing test.

When determining what standard of review is appropriate, it is helpful to look at the reason parental rights are considered fundamental. Parental rights exist partially because we assume that fit parents act in the best interests of their children.<sup>193</sup> The original purpose of those rights, however, was to protect the liberty interest of the parent and the family unit.<sup>194</sup> The Supreme Court was concerned with unnecessary state intrusion into family life because it felt that parents were able to make better judgments for their children than the state.<sup>195</sup> In *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, the Court recognized that the state could regulate areas like education for the public welfare.<sup>196</sup> Yet the Court made clear its concern with unwarranted state intrusion: "The child is not the mere creature of the state; those

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188. *Zablocki v. Redhail*, 434 U.S. 374 (1978). See the discussion of the *Zablocki* standard *supra* Part III.A.

189. *Id.* at 388.

190. *See id.* at 388.

191. *Id.* at 386.

192. *Id.*

193. *See Troxel v. Granville*, 530 U.S. 57, 60 (2000).

194. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

195. *See id.* at 399-400.

196. 268 U.S. 510, 535 (1925).

who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”<sup>197</sup>

In recent years, courts have treated parental rights with hesitancy because of fear that a strict standard would lead to strong parental rights at the expense of children’s welfare.<sup>198</sup> This does not have to be the case. States have a powerful interest in protecting children, and this interest seems clearly to prevail over parental rights, regardless of the standard used, where harm to the child will result. Also, other state courts have chosen to apply strict scrutiny to statutes affecting parental rights even after *Troxel*,<sup>199</sup> suggesting that the standard *is* appropriate and workable in the modern family law context.

In some respects, due process is already a balance of interests between the right holder and the state. The difference between heightened scrutiny and a balancing test is that under heightened scrutiny, by declaring a right to be fundamental, we tip the balance in favor of the right holder. In our society we believe that, based on the parent’s relationship with the child, a parent is in a better position than the state to make certain decisions regarding the child. Therefore, we give the parent a trump card of sorts. Applying a heightened standard of review to statutes affecting parental rights does not mean that children’s interests are irrelevant but rather that, absent a compelling reason, parents should have a right to have a relationship with their children and the ability to make judgments for them.

In *Weigand*, the Supreme Court of Missouri held that *Troxel* stands for the proposition that parental rights are entitled merely to heightened scrutiny, not strict scrutiny.<sup>200</sup> While the Supreme Court of the United States did reaffirm the fundamental nature of parental rights and state that certain fundamental rights are entitled to heightened scrutiny, nowhere in the plurality

197. *Id.*

198. *See Troxel*, 530 U.S. at 73.

199. For example, the Supreme Court of Connecticut found that strict scrutiny is required when a parent’s interest in the care, custody and control of his or her child(ren) is at stake because strict scrutiny is “consistent” with the Supreme Court’s determination that parental rights are fundamental. *Roth v. Weston*, 789 A.2d 431, 440-41 (Conn. 2002). The Iowa Supreme Court also held that strict scrutiny applies to parental rights, regardless of the marital status of the parents. *In re Marriage of Howard*, 661 N.W.2d 183, 188-89 (Iowa 2003). The Iowa court recognized that *Troxel* did not follow strict scrutiny; however, the court found that standard to be the most appropriate because of the right’s fundamental nature. *Id.* at 187-89. The court stated,

The particular circumstances of the divorce that tend to disrupt the decision-making of parents can be considered as they implicate the compelling interests of the state to intervene. We conclude this traditional constitutional analysis captures our sense of the essential balance between the caretaking interests of parents and the state under our constitution, and we reject any reviewing standard . . . short of strict scrutiny.

*Id.* at 189.

200. *Weigand v. Edwards*, 296 S.W.3d 453, 457-58 (Mo. 2009) (en banc).

opinion of *Troxel* did the Court deny that strict scrutiny could be applied.<sup>201</sup> In fact, any other mention of a standard of review is conspicuously missing from the opinion. The concurring opinion by Justice Thomas specifically pointed to the absence of any articulated standard of review and argued that strict scrutiny should be applied to all fundamental rights.<sup>202</sup> One could view Justice Thomas's concurrence as evidence that the court rejected strict scrutiny under the facts in *Troxel*. A strict reading of the opinion suggests, however, that the Court intentionally refused to create or reject any standard, including strict scrutiny, in such an instance.

The Supreme Court of Missouri, relying on *Troxel*, chose to apply a balancing-of-interests test that equally considers the rights of parents, the child and the state.<sup>203</sup> The court concluded that such a test was applied to the grandparent visitation statute in *Troxel* but did not indicate where in the plurality opinion this test was stated or implied.<sup>204</sup> There does not seem to be any indication in *Troxel* that the plurality of the Court considered any interests other than those of the mother and the state. The only mention of balancing interests comes from the dissenting opinion of Justice Stevens, in which he argues that a parent's rights have never been considered absolute because the Court has always operated under the assumption that the interests of the child must be balanced with the interests of the parent and the state.<sup>205</sup>

The only support in *Troxel* for the balancing-of-interests test applied by the Supreme Court of Missouri comes from a dissenting opinion, which leads one to question the adequacy of the standard. Clearly, the plurality in *Troxel* thought that some level of heightened scrutiny was necessary to protect parental rights. The balancing test is problematic because it provides little guidance to courts when deciding if a statute is constitutional, and the Supreme Court of Missouri made no attempt to explain how the test is consistent with heightened scrutiny.

The court seemed to suggest that, regardless of the standard applied, the statute would remain constitutional. The court emphasized that Mr. Edwards was denied his parental rights because of the prior custody decision, not section 452.455.4.<sup>206</sup> The court also implied that because of the statute's limited scope Mr. Edwards's parental rights were not infringed upon at all.<sup>207</sup> This author disagrees with the court about the statute's effect. Even if a parent is denied custody and visitation, the decision is subject to modification if circumstances change,<sup>208</sup> thus a parent does not totally lose all rights as a parent

201. *Troxel*, 530 U.S. at 60-75.

202. *Id.* at 80 (Thomas, J., concurring).

203. *Weigand*, 296 S.W.3d at 458-60.

204. *Id.* at 458 (citing *Troxel*, 530 U.S. at 88 (Stevens, J., dissenting)).

205. *Troxel*, 530 U.S. at 86-88 (Stevens, J., dissenting).

206. *Weigand*, 296 S.W.3d at 457, 460.

207. *Id.*

208. MO. REV. STAT. § 452.400.2 (Supp. 2008). See also MO. REV. STAT. § 452.410 (Supp. 2008).

when his or her custody or visitation with the child is restricted. By limiting the ability of the parent in arrears to assert certain rights, section 452.455.4 was at least partially responsible for denying the parent's ability to have a relationship with his or her child. In *Weigand*, absent the statute, Mr. Edwards would have been able to bring a claim for custody or visitation, asserting the parental rights he retained. And, if circumstances had changed, he may have been awarded partial custody of his child.

Section 452.455.4 did not actually state that a parent could not have a relationship with his or her child if the parent did not pay child support. However, that was essentially the effect for Mr. Edwards and other parents who had been completely denied custody and visitation. The state clearly has an interest in ensuring that custodial parents receive adequate child support and are not burdened by continuous lawsuits regarding custody and visitation that they cannot afford. The question is whether this state interest is important or compelling enough to overcome the right of a noncustodial parent to at least have his or her claims considered. It is not clear to this author that the statute passed any form of heightened scrutiny.

The court also based its decision on many assumptions that were unfair and problematic because they could easily disadvantage a parent who is unfamiliar with the legal system or merely experiencing economic difficulties. For instance, the court assumed that Mr. Edwards could pay the ordered child support because he did not file a motion to modify the amount.<sup>209</sup> The court also assumed that Mr. Edwards had the chance to litigate his rights in the earlier custody hearing but chose not to do so.<sup>210</sup> And the court relied on the supposition that the 2004 custody decision was correctly decided under Missouri law.<sup>211</sup>

The court's assumption that Mr. Edwards could pay the ordered child support is problematic due to the method in which child support is awarded and enforced. Child support amounts in Missouri are based on general child support guidelines that look primarily at the parent's income<sup>212</sup> without consideration of other factors that might hinder or influence the parent's ability to pay the statutorily imposed amount. The guidelines create a rebuttable presumption that the guideline amount is correct and fair.<sup>213</sup> For the amount to be reduced, the parent must succeed in convincing the judge that the award is either unjust or inappropriate.<sup>214</sup> Mr. Edwards may have legitimately been unable to pay the ordered amount but may not have challenged the award because he did not know he was able to or thought that he would not succeed. Another thing that makes the court's assumptions problematic is that Mr.

209. *Id.* at 460.

210. *Id.*

211. *Id.*

212. MO. REV. STAT. § 452.340.8 (Supp. 2008).

213. *Id.* § 452.340.9.

214. *See id.*



Edwards was notified of the original custody hearing by publication.<sup>215</sup> With notice by publication, the parent, like Mr. Edwards, may not have actually known about the modification hearing that denied him or her parental rights. One could argue that a parent who is absent from the child's life for an extended period of time and does not know about a scheduled custody hearing may not be a proper person to have custody or visitation with the child. However, there may be circumstances where this is not true, and a parent should not be blocked from having the court at least consider his or her claim for custody or visitation.

Even if section 452.455.4 were justified by the state's interests in protecting the custodial parent and the child, the manner in which the statute attempted to accomplish this did not seem to be tailored narrowly enough to survive either strict or heightened scrutiny. Requiring the payment of a bond was an overly restrictive means of providing funds for the custodial parent, and it hardly seems as though providing money to the custodial parent after the modification really assisted him or her in obtaining legal counsel. The court asserted that holding the bond in escrow until after the modification hearing made it easier for the parent to retain an attorney.<sup>216</sup> Even with this statute, many attorneys would still be hesitant to accept a client who could not pay for the legal fees on his or her own, and providing funds after the fact does little to help the parent defend the suit. The statute also made no provision for the parent's legal fees in a motion to modify child support, which the noncustodial parent was legally entitled to bring. This makes one wonder if the court was correct in asserting the financial interests of the custodial parent as the primary justification for the statute.

### *B. The Open Courts Provision and Procedural v. Substantive Restrictions*

The decision of the Supreme Court of Missouri in *Weigand* is also problematic because the court did not adequately consider the procedural nature of the statute when addressing the open courts claim made by Mr. Edwards. The court found that a motion to modify child support was an independent cause of action recognized by the state and that the cause of action was restricted by the statute.<sup>217</sup> The court then determined that, under the *Snodgras* test, the only question was whether that restriction was arbitrary and unreasonable.<sup>218</sup> The problem, however, was that, in determining whether the restriction on parental rights was arbitrary and unreasonable, the court considered the same factors that it applied in its due process balancing test.<sup>219</sup> The

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215. *Weigand*, 296 S.W.3d at 455.

216. *Id.* at 459.

217. *Id.* at 461-62.

218. *Id.*

219. *See id.* at 462.

court made clear in its earlier cases that one of the major considerations in determining whether a statute is arbitrary and unreasonable is whether it is a procedural bar to the cause of action or whether it modifies the substantive law.<sup>220</sup>

The statute here did not change what a motion to modify child custody entails. It merely kept the defendant from bringing the claim as a matter of procedure. The statute in this case was significantly different from the statutes in *Snodgras* and *Eting*, which were determined to be challenges to the substantive natures of the respective statutes. Also significant in those cases was the absence of a right to a wrongful death claim or workers' compensation benefits apart from the statutes. Here, Edwards has a constitutionally guaranteed right to custody and visitation with his child simply because of his status as a biological parent. That right can only be taken away by the state for good cause, unlike a statutorily created right, which can be amended or removed by the state at will.

The court also distinguished the instant case from *Kilmer* because the statute in *Kilmer* required the action of a third person, while the statute here depended solely on the actions of the parent in arrears.<sup>221</sup> While the involvement of a third person who is subject to a variety of pressures might add weight to the arbitrariness or unreasonableness of a statute, that is not the determinative question that must be asked. As noted earlier, in its more recent decisions involving the open courts provision, the Supreme Court of Missouri has focused largely on the procedural nature of the restriction.<sup>222</sup> The decision in *Kilmer* can be reconciled with the court's subsequent decisions because the requirement that the individual be convicted of a crime before being subject to civil liability is arguably more procedural in nature than substantive.

If the court fails to consider the procedural nature of the statute when determining whether there has been an open courts violation, it seems to this author that the court's test of "arbitrary and unreasonableness" could easily become just a rubber stamp for legislative decisions that infringe on long recognized constitutional rights. It is a very low threshold to show that a legislative decision is merely reasonable. Under this test, the court easily could find a rationale for restrictions on all sorts of rights. The *Weigand* court did not consider what the actual justifications for enactment of the statute were but merely determined from the language of the statute what it thought the legislature was trying to accomplish.

The open courts provision of the Missouri Constitution is essentially useless if the court never enforces it. As laid out and applied in the current

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220. See *Eting v. Westport Heating & Cooling Servs., Inc.*, 92 S.W.3d 771, 773 (Mo. 2003) (en banc); *Snodgras v. Martin & Bailey, Inc.*, 204 S.W.3d 638, 640 (Mo. 2006) (en banc).

221. *Weigand*, 296 S.W.3d at 462.

222. See *supra* Part III.B.

case, it seems difficult to think of a situation in which the court would ever strike down a legislative restriction. Due process claims are difficult to win, and the open courts provision of the Missouri Constitution should afford additional protection to the rights of individuals that might not be adequately vindicated by the Fourteenth Amendment. If the court applies the balancing test to the analysis of due process and equal protection rights in the area of child custody, rather than carefully analyzing the state's intrusion on the parent's fundamental rights, the interests of the state are given the same weight as the interests of the parent. Also, as applied, the open courts provision does little to protect the rights of the individual from intrusion by the state. This decision essentially makes it easier for the state of Missouri to enact laws that infringe on constitutionally protected rights, as long as the court can find any justification for the infringement.

## VI. CONCLUSION

Despite the fact that section 452.455.4 recently has been repealed, the court's decision in *Weigand* could have a significant impact on future decisions in the area of parental rights and in decisions addressing the open courts provision of the Missouri Constitution. The court's decision to balance parental rights with the interests of the child and the state does not give adequate scrutiny to the rights of parents and has the potential to seriously undermine the due process and equal protection claims of parents whose rights have been infringed. The Supreme Court of the United States has recognized that the right of a parent to the care, custody and control of his or her children is a fundamental right and has equated it with other fundamental rights that receive strict scrutiny or a form of heightened scrutiny. The Supreme Court of Missouri should apply a strict scrutiny standard to parental rights claims and should have struck down section 452.455.4 because it was not narrowly tailored to achieve the state's interests in protecting children and custodial parents. In the alternative, Missouri should apply a form of heightened review that is more stringent than intermediate scrutiny.

The court also may have undermined the ability of individuals to bring a successful open courts challenge in Missouri. By failing to consider the procedural nature of the statute in question, the court set a very low standard that almost any statute can meet. If the court can come up with a justification, then the statute could be upheld under the current interpretation of the open courts provision. This is a significant departure from the court's earlier precedent and undercuts the ability of the open courts provision to protect the rights of Missouri citizens in many areas of law, not merely parental rights.

NICHOLE WALSCH