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Comments

CHILD SUPPORT IN MISSOURI: THE FATHER'S DUTY, THE CHILD'S RIGHT AND THE MOTHER'S ABILITY TO ENFORCE

The obligation of a father to provide support for his children has long been established in Missouri. Unlike common law, which considered it only a moral duty,¹ Missouri law recognizes the duty of support as a legal obligation. While many American states altered the common law position by statute, in the absence of legislative help courts have declared the duty to be legally enforceable by relying on natural theories of legal reasoning.² Thus, in 1881, the Missouri Supreme Court said in *In re Scarritt*:³

The father owes a duty to nurture, support, educate and protect his child, and the child has the right to call on him for the discharge of this duty. These obligations and rights are imposed and conferred by the laws of nature; and public policy, for the good of society, will not permit or allow the father to irrevocably divest himself of or to abandon them at his mere will or pleasure.⁴

This obligation exists between father and child, the father having a duty to provide support, and the child having the right to receive support from his father. The enforceability of the obligation, however, does not run in a parallel manner. In *Worthington v. Worthington*,⁵ a guardian acting in behalf of seven minor children attempted to enforce the children's right of support against their father; the St. Louis Court of Appeals affirmed the father's demurrer. The court held that even though the father's duty to support his children was a legal duty, no cause of action is recognized in the children themselves. The underlying concept in equity was that the stability of families would be threatened if dissatisfied children could sue their father.

The result of recognizing the child's legal right to support, while denying him any direct remedy, is that the duty can be enforced only by third parties acting for the benefit of the child. Probably the most common and most logical person to enforce this duty is the child's mother. The objective of this comment is to summarize and analyze the ability of a minor child's mother to enforce his right of support against the the child's father. To make this attainable, the scope has been limited to consideration of the situation where all three parties—father, mother, and child—are residents of Missouri.

1. English cases are considered and cited by the New Hampshire Supreme Court in *Kelley v. Davis*, 49 N.H. 187 (1870).

2. These are discussed by the St. Louis Court of Appeals in *State ex rel. Kramer v. Carroll*, 309 S.W.2d 654, 658-59 (St. L. Mo. App. 1958). See also *Brosius v. Barker*, 154 Mo. App. 657, 662, 136 S.W. 18, 19 (Spr. Ct. App. 1911).

3. 76 Mo. 565 (1882).

4. *Id.* at 584.

5. 212 Mo. App. 216, 253 S.W. 443 (St. L. Ct. App. 1923).

Since *R. _____ v. R. _____*⁶ a 1968 Missouri Supreme Court decision, both legitimate and illegitimate children apparently have had the right to support from their fathers. Prior to this time the right had been recognized only in the case of legitimate children, and Missouri law had held that the duty to support an illegitimate child fell on its mother.⁷ Because of this earlier distinction, the situations of the legitimate child and the illegitimate child will be considered separately.

I. THE LEGITIMATE CHILD

A. *The Child's Right to Support*

The basic right of the child to support and the duty of a father to provide that support is the same today as it was at common law. The duty arises at birth and continues until the death of the father⁸ or the emancipation of the child,⁹ whichever occurs first.

In the case of the death of the father there is no difficulty in placing the termination of the duty of support at a specific point in time; emancipation, however, presents a more difficult problem. Because the concept of emancipation is important in other legal contexts,¹⁰ it is often described in language which is not well suited to the issue of the right to support. Emancipation is defined as the voluntary termination of the parent-child relationship.¹¹ The existence or termination of that relationship is solely a question of fact to be determined by the jury.¹² An emancipation can be shown by express agreement between the parent and child, or implied from the actions of the parties.¹³ The ultimate question of fact is whether the parent and child have agreed to dissolve the mutual obligations between them which arise out of the parent-child relationship, one of which is the father's duty of support.¹⁴

There are several factual situations which raise presumptions as to the existence of an emancipation. Due to the interdependence of the duty

6. As explained in Part II of this comment, the Missouri Supreme Court in *R. _____ v. R. _____*, 431 S.W.2d 152 (1968), held that an illegitimate child has a right of support from his father, a substantial change in Missouri law.

7. *James — v. Hutton*, 373 S.W.2d 167 (K.C. Mo. App. 1963); *Easley v. Gordon*, 51 Mo. App. 637 (St. L. Ct. App. 1892).

8. *Gardine v. Cottey*, 360 Mo. 681, 230 S.W.2d 731 (En Banc 1950). In its opinion the court noted that although the duty normally terminated with the father's death, the father could extend the obligation beyond his death by contractual agreement.

9. *Steckler v. Steckler*, 293 S.W.2d 129 (Spr. Mo. App. 1956); *Green v. Green*, 234 S.W.2d 350 (St. L. Mo. App. 1950); *Swenson v. Swenson*, 241 Mo. App. 21, 227 S.W.2d 103 (K.C. Ct. App. 1950).

10. Only an emancipated minor can sue his parent for an unintentional tort. *Wurth v. Wurth*, 322 S.W.2d 745 (Mo. En Banc 1959). A parent can sue in behalf of a minor child for injuries to the child only if he is unemancipated. *Beebe v. Kansas City*, 223 Mo. App. 642, 17 S.W.2d 608 (K.C. Ct. App. 1929). Only an emancipated minor can establish an independent residence for purposes of diversity jurisdiction in federal courts. *Spurgeon v. Mission State Bank*, 151 F.2d 702 (8th Cir. 1945). This list is only illustrative, not exhaustive.

11. *Wurth v. Wurth*, 322 S.W.2d 745 (Mo. En Banc 1959).

12. *Spurgeon v. Mission State Bank*, 151 F.2d 702 (8th Cir. 1945).

13. *Id.*

14. *Id.*; *Wurth v. Wurth*, 322 S.W.2d 745 (Mo. En Banc 1959).

to support and the fact of emancipation, the issue of whether an emancipation occurred, as a practical matter, is determined by the presumptions.¹⁵ The basic presumption is that a child is emancipated when he attains the age of legal majority.¹⁶ Where a child under the age of legal majority marries, however, he will also be presumed emancipated because he has assumed obligations which take priority over those of the parent-child relationship.¹⁷ This same rationale is used to find a presumption of emancipation when a child joins a branch of the armed forces.¹⁸ The child's first obligation, because of his marriage or membership in the armed forces, is directed to some person or object other than his father, and, likewise, that other person or organization assumes obligations in return concerning the needs and welfare of the child which before the emancipation were the responsibility of the father. The underlying theory as it developed at common law was that in return for his duty of support, a father was entitled to the custody and earnings of the child.¹⁹ After emancipation, the father is denied both the custody of the child and the right to the child's earnings; he is therefore relieved of his corresponding duty of support.

It is also possible for the child by his wrongful behavior to waive his right to support. The only Missouri case to consider this possibility decided, as a matter of first impression, that where the father had rightful custody and had adequately provided for his four sons, their actions in leaving the home of the father and going to live with their mother was a waiver of their right to support from their father.²⁰ In the situation before the court, the mother was attempting to enforce the duty by seeking to recover her expenses of supporting the four boys over whom she did not have legal custody. Therefore, in finding that the sons had waived their right to support, the court neither inflicted upon them financial losses nor left them without means of support, since even if their mother refused to support them in the future they could probably return to the home of their father.

B. *Enforcing the Right*

A mother has two alternatives in seeking to enforce her child's right to support from his father. She may provide support herself and seek re-

15. Even in the area of child support additional facts may rebut the presumption. Thus, in *State ex rel. Kramer v. Carroll*, 309 S.W.2d 654, 658-59 (St. L. Mo. App. 1958), the court held that the duty to support a physically incapacitated child extends beyond the age of legal majority. Here the child was presumed emancipated by her age, but, since she was not physically able to be "emancipated," the presumption was overcome. The court, however, did not analyze the situation strictly in terms of emancipation, and thereby avoided much confusion.

16. *Green v. Green*, 234 S.W.2d 350 (St. L. Mo. App. 1950). *But see State ex rel. Kramer v. Carroll*, 309 S.W.2d 654 (St. L. Mo. App. 1958), which held that the duty of support extended past the age of legal majority because the child was incapacitated by epilepsy and unable to care for herself.

17. *Steckler v. Steckler*, 293 S.W.2d 129 (Spr. Mo. App. 1956); *Green v. Green*, 234 S.W.2d 350 (St. L. Mo. App. 1950).

18. *Schaffer v. Security Fire Door Co.*, 326 S.W.2d 376 (St. L. Mo. App. 1959); *Swenson v. Swenson*, 241 Mo. App. 21, 227 S.W.2d 103 (K.C. Ct. App. 1950).

19. *Swenson v. Swenson*, 241 Mo. App. 21, 227 S.W.2d 103 (K.C. Ct. App. 1950); *Rankin v. Rankin*, 83 Mo. App. 335 (St. L. Ct. App. 1900).

20. *Wills v. Barker*, 240 Mo. App. 705, 214 S.W.2d 748 (K.C. Ct. App. 1948).

imbursement in the "common law suit,"²¹ or she may seek a decree in conjunction with a proceeding for divorce or separate maintenance requiring a continuing payment by the father for the support of the child. The absence of any remedy available until after the breakup of the family is again explained by the equitable doctrine of not allowing suits between members of existing families, because of their disruptive effect.²²

1. Common Law Suit

Traditionally, a mother has been entitled to recover the cost of supporting her child by suit against the child's father for amounts expended.²³ To recover she must first show that she has proper custody, and, second, prove her expenditures in providing necessities for the child.

The burden of showing proper custody is minimal, and this requirement is almost always satisfied unless her custody has been affirmatively wrongful. A court decree giving custody to the mother will, of course, satisfy this requirement.²⁴ In the absence of a formal court decree, the mother can almost always show proper custody by consent of the father through his words or actions.²⁵ The mere failure of the father to seek custody through the courts is evidently considered consent on his part.²⁶ The only Missouri case excusing the father for his failure to seek custody through a court proceeding is *Assman v. Assman*,²⁷ where the father would have had to go to New York to assert his claims to custody. But in *Dolvin v. Schimmel*,²⁸ where the mother induced the child to leave his father and took him to a third party's home and promised the third party compensation for temporarily keeping the child, the father was unable to defeat the third party's claim for amounts owing because he had failed to attempt to locate his son or get him back. It is probably safe to assume that had the mother, rather than a third party, been seeking reimbursement, the court

21. While such a suit could not have existed under common law because the obligation of support was not recognized as a legal duty, courts nevertheless refer to a suit by the mother against the father for past expenses of support as a "common law suit." Occasionally, the fact that this legal duty was judicially established is overlooked by a court. See, e.g., *Robinson v. Robinson*, 268 Mo. 703, 709, 186 S.W. 1032, 1033 (1916); *Anderson v. Anderson*, 437 S.W.2d 704, 709 (K.C. Mo. App. 1969).

22. *Worthington v. Worthington*, 212 Mo. App. 216, 218-19, 253 S.W. 443 (St. L. Ct. App. 1923), quoting *Rawlings v. Rawlings*, 121 Miss. 140, 83 So. 146 (1919).

23. *Clark v. Routt*, 453 S.W.2d 656 (Spr. Mo. App. 1970); *Broemmer v. Broemmer*, 219 S.W.2d 300 (St. L. Mo. App. 1949); *Bennett v. Robinson*, 180 Mo. App. 56, 165 S.W. 856 (Spr. Ct. App. 1914); *Rankin v. Rankin*, 83 Mo. App. 335 (St. L. Ct. App. 1900).

24. *Broemmer v. Broemmer*, 219 S.W.2d 300 (St. L. Mo. App. 1949); *Bennett v. Robinson*, 180 Mo. App. 56, 165 S.W. 856 (Spr. Ct. App. 1914).

25. Often where the husband-father's consent is obvious, such as where the father has abandoned his family, the courts fail to even mention that the mother had lawful custody by consent. The father's conduct in abandoning the family obviously implies consent. *Berkley v. Berkley*, 246 S.W.2d 804 (Mo. 1952); *Rankin v. Rankin*, 83 Mo. App. 335 (St. L. Ct. App. 1900).

26. *Dolvin v. Schimmel*, 284 S.W. 811 (St. L. Mo. App. 1926); *Assman v. Assman*, 192 Mo. App. 678, 179 S.W. 957 (St. L. Ct. App. 1915).

27. 192 Mo. App. 678, 179 S.W. 957 (St. L. Ct. App. 1915).

28. 284 S.W. 811 (St. L. Mo. App. 1926).

would not have found consent on the part of the father so easily. However, in the absence of an outright attempt to avoid the father and conceal the child, dicta in *Assman*²⁹ indicates that anything less than legal proceedings might well be characterized as consent by Missouri courts.

After showing that she has had proper custody of the child, a mother need only show the amounts expended in providing the child's necessities to obtain recovery from the father.³⁰ No exact accounting is required, as in a suit by creditors,³¹ and the issues of the father's standard of living or ability to pay are not considered. The amount of recovery is determined only by the cost of the necessities provided. Missouri courts have been reluctant to issue a comprehensive list of what constitutes necessities, but in *Josey v. Forde*³² the Missouri Supreme Court said:

'[N]ecessaries' include food, drink, clothing, washing, medicine, instruction, suitable place of residence, and in nearly every family some comforts in excess of the strict necessities of life are enjoyed and treated as necessities.³³

The common law suit for necessities provided is a relatively inexpensive and expeditious method of enforcing the right of the child when the defendant father is subject to jurisdiction and has the means to satisfy a lump sum judgment. The primary disadvantage as compared with the judgment for continuing payments of support is that the mother must have independent means to initially pay for the child's support, and suits must be brought periodically to recover as the amount of support provided accrues. While the decree for continuing payments is the preferred remedy in a divorce or separate maintenance situation, the common law suit is still useful to recover amounts expended before an order of support is obtained,³⁴ or for amounts expended after the running of the statute of limitations on a judgment for continuing payment.³⁵

2. Judicial Order in Conjunction with Divorce or Separate Maintenance

A judicial order against the father for support and maintenance of minor children is available under the statute pertaining to orders in proceedings for divorce (section 452.070, RSMo 1969).³⁶ The court has authority³⁷ to

29. 192 Mo. App. 678, 684, 179 S.W. 957, 958 (St. L. Ct. App. 1915).

30. *Clark v. Routt*, 453 S.W.2d 656 (Spr. Mo. App. 1970); *Broemmer v. Broemmer*, 219 S.W.2d 300 (St. L. Mo. App. 1949); *Bennett v. Robinson*, 180 Mo. App. 56, 165 S.W. 856 (Spr. Ct. App. 1914); *Rankin v. Rankin*, 83 Mo. App. 335 (St. L. Ct. App. 1900).

31. *Josey v. Forde*, 338 S.W.2d 14 (Mo. 1960).

32. *Id.*

33. *Id.* at 15.

34. *Kelly v. Kelly*, 329 Mo. 992, 47 S.W.2d 762 (En Banc 1932); *Clark v. Routt*, 453 S.W.2d 656 (Spr. Mo. App. 1970); *Bennett v. Robinson*, 180 Mo. App. 56, 165 S.W. 856 (Spr. Ct. App. 1914).

35. *Hohler v. Fuchs*, 156 S.W.2d 21 (St. L. Mo. App. 1941).

36. § 452.070, RSMo 1969:

When a divorce shall be adjudged, the court shall make such order touching the alimony and maintenance of the wife, and the care, custody and maintenance of the children, or any of them, as from the circumstances of the parties and the nature of the case, shall be reasonable, and when the

issue an order of support whenever custody has been awarded to the mother, and a divorce is granted.³⁸ Other Missouri statutes which should also authorize an order of support, the separate maintenance statute³⁹ and those pertaining to the determination of custody between parents who are living apart,⁴⁰ are not included within the language of section 452.070, and

wife is plaintiff, may order the defendant to give security for such alimony and maintenance; and upon his neglect to give the security required of him, or upon default of himself and his sureties, if any there be, to pay or provide such alimony and maintenance, may award an execution for the collection thereof, or enforce the performance of the judgment or order by sequestration of property, or by such other lawful ways and means as is according to the practice of the court. The court, on the application of either party, may make such alteration, from time to time, as to the allowance of alimony and maintenance, as may be proper, and the court may decree alimony pending the suit for divorce in all cases where the same would be just, whether the wife be plaintiff or defendant, and enforce such order in the manner provided by law in other cases.

37. A court has authority to make an order concerning child support whenever the issue of custody is determined in a divorce proceeding and the divorce is granted. Thus, in *Allen v. Allen*, 433 S.W.2d 580 (K.C. Mo. App. 1968), an order of support was upheld even though the pleadings contained no prayer for relief. Prior cases had been to the contrary; *see, e.g., Lambert v. Lambert*, 222 S.W.2d 544 (St. L. Mo. App. 1949).

38. A court has no authority under § 452.070, RSMo 1969 to enter an order for child support when the divorce is not granted. *Rogers v. Rogers*, 399 S.W.2d 606 (K.C. Mo. App. 1966).

39. § 452.130, RSMo 1969:

When the husband, without good cause, shall abandon his wife, and refuse or neglect to maintain and provide for her, the circuit court, on her petition for that purpose, shall order and adjudge such support and maintenance to be provided and paid by the husband for the wife and her children, or any of them, by that marriage, out of his property, and for such time as the nature of the case and the circumstances of the parties shall require, and compel the husband to give security for such maintenance, and from time to time make such further orders touching the same as shall be just, and enforce such judgment by execution, sequestration of property, or by such other lawful means as are in accordance with the practice of the court; and as long as said maintenance is continued, the husband shall not be charged with the wife's debts, contracted after the judgment for such maintenance.

40. §§ 452.150, .160, RSMo 1969. § 452.150:

The father and mother living apart are entitled to an adjudication of the circuit court as to their powers, rights and duties in respect to the custody and control and the services and earnings and management of the property of their unmarried minor children without any preference as between the said father and mother, and neither the father nor the mother has any right paramount to that of the other in respect to the custody and control or the services and earnings or of the management to the property of their said unmarried minor children; pending such adjudication the father or mother who actually has the custody and control of said unmarried minor children shall have the sole right to the custody and control and to the services and earnings and to the management of the property of said unmarried minor children.

§ 452.160:

The terms of section 452.150 shall apply to children born out of wedlock and to children born in wedlock, and the terms "father and mother," "parent," "child," shall apply without reference to whether a child was born in lawful wedlock.

contain no similar provision of their own. However, several cases indicate that judgments concerning child support may be given in conjunction with suits for separate maintenance.⁴¹ Evidently no cases are reported in which support was sought in conjunction with a determination of custody,⁴² except for cases in which the statutes were unsuccessfully used as a basis to argue that the obligation of the father to support an illegitimate child had been compelled by the legislature.⁴³ Though the Missouri courts talk of authority to declare a continuing judgment of child support as being strictly limited to the situations enumerated in section 452.070, their decisions in granting such orders in the separate maintenance situation would seem to speak to the contrary.⁴⁴

An order for continuing payment of child support is a prior judicial determination of the magnitude of the duty of a father, and compliance with the order is full satisfaction of the duty of support.⁴⁵ It is not necessary for such an order to be issued with the divorce decree.⁴⁶ Anytime after the divorce, a mother can seek a modification of the decree to allow for child support.⁴⁷ However, once an order of support is given, a mother is no longer able to sue at common law to recover for necessities she may have to provide if the father fails to satisfy his obligation under the order.⁴⁸ Her only remedy after issuance of an order of support is to seek execution on the order of support itself. This does not prevent her from seeking reimbursement after the order for amounts expended to provide necessities prior to the order,⁴⁹ or for necessities provided after the statute of limitations has run on the order.⁵⁰ The Missouri Supreme Court has characterized the remedies as "coterminous,"⁵¹ meaning that from the point in time when the order of continuing support is given, support owed from periods

41. *Genazzi v. Genazzi*, 343 S.W.2d 686 (St. L. Mo. App. 1961); *Miller v. Miller*, 241 S.W.2d 805 (St. L. Mo. App. 1951); *Carder v. Carder*, 227 Mo. App. 1005, 60 S.W.2d 706 (K.C. Ct. App. 1933).

42. See annots., Mo. ANN. STAT. §§ 452.150-160 (Vernon 1952).

43. *Heembrock v. Stevenson*, 387 S.W.2d 263 (St. L. Mo. App. 1965); *State ex rel. Canfield v. Porterfield*, 222 Mo. App. 553, 292 S.W. 85 (K.C. Ct. App. 1927).

44. See, e.g., *Rogers v. Rogers*, 399 S.W.2d 606 (K.C. Mo. App. 1966).

45. *Lodahl v. Papenberg*, 277 S.W.2d 548 (Mo. 1955); *Clark v. Routt*, 453 S.W.2d 656 (Spr. Mo. App. 1970); *Hunter v. Schwertfeger*, 407 S.W.2d 606 (Spr. Mo. App. 1966).

46. *Kelly v. Kelly*, 329 Mo. 992, 47 S.W.2d 762 (1932); *Hunter v. Schwertfeger*, 407 S.W.2d 606 (Spr. Mo. App. 1966); *Roberts v. Roberts*, 292 S.W.2d 596 (Spr. Mo. App. 1956).

47. Cases cited note 46 *supra*.

48. *Lodahl v. Papenberg*, 277 S.W.2d 548 (Mo. 1955); *Kelly v. Kelly*, 329 Mo. 992, 47 S.W.2d 762 (1932).

49. *Bennett v. Robinson*, 180 Mo. App. 56, 165 S.W. 856 (Spr. Ct. App. 1914), and *Robinson v. Robinson*, 268 Mo. 703, 186 S.W. 1032 (1916). These are companion cases involving the same parties. Originally the wife was awarded a divorce with custody, but no order of child support. In the first case cited she recovered for amounts expended, while the second case affirmed a 1912 modification of the divorce decree to include an order for child support.

50. *Hohler v. Fuchs*, 156 S.W.2d 21 (St. L. Mo. App. 1941).

51. *Lodahl v. Papenberg*, 277 S.W.2d 548 (Mo. 1955); *Kelly v. Kelly*, 329 Mo. 992, 47 S.W.2d 762 (1932).

previous to the order can be collected only in the common law suit, while future support can be collected only under the continuing judgment.

While the order of continuing support acts as a judicial substitution for the obligation to provide necessities, only the court can declare the magnitude of the duty, and the mother and father cannot change or determine the obligation by agreement between themselves.⁵² In *Robinson v. Robinson*⁵³ the mother had been awarded a divorce and custody with no provision for child support, but the parties had executed an agreement providing for a property settlement, alimony and child support. In reviewing the wife's motion to modify the divorce decree to provide for child support, the Missouri Supreme Court held that the rights of the child to continuing support were paramount to the rights of the parents regardless of the purpose or intention of the parties at the time of the original decree.⁵⁴ Likewise, it has been held that the mother could not compromise future obligations under an order of child support,⁵⁵ though it may be possible to release an indebted father from arrearages by compromise, but only as against the mother.⁵⁶ The underlying principle is that the right runs to the child, himself, and the mother is merely the trustee for the purpose of enforcing the right. Therefore, the court has final authority to determine the monetary value of the right, and the mother is unable to substitute her own judgment for that of the court by contracting to accept less.

A father's obligation under a decree of continuing support can only be satisfied by payment to the mother, and payment directly to the child or others will not satisfy the obligation unless the mother expressly consented.⁵⁷ Such a requirement protects the position of the mother as trustee in enforcing the child's right to support, and in determining how that support will be used to benefit the child. Thus, even payments to a child's bank account while the child was away at college have been disallowed as credits to an obligation under a decree of child support.⁵⁸ The only exception to

52. *Robinson v. Robinson*, 268 Mo. 703, 186 S.W. 1032 (1916); *Messmer v. Messmer*, 222 S.W.2d 521 (St. L. Mo. App. 1949); *Cervantes v. Cervantes*, 239 Mo. App. 932, 203 S.W.2d 143 (Spr. Ct. App. 1947); *Kershner v. Kershner*, 202 Mo. App. 238, 216 S.W. 547 (K.C. Ct. App. 1919).

53. 268 Mo. 703, 186 S.W. 1032 (1916).

54. See also *Bennett v. Robinson*, 180 Mo. App. 56, 165 S.W. 856 (Spr. Ct. App. 1914), an earlier case between the same parties where the mother succeeded under the common law suit for necessities provided. The lesson of these cases is that a decree of divorce should always include provisions allocating a definite amount as payment for child support whenever custody is given to the mother.

55. *Messmer v. Messmer*, 222 S.W.2d 521 (St. L. Mo. App. 1949); *Cervantes v. Cervantes*, 239 Mo. App. 932, 203 S.W.2d 143 (Spr. Ct. App. 1947).

56. In *Koenig v. Koenig*, 191 S.W.2d 269 (St. L. Mo. App. 1945), a compromise and release of an order of child support was held good against the mother, although the court stated the release would not bind the children themselves. The case was explained further in *Messmer v. Messmer*, 222 S.W.2d 521 (St. L. Mo. App. 1949), where the court said that the parties could compromise only amounts which had already fallen due under a decree of support, and that the parties were without capacity to compromise future payments.

57. *Stemme v. Stemme*, 351 S.W.2d 823 (St. L. Mo. App. 1961); *Goeller v. Goeller*, 346 S.W.2d 545 (St. L. Mo. App. 1961); *M_____ v. M_____*, 313 S.W.2d 209 (St. L. Mo. App. 1958); *Steckler v. Steckler*, 293 S.W.2d 129 (Spr. Mo. App. 1956).

58. *Stemme v. Stemme*, 351 S.W.2d 823 (St. L. Mo. App. 1961).

the requirement that payments be made to the mother is where the mother is guilty of some wrongdoing. Thus, in *M_____ v. M_____*,⁵⁹ where the mother had left the children with their paternal grandparents, payments of support to the grandparents while they were keeping the children were allowed as satisfaction of the obligation accruing during those periods.

The most difficult problem concerning judicial orders of support arises when the duty terminates due to the emancipation of the child and the father fails to secure a modification from the court reducing the order by the amount of support originally granted for the emancipated child. The situation first came before the Kansas City Court of Appeals in *Swenson v. Swenson*,⁶⁰ when a father sought to quash an execution on a decree of support by showing that the child for whom support had been ordered had joined the armed forces. The court held that the obligation of the father to satisfy the order expired when the child's right to support terminated by reason of his emancipation, a seemingly correct decision. The issue arose again, on similar facts, in the St. Louis Court of Appeals in *Schaffer v. Security Fire Door Co.*⁶¹ The St. Louis court, however, held that the lower court was without authority to modify the judgment retroactively, and that the mother had acquired a vested property right as each payment accrued which could not be undermined by later declarations of the court.⁶² The question was certified to the Missouri Supreme Court for resolution of the conflicting holdings, but the court found that the mother had conceded that no amounts were due during the period the minor was in the armed forces, so no dispute remained on the issue certified for clarification.⁶³

It is unfortunate that the supreme court failed to provide at least dicta suggesting its views on the problem. The rationale of the St. Louis court is inconsistent with the underlying theory of the decree of support. The order for continuing support is not based on any right of the mother against the father, but rather is the enforcement of the child's right to support through the mother, who acts in a capacity similar to that of a trustee. Therefore, the mother is not deprived of any property right when, because the right of the child terminates at emancipation,⁶⁴ she can no longer collect the decreed support in enforcement of the child's right. After

59. 313 S.W.2d 209 (St. L. Mo. App. 1958).

60. 241 Mo. App. 21, 227 S.W.2d 103 (K.C. Ct. App. 1950).

61. 326 S.W.2d 376 (St. L. Mo. App. 1959).

62. *Id.* at 379, 382.

63. *Schaffer v. Security Fire Door Co.*, 332 S.W.2d 860 (Mo. 1960).

64. The St. Louis court justified enforcing the order of support after the emancipation by considering the issue in terms of retroactive modification of judgments and vestiture of property rights in judgments. An equally good argument in support of its holding is the fact that the existence of an emancipation is not always obvious, and the general rule is that persons asserting the emancipation of a minor have the burden of proof. *Wurth v. Wurth*, 322 S.W.2d 745 (Mo. En Banc 1959). Therefore, a court determination is necessary to find an emancipation. However, because the existence of the duty to support is part of the parent-child relationship (the termination of which is emancipation), existence of an emancipation must really be determined on the basis of presumptions. Thus, where a minor child has married or joined the armed services, no court determination is needed to know an emancipation has occurred.

the time of emancipation there is no longer any duty and no longer any right to enforce, and, logically, the judgment should abate just as it does at the time of the father's death.⁶⁵

To avoid confusion, a similar situation should be distinguished. In *Gordon v. Ary*,⁶⁶ the divorced mother had been awarded \$80 per month as support for two children. In support of a motion to quash a garnishment on the decree, the father argued that since one of the children had been emancipated by marriage his subsequent payments of \$40 per month satisfied the obligation. The Kansas City Court of Appeals reversed the quashing of the garnishment, holding that it could not be assumed that the lump sum support was allocable pro rata between the two children. Often the court considers the father's ability to pay as well as the needs of the children in determining the amount of support, the Kansas City court reasoned, and when one child is emancipated the original court might find that the support payment for the remaining child exceeds his pro rata share of the original order. The reasoning in *Gordon*⁶⁷ is entirely consistent with the theory underlying decrees of child support and should lead to one practical conclusion for the practitioner: Decrees of child support should be sought which indicate the basis on which the amount is determined and the allocation among the children for which the benefits are decreed. In addition, the father, to be safe, should seek a modification immediately after an emancipation is believed to have occurred.

The amount of an order for support is determined on the basis of the needs of the children and the ability and financial situation of the father.⁶⁸ Courts are lenient and consider the father's station in life in determining what items are included in a child's needs.⁶⁹ The best type of evidence to support the request for an order of support is an actual record of itemized costs over a recent period preceding the hearing.⁷⁰ Obvious items to be included within the definition of "needs" are food, clothing, shelter, medical care, school expenses, and recreational expenses.⁷¹ However, expenses for all items should be presented, especially where the practice of providing that item commenced before the breakup of the family. Courts have accepted showings of spending allowances, dry cleaning, haircuts and beauty

65. *Gardine v. Cottey*, 360 Mo. 681, 230 S.W.2d 731 (En Banc 1950).

66. 358 S.W.2d 81 (K.C. Mo. App. 1962).

67. *Id.*

68. *McCann v. McCann*, 448 S.W.2d 323 (K.C. Mo. App. 1969). But the fact that the mother or the children have independent means or that the father has very meager means will not discharge or excuse the father's duty of support. See *Brosam v. Brosam*, 437 S.W.2d 694 (K.C. Mo. App. 1969).

69. *Anderson v. Anderson*, 437 S.W.2d 704 (K.C. Mo. App. 1969); *Royster v. Royster*, 420 S.W.2d 1 (K.C. Mo. App. 1967).

70. Orders are sometimes affirmed when there is very little evidence in the record. In *Boyd v. Boyd*, 459 S.W.2d 8 (St. L. Mo. App. 1970), there was evidence only of the father's salary and the mother's expenses for food and rent. However, cases are reversed if the appellate court finds there was no evidence of costs on which to base the order of support. *McCullough v. McCullough*, 402 S.W.2d 623 (St. L. Mo. App. 1966); *Nelson v. Nelson*, 357 S.W.2d 223 (St. L. Mo. App. 1962).

71. *Bagley v. Bagley*, 460 S.W.2d 736 (St. L. Mo. App. 1970); *Smolly v. Hoffman*, 458 S.W.2d 579 (St. L. Mo. App. 1970); *Anderson v. Anderson*, 437 S.W.2d 704 (K.C. Mo. App. 1969).

shop expenses, music or art lessons, hobby expenses, gifts, gasoline for automobiles, and college expenses.⁷²

The court will consider the father's assets as well as his income in determining the father's ability to provide support.⁷³ Since courts will not order an amount so excessive as to stifle the father's incentive,⁷⁴ a showing of his living expenses and "needs" are also relevant in determining the upper limit of support. Again, the most convincing evidence of these three factors is a record of actual dollar amounts involved within a recent period. The trial court judge is given discretion in setting the amount of support and is reversed only upon finding an abuse of discretion.⁷⁵ However, in reviewing the decision the appellate court follows the principles of equity in considering all the facts *de novo*;⁷⁶ therefore, establishing a firm foundation of specific evidence on the relevant factors is an important part of every case.⁷⁷ Agreements between the parties have no binding effect on the court since the parties are without capacity to agree to the amount, but the courts do consider agreements between the parties as indicative of what the parties consider a reasonable amount of support.⁷⁸

The judicial determination is a final decree for purposes of execution;⁷⁹ however, the amount of support may be modified by showing a change in circumstances.⁸⁰ Such circumstances can be a change in the children's needs,⁸¹ a change in the cost of providing those needs,⁸² such as inflation, or a change in the father's ability to provide support.⁸³ The character of evidence needed to support such a modification is the same as that of the original decree. A factual basis for the new order is needed as well as the fact of the existence of a "change;"⁸⁴ therefore, a presentation of the dollar amounts established in obtaining the original order, as well as the dollar amounts over a recent period of time, should be introduced in evi-

72. Cases cited note 71 *supra*. These items listed are only illustrative. Counsel representing the mother should take advantage of all the facts and present every expense for the court's consideration.

73. Anderson v. Anderson, 437 S.W.2d 704 (K.C. Mo. App. 1969).

74. McCann v. McCann, 448 S.W.2d 323 (K.C. Mo. App. 1969).

75. Bryan v. Bryan, 452 S.W.2d 293 (Spr. Mo. App. 1970); McCann v. McCann, 448 S.W.2d 323 (K.C. Mo. App. 1969); McCullough v. McCullough, 402 S.W.2d 623 (St. L. Mo. App. 1966).

76. Anderson v. Anderson, 437 S.W.2d 704 (K.C. Mo. App. 1969); Sportsman v. Sportsman, 409 S.W.2d 787 (K.C. Mo. App. 1966).

77. McCullough v. McCullough, 402 S.W.2d 623 (St. L. Mo. App. 1966); Nelson v. Nelson, 357 S.W.2d 223 (St. L. Mo. App. 1962).

78. Houston v. Snyder, 440 S.W.2d 156 (Spr. Mo. App. 1969).

79. Partney v. Partney, 442 S.W.2d 117 (St. L. Mo. App. 1969); Royster v. Royster, 420 S.W.2d 1 (K.C. Mo. App. 1967); Steckler v. Steckler, 293 S.W.2d 129 (Spr. Mo. App. 1956).

80. Jenkins v. Jenkins, 453 S.W.2d 619 (St. L. Mo. App. 1970); Anderson v. Anderson, 437 S.W.2d 704 (K.C. Mo. App. 1969).

81. Bagley v. Bagley, 460 S.W.2d 736 (St. L. Mo. App. 1970); Royster v. Royster, 420 S.W.2d 1 (K.C. Mo. App. 1967).

82. Smolly v. Hoffman, 458 S.W.2d 579 (St. L. Mo. App. 1970).

83. Bryan v. Bryan, 452 S.W.2d 293 (Spr. Mo. App. 1970); Anderson v. Anderson, 437 S.W.2d 704 (K.C. Mo. App. 1969).

84. McCullough v. McCullough, 402 S.W.2d 623 (St. L. Mo. App. 1966); Nelson v. Nelson, 357 S.W.2d 223 (St. L. Mo. App. 1962).

dence. Since the prior determination of the magnitude of the duty of support is *res judicata* as to those prior circumstances,⁸⁵ the evidence must show a difference in those amounts which will illustrate the "change" in circumstances.

The order is enforced in Missouri, as any other judgment, through procedures of execution and garnishment.⁸⁶ Likewise, the judgment is subject to the normal ten year statutory limitation.⁸⁷ The Missouri courts have strictly maintained their refusal to enforce any type of order for support of a wife through contempt procedures, although Missouri is the only state taking such a position.⁸⁸ The rationale that such enforcement would be a violation of the constitutional guarantee against imprisonment for debt⁸⁹ has been the subject of criticism.⁹⁰ The position has been upheld, however, as recently as 1969, when the St. Louis Court of Appeals, in *Partney v. Partney*,⁹¹ applied the no contempt restriction to orders for child support.

II. THE ILLEGITIMATE CHILD

The duty of a father to support his illegitimate child is one of the more uncertain areas of Missouri law. This is a result of the 1968 decision of the Missouri Supreme Court in *R_____ v. R_____*,⁹² which overturned the long standing precedent that the father of an illegitimate was under no duty of support in the absence of a statute to the contrary.⁹³ In that case the court held that recent decisions of the United States Supreme Court⁹⁴

85. *McCullough v. McCullough*, 402 S.W.2d 623 (St. L. Mo. App. 1966).

86. *Partney v. Partney*, 442 S.W.2d 117 (St. L. Mo. App. 1969); *Royster v. Royster*, 420 S.W.2d 1 (K.C. Mo. App. 1967); *Steckler v. Steckler*, 293 S.W.2d 129 (Spr. Mo. App. 1956).

87. *Mayes v. Mayes*, 342 Mo. 401, 116 S.W.2d 1 (1938); *Hohler v. Fuchs*, 156 S.W.2d 21 (St. L. Mo. App. 1941).

88. Schoenlaub, *Use of Contempt Powers in the Enforcement of Alimony and Support Decrees*, 23 J. Mo. B. 396 (1967); Woods, *The Fathers Have Eaten Sour Grapes and the Children's Teeth Are Set on Edge—Ezekiel 18:12*, 26 J. Mo. B. 560 (1970).

89. Mo. CONST. art. I, § 11.

90. Authorities cited note 88 *supra*.

91. 442 S.W.2d 117 (St. L. Mo. App. 1969). According to the brief for plaintiff-appellant, the trial court refused to allow even an offer of proof to support the motion for contempt. The brief alleged that defendant had not only refused to make alimony and child support payments, but had remarried, concealed all of his assets in his new wife's and business names and informed plaintiff-appellant that neither she nor the courts of Missouri [would] ever compel him to do anything he [did] not want to do. Brief for Appellant at 10, *Partney v. Partney*, 442 S.W.2d 117 (St. L. Mo. App. 1969).

92. 431 S.W.2d 152 (Mo. 1968).

93. *James _____ v. Hutton*, 373 S.W.2d 167 (K.C. Mo. App. 1963); *State ex rel. Canfield v. Porterfield*, 222 Mo. App. 553, 292 S.W. 85 (K.C. Ct. App. 1927); *Easley v. Gordon*, 51 Mo. App. 637 (St. L. Ct. App. 1892).

94. See *Levy v. Louisiana*, 391 U.S. 68 (1968), and *Glonn v. American Guarantee & Liab. Ins. Co.*, 391 U.S. 73 (1968). *Levy* concerned the denial of the right of an illegitimate child to recover for the wrongful death of his mother on the basis of the illegitimacy. The court held that to distinguish recovery on the basis of legitimacy-illegitimacy was a violation of the equal protection clause of the fourteenth amendment to the U. S. Constitution. *Glonn* concerned the right of a mother to recover for the wrongful death of her illegitimate child.

compel the conclusion that the proper construction of our statutory provisions relating to the obligations and rights of parents (§§ 452.150, 452.160, RSMo 1959, § 559.353 RSMo 1967 Supp., V.A.M.S.) affords illegitimate children a right equal with that of legitimate children to require support by their fathers. Prior cases to the contrary are no longer to be followed.⁹⁵

The rationale of the decision was that to discriminate between legitimate and illegitimate children for the purposes of determining the right to compel support by their fathers was a violation of the equal protection clause of the fourteenth amendment of the U.S. Constitution and a violation of Article I, section 2 and section 14 of the Missouri Constitution.

While this decision might seem to provide a just and certain answer to the often criticized treatment the old Missouri law had given this problem,⁹⁶ the existence and the nature of a remedy for illegitimates and their mothers is still uncertain. This uncertainty is due to another long standing policy that children may not seek judicial enforcement of the duty of support owed them by suing in their own behalf.⁹⁷ Thus, no non-statutory rights of action for support by an illegitimate child in his own behalf could be maintained under a theory of equal protection since no personal right to recovery is recognized as existing in legitimate children. The statutory remedies given those acting in behalf of a legitimate child contemplate situations in which the question of support of an illegitimate child would never arise.⁹⁸ In addition, prior cases⁹⁹ which are not clearly overruled by *R. _____ v. R. _____* seem to construe all the relevant Missouri statutes in such a way that illegitimate children and those acting on their behalf may still be without a statutory remedy.

The precedent denying relief in the absence of statute was established in Missouri by *Easley v. Gordon*¹⁰⁰ in 1892. There a suit by the mother of an illegitimate child to enforce an express promise by the father to pay for support of her child was unsuccessful. The court reasoned that since the primary duty of support was on the mother of an illegitimate child, her performance of that duty was not consideration sufficient to support the putative father's promise to pay. In arriving at the conclusion that the duty of support was on the mother rather than the father, the court looked to the common law as it existed before 1607, as adopted by Missouri,¹⁰¹ and found that in the absence of a statute to the contrary, the duty of sup-

95. *R. _____ v. R. _____*, 431 S.W.2d 152, 154 (Mo. 1968).

96. See 13 St. L.U.L.J. 311 (1968); 1968 WASH. U.L.Q. 624; 1953 WASH. U.L.Q. 94.

97. *Glaze v. Hart*, 225 Mo. App. 1205, 36 S.W.2d 684 (K.C. Ct. App. 1931); *Worthington v. Worthington*, 212 Mo. App. 216, 253 S.W. 443 (St. L. Ct. App. 1923); *Huke v. Huke*, 44 Mo. App. 308 (St. L. Ct. App. 1891).

98. § 452.070, RSMo 1969 concerning divorce; § 452.130, RSMo 1969 concerning separate maintenance.

99. *Heembrock v. Stevenson*, 387 S.W.2d 263 (St. L. Mo. App. 1965); *James _____ v. Hutton*, 373 S.W.2d 167 (K.C. Mo. App. 1963); *State ex rel. Canfield v. Porterfield*, 222 Mo. App. 553, 292 S.W. 85 (K.C. Ct. App. 1927).

100. 51 Mo. App. 637 (St. L. Ct. App. 1892).

101. § 6561, RSMo 1889 [now § 1.010, RSMo 1969].

port fell on the mother.¹⁰² Such a rule had particularly harsh results in view of the fact Missouri had no bastardy or filiation statutes.¹⁰³

Subsequent cases have attempted to find among the Missouri statutes one which a court could construe as altering the common law rule, but no such statute could be found. In *James _____ v. Hutton*¹⁰⁴ the plaintiffs argued that the criminal support statute¹⁰⁵ demonstrated the legislative intent to change the duty of support, but the court held that criminal statutes should be strictly construed, and that no such application of the statute could be made. In *State ex rel. Canfield v. Porterfield*¹⁰⁶ a mother seeking support for her illegitimate child argued that the 1919 versions of sections 452.150 and 452.160¹⁰⁷ gave the mother of an illegitimate child a right against the father for support, but the court held that the statutes would only apply when the father was seeking custody or control of the child, or the services, earnings or property of the child. Thus, where the putative father was attempting to avoid all aspects of the paternal relation, the common law rule remained unchanged.

Furthermore, the failure of the Missouri legislature to change the common law rule was characterized as a tacit declaration of the public policy of Missouri by the Kansas City Court of Appeals in *James _____ v. Hutton*¹⁰⁸ and affirmed by the St. Louis Court of Appeals in *Heembrock v. Stevenson*.¹⁰⁹ The Kansas City court looked at the legislative history of three attempts in the preceding seventeen years to adopt remedial legislation, and concluded that

[b]y such action the General Assembly has said that the public policy of the State of Missouri is the law under the decisions of the Supreme Court and Courts of Appeal which have held there is no civil obligation for the support of illegitimate children as far as the father . . . is concerned.¹¹⁰

Thus, by 1965 Missouri's position among the three states¹¹¹ accepting the minority view on support of illegitimates was characterized as a positive public policy of the legislature.

102. *Easley v. Gordon*, 51 Mo. App. 637, 641 (St. L. Ct. App. 1892). Though it is true that no obligation of support of an illegitimate was owed by the father under common law, it is questionable whether a legal duty fell on the mother. See *Huke v. Huke*, 44 Mo. App. 309 (St. L. Ct. App. 1891).

103. See *James _____ v. Hutton*, 373 S.W.2d 167 (K.C. Mo. App. 1963) and *Smull, Illegitimate Children—No Civil Liability for Support*, 30 Mo. L. REV. 154 (1965), concerning attempts of the Missouri legislature to adopt such legislation, the purpose of which is to create for the illegitimate or his mother a civil cause of action against a father for support of the child.

104. 373 S.W.2d 167 (K.C. Mo. App. 1963).

105. § 559.350, RSMo 1959 [now §§ 559.353, .356, RSMo 1969].

106. 222 Mo. App. 553, 292 S.W. 85 (K.C. Ct. App. 1927).

107. §§ 1813, 1814, and 1814a, RSMo 1919 [now §§ 452.150, .160, RSMo 1969].

See these statutes quoted note 40 *supra*.

108. 373 S.W.2d 167 (K.C. Mo. App. 1963).

109. 387 S.W.2d 263 (St. L. Mo. App. 1965).

110. *James _____ v. Hutton*, 373 S.W.2d 167, 169 (K.C. Mo.App. 1963). See *Smull, supra* note 103.

111. By 1965 only Texas, Idaho, and Missouri refused to give a civil remedy to force support of an illegitimate by his father. Virginia recognizes the duty only where the father has voluntarily and formally recognized the child. See *Smull, supra* note 103, at 155.

Although it is not clear from the court's opinion, the plaintiffs in *R_____ v. R_____*,¹¹² an illegitimate child by his mother as next friend and the mother herself, sought a declaratory judgment of paternity and an order of support against the father.¹¹³ The appeal was from the trial court's action in sustaining defendant's motion to dismiss and the disposition by the supreme court was to reverse and remand for further proceedings. In doing so the court suggested in its opinion that the plaintiffs are entitled to relief under a construction of sections 452.150 and 452.160, RSMo 1959, and section 559.353, RSMo 1967.¹¹⁴ While the plaintiffs had not prayed for relief under these statutes in their suit, in their brief to the Missouri Supreme Court they argued that under these statutes the courts were given an implied power to declare support owing from the father. They contended that the mother of an illegitimate is entitled to an adjudication of the father's rights and duties in respect to custody and control of the child and from this inferred a court's authority to decree child support, since the judicial declaration of the mother's right to custody without the father's duty of support would be valueless.¹¹⁵

112. 431 S.W.2d 152 (Mo. 1968).

113. Brief for Appellant at 25, *R_____ v. R_____*, 431 S.W.2d 152 (Mo. 1968).

114. Now §§ 452.150, .160, 559.353, .356, RSMo 1969. See statutes quoted note 40 *supra*. § 559.353, RSMo 1969:

Any man who, without good cause, fails, neglects or refuses to provide adequate food, clothing, lodging, or medical or surgical attention for his wife; or any man or woman who, without good cause, abandons or deserts or, without good cause, fails, neglects or refuses to provide adequate food, clothing, lodging, or medical or surgical attention for his child born in or out of wedlock, under the age of sixteen years, or if any person, not the father or mother, having the legal care or custody of such minor child, without good cause, fails, refuses or neglects to provide adequate food, clothing, lodging, or medical or surgical attention for the child, whether or not in either such case the child by reason of such failure, neglect or refusal actually suffers physical or material want or destitution, is guilty of a misdemeanor and upon conviction thereof shall be punished as provided by law.

§ 559.356, RSMo 1969:

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

115. Brief for Appellant at 25 and 26, *R_____ v. R_____*, 431 S.W.2d 152 (Mo. 1968).

In spite of the language of the opinion in *R_____ v. R_____*,¹¹⁶ it seems at least questionable that an illegitimate would be entitled to a decree of support in a suit solely on the basis of the statutes cited by the court. While the construction of sections 452.150 and 452.160 in *State ex rel. Ganfield v. Porterfield*¹¹⁷ may have been overruled by *R_____ v. R_____*,¹¹⁸ it remains difficult to justify granting relief to an illegitimate on the basis of equal protection when the statutes have never been construed as giving a right of support in the case of legitimate children.¹¹⁹ Furthermore, the tradition that criminal statutes create no civil remedy is a policy much broader than the area of support of illegitimates.¹²⁰ While the court implied that the proper construction of the statutes gives the illegitimate his right to support, it is really by judicial doctrine that the duty has been established. It was the Supreme Court of Missouri, declaring what it found to be a requirement of the federal and state constitutions, that established the duty.¹²¹

Since the right and duty have been established by judicial decree, a better solution than merely suing under the statutes cited would seem to be suit for determination of paternity by declaratory judgment. This would be a remedy the illegitimate himself could seek, and while a successful determination would entitle him to the same status and rights of support as the legitimate child, there would be no violation of the doctrine precluding monetary recovery by the child in his own behalf.¹²² Such a remedy was sought in *James _____ v. Hutton*,¹²³ and though dismissal was sustained the holding was based on the fact that the father of an illegitimate child had no duty of support; therefore, no justiciable dispute was presented. In *State ex rel. Anonymous v. Murphy*,¹²⁴ the Kansas City Court of Appeals acknowledged by dicta the appropriateness of a declaratory judgment of paternity. However, the court refused to issue mandamus against a circuit court judge to compel him to assume jurisdiction of a declaratory judgment action seeking declaration of paternity because no personal jurisdiction over the defendant had been obtained, and the result of a finding that the defendant was the father would expose him to personal liability for support. This dicta, then, indicated approval, in a case where personal jurisdiction over the defendant is obtained, of an action under declaratory judgment for a declaration of paternity.

For the Missouri mother of an illegitimate, therefore, the best approach would be that in *R_____ v. R_____*¹²⁵ where the child through his

116. 431 S.W.2d 152 (Mo. 1968).

117. 222 Mo. App. 553, 292 S.W. 85 (K.C. Ct. App. 1927).

118. 431 S.W.2d 152 (Mo. 1968).

119. See annots., MO. ANN. STAT. §§ 452.150, .160 (Vernon 1952). See also statutes quoted note 40 *supra*.

120. *Christy v. Petrus*, 365 Mo. 1187, 295 S.W.2d 122 (En Banc 1956).

121. Creating the right of support by judicial declaration was nothing unique. This is the way Missouri first recognized the legitimate child's right to support. See *State ex rel. Kramer v. Carroll*, 309 S.W.2d 654 (St. L. Mo. App. 1958), and cases cited note 2 *supra*.

122. *Worthington v. Worthington*, 212 Mo. App. 216, 253 S.W. 443 (St. L. Ct. App. 1923).

123. 373 S.W.2d 167 (K.C. Mo. App. 1963).

124. 354 S.W.2d 43 (K.C. Mo. App. 1962).

125. 431 S.W.2d 152 (Mo. 1968).

mother as next friend sought declaration of paternity and his mother joined as plaintiff seeking a decree of support. It would seem that the declaration of paternity would give him a status parallel to that of the legitimate, as evidently required by the equal protection clause, while his mother, as guardian, would be entitled to enforce her ward's duty of support as the mother of a legitimate child is entitled to do. There is good authority in Missouri for the granting of positive relief upon the status found in the declaratory judgment suit,¹²⁶ whether it be for the payment of money or other equitable relief.

Whether a mother of an illegitimate in such a suit would be entitled to a continuing judgment for child support, however, is questionable. Such a judgment is given mothers of legitimate children only in conjunction with actions for divorce or separate maintenance.¹²⁷ Therefore, it might be difficult to justify an order for continuing support on the grounds of equal protection since the remedy is denied many legitimate children and their mothers. Because the order of support in the divorce-separate maintenance situation is a judicial determination of the amount of support required of a specific father which is substituted for his common law duty of support arising out of the marital relation,¹²⁸ equal protection might not require anything more than the minimum duty to provide the necessities for illegitimate children, and the remedy might be restricted to the common law suit by a mother for reimbursement for amounts spent to provide those necessities. On the other hand, language in *R. _____ v. R. _____*¹²⁹ and *State v. Murphy*¹³⁰ is broad enough that it could be argued the courts have judicially authorized such a remedy under their inherent equitable powers. The issue could best be resolved by the legislature authorizing the courts to entertain actions by illegitimates and their mothers for declaration of paternity and a decree for continuing support. This solution, however, is simply a filiation statute.¹³¹ The failure of the legislature to create by statute even the right to support for the illegitimate makes it seem doubtful that the legislature would now define such a remedy.

Two resourceful mothers of illegitimates have provided Missouri with authority for compelling support by the father of an illegitimate by enforcing rights of the mother in a contract for marriage. In 1902, the plaintiff mother in *Sponable v. Owens*¹³² recovered a judgment for support payments the defendant father had promised to make in a marriage contract executed after the birth of the illegitimate child. The defendant argued that, under the authority of *Easley v. Gordon*,¹³³ the promise to pay for support of an illegitimate child was not supported by sufficient consideration. However, the court found that because in the contract the plaintiff mother

126. *Union Nat'l Bank v. Jessell*, 358 Mo. 467, 215 S.W.2d 474 (1948); *State ex rel. Kramer v. Carroll*, 309 S.W.2d 654 (St. L. Mo. App. 1958).

127. See statute quoted note 36 *supra*.

128. See cases cited note 45 *supra*.

129. 431 S.W.2d 152 (Mo. 1968).

130. 354 S.W.2d 43 (K.C. Mo. App. 1962). See also cases cited note 126 *supra*.

131. See *James _____ v. Hutton*, 373 S.W.2d 167 (K.C. Mo. App. 1963), and *Smull, supra* note 103, regarding attempts by the Missouri legislature to adopt such legislation.

132. 92 Mo. App. 174 (K.C. Ct. App. 1902).

133. 51 Mo. App. 637 (St. L. Ct. App. 1892).

had promised to marry the defendant (as the defendant had also promised), there was sufficient consideration in this promise of marriage to support the promise of child support. It should be noted that the parties there had in fact married and then divorced, and the plaintiff mother could have compelled support on the basis of the former marital relation.

In *Rehg v. Giancola*,¹³⁴ a 1965 St. Louis Court of Appeals case, this remedy was carried a step further when the plaintiff mother recovered support for her illegitimate child as a part of the damages for breach of a promise to marry. Here there was neither a written contract nor actual marriage, but the plaintiff convinced the court that she had been persuaded to enter sexual relations with the defendant only after he had asked and promised to marry her. The court denied that the judgment was a result of any duty the defendant father owed the child, but rather part of the damages suffered as a result of the defendant's failure to perform his promise of marriage. They found that the duty and the expense of maintenance and support of the child, as well as medical expenses and loss of wages due to plaintiff's pregnancy, were all burdens thrust on the plaintiff as a result of defendant's breach which otherwise would have been borne by the defendant.

This rather unique remedy may tend to be ignored in the future since the decision in *R_____ v. R_____*¹³⁵ has subsequently established the father's duty of support. In suits under the *Sponable* and *Rehg* principles the plaintiff not only must establish paternity, but must also show the existence of the contract or promise to marry. There may be some advantages where the extra proof is possible, however. While the duty under *R_____ v. R_____*¹³⁶ may be only to provide necessities, the damages under the breach of promise theory are the amounts of support lost due to the breach.¹³⁷ Thus where the defaulting party is relatively wealthy the damages should be more than the mere necessities for the child; they should be benefits of maintenance and support at the standard of living of the father which the child and his mother would have enjoyed had the father not breached his promise to marry.

III. CONCLUSION

The purpose of this comment has been to summarize and analyze the present state of Missouri law on child support and, hopefully, to draw attention to the areas of inconsistency. Because problems arise so frequently, child support is an area in which the law should be easily ascertainable and well defined. The reluctance of the legislature to act in this regard has left the task of revision and definition to Missouri courts. While the courts have managed to build a workable system of rules on a case-by-case basis, decisional law makes resolution of legal questions in the child support area a complicated task. Summary and analysis of this decisional law can only bring a slight improvement to the situation. Legislative reform and definition is needed.

STEPHEN D. HOYNE

134. 391 S.W.2d 934 (St. L. Mo. App. 1965).

135. 431 S.W.2d 152 (Mo. 1968).

136. *Id.*

137. *Rehg v. Giancola*, 391 S.W.2d 934 (St. L. Mo. App. 1965).

COMMERCIAL ARBITRATION: A NEED FOR REFORM

Commercial arbitration has become an important method of resolving many of the controversies arising in the business sector of our society.¹ Arbitration is a process by which parties, either before or after disputes arise, voluntarily agree to refer such disputes to an impartial third party, the parties having agreed in advance that the award of the arbitrator shall have finality.² This comment will deal solely with commercial arbitration as distinguished from labor arbitration, the latter being governed by its own separate principles and practices,³ and will analyze the present status of the law of commercial arbitration in Missouri and examine the possible need for reform.

I. THE RULE OF REVOCABILITY

A. Generally

At common law, executory arbitration agreements were not specifically enforceable and thus were revocable by either party up to the time an award was made.⁴ The rule had its basis in the early fights in the common law courts for jurisdiction, and in the fact that judges were jealous of any thing which "ousted them of jurisdiction."^{4a} There was, and still is, of course, an action at law for damages for breach of the arbitration agreement; however, this remedy has little practical utility because "unless the plaintiff has been put to expense by reason of the defendant's refusal to arbitrate, he can recover only nominal damages at law."^{4b}

Currently there are two general approaches taken by jurisdictions in the United States regarding specific enforcement of arbitration agreements. Twenty-five jurisdictions,⁵ including the United States Government,^{5a} provide by statute or judicial decision⁶ that all agreements to arbitrate are

1. See generally M. DOMKE, *THE LAW & PRACTICE OF COMMERCIAL ARBITRATION* §§ 2.01-.02 (1968).

2. *Id.* § 1.01.

3. *Grubb v. Leroy L. Wade & Son, Inc.*, 384 S.W.2d 528, 534 (Mo. 1964) (stating ch. 435, RSMo 1959 is not applicable to labor arbitration).

4. *Kill v. Hollister*, 95 Eng. Rep. 532 (1746).

4a. Grossman, *Commercial Arbitration in Missouri*, 12 St. L. L. Rev. 299 (1927).

4b. Simpson, *Specific Enforcement of Arbitration Contracts*, 83 U. PA. L. Rev. 160-61 (1934).

5. See ALASKA STAT. §§ 09.43.010 *et seq.* (Supp. 1970); ARIZ. REV. STAT. ANN. § 12-2501 (1962); CAL. CIV. PRO. § 1280 (1970); CONN. GEN. STAT. REV. § 52-408 (1958); FLA. STAT. §§ 682.01-22 (1965); HAWAII REV. LAWS § 188-1 (1955); ILL. REV. STAT. ch. 10, §§ 101-23 (1968); LA. REV. STAT. ANN. § 9:4201 (1965); ME. REV. STAT. ANN. tit. 14, § 706 (1964); MD. ANN. CODE art. 7, §§ 1-23 (1965); MASS. ANN. LAWS ch. 251, § 1 (1959); MICH. STAT. ANN. §27A.5001 (1962); MINN. STAT. § 572.08 (1965); N.H. REV. STAT. ANN. § 542.1 (1955); N.J. REV. STAT. § 2A:24-1 (1951); N.Y. CIV. PRAC. §§ 7501-14 (McKinney 1963); OHIO REV. CODE ANN. § 2711.01 (Page 1954); ORE. REV. STAT. § 33.210 (1953); PA. STAT. tit. 5, § 161 (1936); R.I. GEN. LAWS ANN. § 28-9-1 (1956); VA. CODE ANN. § 8-503 (b) (1957); WASH. REV. CODE § 7.04.010 (1961); WIS. STAT. § 298.01 (1963); WYO. STAT. ANN. § 1-1048 (1957).

5a. 9 U.S.C. §§ 1-2 (1947).

6. See *Ezell v. Rocky Mountain Bean & Elev. Co.*, 76 Colo. 409, 232 P. 680 (1925); *United Ass'n of Journeymen v. Stine*, 76 Nev. 189, 351 P.2d 965 (1960).

valid, irrevocable, and specifically enforceable.^{6a} Several other states,⁷ including Missouri,⁸ enforce arbitration awards once entered, but apply the common law rule of revocability as to specific enforcement of arbitration agreements.⁹

Generally the Missouri position is to deny specific enforcement of any type of arbitration agreement, whether it was entered into before or after the dispute arose. A codification of the common law, section 435.010, RSMo 1969 provides:

Any contract or agreement hereafter entered into containing any clause or provision providing for an adjustment by arbitration shall not preclude any party or beneficiary under such contract or agreement from instituting a suit or other legal action on such contract at any time and the compliance with such clause or provision shall not be a condition precedent to the right to bring suit or recover in such action.¹⁰

This section was enacted in 1909 as an amendment to the original arbitration act adopted in 1825.¹¹ The 1825 law, copied from a New York act,¹² did not prohibit specific enforcement of arbitration agreements,¹³ but in most of the Missouri cases based on this statute enforcement was denied.¹⁴ One of the reasons given for these decisions was that, where a contract leaves the price to be decided by arbitrators, an essential ingredient of the contract is lacking and specific enforcement by a court "would

6a. Aksen, *Resolving Construction Contract Disputes Through Arbitration*, 23 ARB. J. (n.s.) 141, 147 (1968).

7. See ALA. CODE tit. 7, § 829 (1957); ARK. STAT. ANN. §§ 34-501 to -510 (1947); DEL. CODE ANN. tit. 10, §§ 5701-06 (1953); GA. CODE ANN. §§ 7-101, 201 (1935); IDAHO CODE ANN. §§ 7-901 to -910 (1948); IND. ANN. STAT. §§ 3-201 to -226 (1946); IOWA CODE §§ 679.1-18 (1966); KAN. STAT. ANN. §§ 5-201 to -213 (1963); KY. REV. STAT. §§ 417.010-040 (1963); MISS. CODE ANN. § 279 (1942); MONT. REV. CODES ANN. § 93-201-1 (1947); NEB. REV. STAT. § 25-2103 (1964); N.M. STAT. ANN. § 22-3-1 (1953); N.C. GEN. STAT. § 1-544 (1969); N.D. CENT. CODE § 32-29-01 (1960); S.C. CODE ANN. § 10-1901 (1962); TENN. CODE ANN. § 23-501 (1956); TEX. REV. CIV. STAT. arts. 224-38 (1966); UTAH CODE ANN. § 78-31-1 (1953); W. VA. CODE ANN. § 55-10-1 (1966).

8. §§ 435.010-020, RSMo 1969.

9. Aksen, *Resolving Construction Contract Disputes Through Arbitration*, 23 ARB. J. (n.s.) 141, 147 (1968). This is Mr. Aksen's opinion which is evidently based on § 435.020, RSMo 1969. In fact, the Missouri cases indicate that while an award is almost holy, agreements to arbitrate are not a bar to suit. Grossman, *Commercial Arbitration In Missouri*, 12 ST. L. L. REV. (1927).

10. § 435.010, RSMo 1969.

11. Beatty, *Voluntary Arbitration, Its Legal Status and How it Works*, 22 U.K.C. L. REV. 191, 211 (1954).

12. N.Y. CIV. PRAC. §§ 7501-14 (McKinney 1963).

13. Present ch. 435, RSMo 1969, is identical to the original 1825 act except for the addition of § 435.010.

14. See *City of St. Louis v. St. Louis Gaslight Co.*, 70 Mo. 69 (1879); *King v. Howard*, 27 Mo. 21 (1858). *Bowen v. Lazalere*, 44 Mo. 383 (1869) stated an exception to the rule:

It is not necessary that there be an award, for the consent to arbitrate is in itself a selection of another tribunal and an agreement to transfer the cause to that tribunal, which agreement the court will carry into effect wherever it is properly brought to their notice. *Id.* at 386.

be making a contract for them, and then executing it."¹⁵ The cases decided since 1909 still hold that a provision for arbitration of a future dispute is not specifically enforceable.¹⁶

B. Condition Precedent Exception

Absent a statute prohibiting revocation, revocation is still not always permissible. One method of preventing it is to make compliance with the arbitration agreement a condition precedent to litigation. Such a rule was in force in New York when the United States Court of Appeals said:

Either party may sue the other upon the contract without having offered to arbitrate. He may be liable for damages for a breach of his agreement to arbitrate; but the agreement will not bar his suit. If, however, the contract stipulates that arbitration is to be a condition precedent to the right to sue upon the contract, or if this may be inferred upon construction, no suit can be maintained unless the plaintiff has made all reasonable effort to comply with the condition.¹⁷

This rule is no longer necessary in New York due to its statute¹⁸ allowing specific enforcement of all arbitration agreements. Although the "condition precedent" rule appears on its face to be the broadest exception to revocability, it has not been used in Missouri, because of the language in section 435.010 which provides that arbitration provisions "shall not be a condition precedent to the right to bring suit or recover in such action."

Interestingly, the Missouri courts did recognize this exception in 1918 in dicta in *Mecartney v. Guardian Trust Co.*¹⁹ In that suit for attorney fees the court found there was no agreement to arbitrate. However, the court discussed the condition precedent exception and then went on, in dicta, to say that even if they had found that there had been an agreement to arbitrate it would have been too indefinite to specifically enforce, since it did not provide a means of selecting arbitrators.²⁰ In light of the fact that the court ignored section 435.010 and that the finding of no agreement to arbitrate was dispositive of the case, it seems that the court was using this "indefiniteness" as a make-weight argument, and went too far in limiting the condition precedent exception to revocability, since the defendant did not ask that the court enforce the "agreement" but only that jurisdiction be refused until the condition had been complied with.²¹

15. *City of St. Louis v. St. Louis Gaslight Co.*, 70 Mo. 69, 109 (1879). See also *Tureman v. Altman*, 361 Mo. 1220, 239 S.W.2d 304 (En Banc 1951); *King v. Howard*, 27 Mo. 21 (1858); *Continental Bank Supply Co. v. International Bhd. of Bookbinders*, 239 Mo. App. 1247, 201 S.W.2d 531 (K.C. Ct. App. 1947).

16. *Tureman v. Altman*, 361 Mo. 1220, 239 S.W.2d 304 (En Banc 1951); *Ewing v. Pugh*, 420 S.W.2d 14 (K.C. Mo. App. 1967); *Jenks v. Jenks*, 385 S.W.2d 370 (St. L. Mo. App. 1964); *Hill v. Seaboard Fire & Marine Ins. Co.*, 374 S.W.2d 606 (K.C. Mo. App. 1963); *State ex. rel. State Farm Mut. Auto. Ins. Co. v. Craig*, 364 S.W.2d 343 (Spr. Mo. App. 1963).

17. *Perkins v. United States Elec. Light Co.*, 16 F. 513, 515 (C.C.S.D.N.Y. 1883). See also *Orrick v. Granell*, 14 Alas. 94 (D. 1952); *Ensley v. Associated Terminals*, 304 Mich. 522, 8 N.W.2d 161 (1943).

18. N.Y. CIV. PRAC. §§ 7501-14 (McKinney 1963).

19. 274 Mo. 224, 202 S.W. 1131 (1918).

20. *Id.* at 258, 202 S.W. at 1141.

21. *Id.* at 224, 202 S.W. at 1131.

Under section 435.010, even if a condition precedent were held to exist, the party desiring arbitration would be forced to resort to litigation. If the defaulting party refused to arbitrate, the other party, after having made "all reasonable effort to comply with the condition,"²² is left with only the remedy of litigation that he contracted to avoid through arbitration. This will necessarily be a suit on the merits of the case since section 435.010 does not allow specific enforcement of arbitration agreements.

C. Appraisal Exception

Generally, an agreement for an "appraisal" is specifically enforceable. An appraisal award merely sets a value on the commodity or service involved:

[A]greements to arbitrate are incapable of specific enforcement. But though this is the general rule it is not the universal rule. The rule has its well ascertained exception. This exception occurs when the essence of the agreement does not consist in fixing of a value by arbitrators, but the fixing of such value is merely subsidiary or auxiliary to the principal agreement.²³

Such an agreement for valuation by appraisers does not oust the courts of jurisdiction, but establishes a means of determining a disputed amount.²⁴ Thus, this exception to the revocability rule is justified by the fact that, prior to an award, no cause of action has accrued and any action brought is premature.²⁵

The leading case in Missouri distinguishing arbitration and appraisal is *Dworkin v. Caledonian Insurance Co.*²⁶ Although the court discussed differences in procedure, it appears the court was merely trying to protect its own jurisdiction when it pointed out that "arbitrators act like judges" in affixing liability (*i.e.*, making a legal determination)²⁷ while appraisers make *factual* findings based on their own knowledge. The court also pointed out that an arbitration award is itself a basis for suit and merges with the original cause of action while the award through appraisal does not create a new cause of action.²⁸

The question decided by *Dworkin* was whether the statutory policy of revocability²⁹ of arbitration agreements should be extended to cover appraisals.³⁰ The court held the policy should not be extended because, quoting Lord Campbell, "It would be a most inexpedient encroachment upon the liberty of the subject if he were not allowed to enter such a contract."³¹ The *Dworkin* court also quoted with approval the Supreme Court of California which said that an extension of the revocability rule to appraisals

22. Perkins v. United States Elec. Light Co., 16 F. 513 (C.C.S.D.N.Y. 1883).

23. Black v. Rogers, 75 Mo. 441, 449 (1882).

24. Bales v. Gilbert, 84 Mo. App. 675 (K.C. Ct. App. 1900).

25. McNees v. Southern Ins. Co., 61 Mo. App. 335 (K.C. Ct. App. 1895).

26. 285 Mo. 342, 226 S.W. 846 (En Banc 1920).

27. *Id.* at 356, 226 S.W. at 848.

28. *Id.*

29. § 435.010, RSMo 1969.

30. *Dworkin v. Caledonian Ins. Co.*, 285 Mo. 342, 226 S.W. 846 (En Banc 1920).

31. *Id.* at 361, 226 S.W. at 850.

would "interfere with the ordinary transactions of mankind and put unnecessary clogs on business."³²

II. VOLUNTARY ARBITRATION IN MISSOURI

Section 435.020³³ appears to permit submission of an existing controversy to arbitration if it is subject to action, and the parties agree that a judgment should be entered on the award.³⁴ Section 435.010, however, precludes compulsory submission; thus section 435.020 merely recognizes purely voluntary arbitration.³⁵ In other words, judicial enforcement will be given to an award resulting from the parties having voluntarily gone to arbitration.

In this connection, Missouri courts have distinguished between common law arbitration and statutory arbitration. The distinction is made to test the validity of the agreement submitting the controversy to arbitration under section 435.020. This is necessary due to the differences in common law and statutory arbitration. At common law the dispute did not have to rise to the level of a controversy and the submission agreement and award only had to be in writing if required by the statute of frauds. Under section 435.020 the dispute must rise to the level of a cause of action and both the submission agreement and the award must be in writing. This is the only reason for any distinction, as each type is regarded as a distinct and concurrent remedy aiming at the same result.³⁶ The two types of arbitration differ in (1) the formality of the agreement, and (2) the level to which the controversy must rise. The cases discussing the distinction have in common the fact that an existing controversy, rather than a possible future dispute, was the subject of arbitration.³⁷

The first element of statutory submission under section 435.020 requires that the submission agreement be in writing, while at common law it could be either parol or written,³⁸ except that where the subject matter

32. *Id.*

33. § 435.020, RSMo 1969:

All persons, except infants and persons of unsound mind, may, by instrument of writing, submit to the decision of one or more arbitrators any controversy which may be existing between them, which might be the subject of an action, and may, in such submission, agree that a judgment of any circuit or other court having jurisdiction of the subject matter, to be designated in such submission, shall be rendered upon the award made pursuant to such submission.

34. Beatty, *Voluntary Arbitration, Its Legal Status and How It Works*, 22 U.K.C. L. REV. 191 (1954).

35. Grossman, *Commercial Arbitration in Missouri*, 12 ST. L. L. REV. 229 (1927).

36. *Thatcher Implement & Mercant. Co. v. Brubaker*, 193 Mo. App. 627, 187 S.W. 117 (K.C. Ct. App. 1916).

37. *Continental Bank Supply Co. v. International Bhd. of Bookbinders*, 239 Mo. App. 1247, 201 S.W.2d 531 (K.C. Ct. App. 1947); *Rickman v. White*, 266 S.W. 997 (Spr. Mo. App. 1924); *Bunnell v. Reynolds*, 205 Mo. App. 653, 226 S.W. 614 (K.C. Ct. App. 1920); *Thatcher Implement & Mercant. Co. v. Brubaker*, 193 Mo. App. 627, 187 S.W. 117 (K.C. Ct. App. 1916); *Donnell v. Lee*, 58 Mo. App. 288 (K.C. Ct. App. 1894); *Carter v. Skaggs*, 38 Mo. 302 (1866).

38. *Thatcher Implement & Mercant. Co. v. Brubaker*, 193 Mo. App. 627, 187 S.W. 117 (K.C. Ct. App. 1916).

of the contract was within the Statute of Frauds the submission agreement had to be in writing.³⁹ The fact that submission is in writing, however, does not in and of itself make the agreement statutory.⁴⁰ The second element of statutory submission requires that it have as its subject matter a controversy which could be the subject of a civil action.⁴¹ A common law submission on the other hand, while it must have as its subject matter an existing controversy, need not rise to the level of a cause of action.⁴²

Once the parties to an arbitration agreement have voluntarily submitted their dispute to arbitration, the decision of the arbitrators, the award, is highly regarded by the courts. Arbitration, in the words of the Missouri Supreme Court, is like "a domestic tribunal, and the arbitrators are judges of the parties own choosing, and are favored by both the courts and lawmaking power."⁴³ While the courts view arbitration agreements as threats to their jurisdiction and a deprivation of the parties' right to a day in court, there is nothing but praise for arbitration awards. The Missouri court has described arbitration and how it works in glowing terms as:

a domestic tribunal, created by the will and consent of parties litigant, and resorted to to avoid the expense, delay, and ill feeling consequent upon litigating in courts of justice. The arbitrators are generally selected from among the friends of the parties, and are not supposed to be well versed in the law, or the technical rules of evidence; but are expected to settle all matters in dispute untrammelled by the niceties of the law, and in a manner that will be just and equitable between the parties; and so favored is this tribunal by our courts that they will not [normally] interfere with an award. . . .⁴⁴

The courts have upheld awards saying that mere errors of law or wrong conclusions were not sufficient to upset an award⁴⁵ without a showing of some impropriety by the arbitrators.

The description of arbitration by the Missouri court may not be completely accurate today because arbitrators are presently chosen largely from the legal profession by the various trade and arbitration associations, and are generally not acquainted with the parties;⁴⁶ but the quoted material

39. Rickman v. White, 266 S.W. 997 (Spr. Mo. App. 1924); Bunnell v. Reynolds, 205 Mo. App. 653, 226 S.W. 614 (K.C. Ct. App. 1920); Donnell v. Lee, 58 Mo. App. 288 (K.C. Ct. App. 1894).

40. Continental Bank Supply Co. v. International Bhd. of Bookbinders, 239 Mo. App. 1247, 201 S.W.2d 531 (K.C. Ct. App. 1947).

41. *Id.* See also § 435.020, RSMo 1969.

42. Continental Bank Supply Co. v. International Bhd. of Bookbinders, 239 Mo. App. 1247, 201 S.W.2d 531 (K.C. Ct. App. 1947); § 435.020, RSMo 1969.

43. Garred v. Macy, 10 Mo. 161, 164 (1846).

44. Bennet's Adm'r v. Russell's Adm'r, 34 Mo. 524, 528 (1864).

45. *Id.* See also Cochran v. Bartle, 91 Mo. 636, 3 S.W. 854 (1887); Bridgeman v. Bridgeman, 23 Mo. 272 (1856); Vaughn v. Graham, 11 Mo. 575 (1848); Newman v. Labeaume, 9 Mo. 30 (1845); Fernandes Grain Co. v. Hunter, 217 Mo. App. 187, 274 S.W. 901 (St. L. Ct. App. 1925); Becket v. Wiglesworth, 178 S.W. 898 (K.C. Mo. App. 1915); Taylor v. Scott, 26 Mo. App. 249 (St. L. Ct. App. 1887); State *ex. rel.* Kennedy v. Union Merchants' Exch., 2 Mo. App. 96 (St. L. Ct. App. 1876); Mitchell v. Curran, 1 Mo. App. 453 (St. L. Ct. App. 1816).

46. M. DOMKE, COMMERCIAL ARBITRATION 14 (1965).

is still an accurate summary of the reasons for electing to arbitrate and the purposes that arbitrators hope to achieve.⁴⁷

So long as an arbitration agreement is carried through to an award, the courts will not question the agreement because the mutual promises to submit to arbitration are consideration for each other.⁴⁸ The prevention of litigation is not only a sufficient consideration, but one highly favored by our courts.⁴⁹ Thus the court will not look into the character of the claims submitted for the purpose of setting aside the compromise.⁵⁰ The submission statute⁵¹ requires that there be an existing controversy between the parties. The Kansas City Court of Appeals has held, however, that when they are asked to set aside an award it is sufficient that the parties thought, at the time, that there was a dispute.⁵² Also, a mere showing that the award is contrary to law or against the weight of the evidence is insufficient to set aside the award.⁵³ Courts liberally interpret arbitration proceedings on the theory that justice may be promoted by submission to an arbitration tribunal which can consider facts that courts bound by the strict rules of evidence can not consider.⁵⁴

Although there *are* means of attacking an award once it has been made, it appears to be very difficult, under both section 435.100 and case law, to set aside an award. Section 435.100 provides that an arbitration award can be set aside on any one of four separate grounds: (1) the award was procured by corruption or fraud; (2) evident partiality or corruption on the part of the arbitrator; (3) the arbitrator was guilty of misconduct in refusing to hear evidence, refusing to postpone the hearing when good cause is shown, or by engaging in any misbehavior prejudicing the rights of the parties; and (4) the arbitrator exceeded his powers. In *Mitchell v. Curran*⁵⁵ an arbitration award was granted to the defendant. This award was set aside by an appeals committee and on rehearing the arbitrators found for the defendant again. The appeals committee again set aside the award and gave a \$600 award for the plaintiff. This award was confirmed by the circuit court and defendant moved to set aside the award. The court noted that even though there was no evidence to support an award for the plaintiff they could not set aside the award. The court in *Mitchell* set out five grounds for setting aside an award, adding only one ground of attack in addition to the statutory grounds: insufficiency of the award. In addition to this listing of grounds which may be used to upset an award, the court noted that section 435.240, which denies any impairment of the powers of equity, does not authorize the setting aside of an award merely because it is against the weight of the evidence.⁵⁶ The cases decided under section

47. *Id.* at 8-12.

48. *Downing v. Lee*, 98 Mo. App. 604, 73 S.W. 721 (K.C. Ct. App. 1903).

49. *Id.*

50. *Id.*

51. § 435.020, RSMo 1969.

52. *Downing v. Lee*, 98 Mo. App. 604, 73 S.W. 721 (K.C. Ct. App. 1903).

53. *Fernandes Grain Co. v. Hunter*, 217 Mo. App. 187, 274 S.W. 901 (St. L. Ct. App. 1925).

54. *Masonic Temple Ass'n v. Farrar*, 422 S.W.2d 95 (St. L. Mo. App. 1967).

55. 1 Mo. App. 453 (St. L. Ct. App. 1876).

56. *Id.*

435.100 have held that, in order for an award to be set aside, the error must appear on the face of the award,⁵⁷ and that the court cannot review arbitrators' conclusions of law.⁵⁸ It seems that in order to set aside an award under section 435.100, corruption, partiality or some misconduct calculated to prejudice one of the parties must be shown.⁵⁹

It is anomalous that our legislature protects merchants from specific enforcement of arbitration agreements by providing that they will not bar an action; yet, when these contracts are carried out, the courts look upon them with favor, and interpret them with liberality.⁶⁰ Arbitration awards receive the presumption of legality given judgments.⁶¹ This is demonstrated by the fact that, as previously noted, wrongful intent of arbitrators is required to upset an award,⁶² and the fact that courts can not review the arbitrators' conclusions of law.⁶³ In addition, mere error in judgment as to law or fact will not vitiate an award,⁶⁴ nor will any error which is not apparent on the face of an award.⁶⁵ It might be inferred from the disparity between legislative and judicial conceptions of public policy that the courts are willing and anxious to adopt a modern arbitration rule and are providing the legislature with excellent policy reasons for updating the Missouri statute. For example, in *Masonic Temple Association v. Farrar*,⁶⁶ the court expressed the feeling that, when controversies arise between persons or groups linked by common interests, arbitration should be used so that facts inadmissible in courts bound by rules of evidence could be considered. In *Farrar* the groups involved were linked fraternally and the court indicated that arbitration would serve to protect amicability.⁶⁷ It could be argued that groups linked by economic ties should use arbitration to maintain useful economic ties.

III. IMPETUS FOR A NEW RULE

One reason advanced for the establishment of the general rule⁶⁸ that arbitration agreements can not be specifically enforced was that public

57. *Vallé v. North Mo. R.R.*, 37 Mo. 445 (1866).

58. *Higgins-Wall-Dyer Co. v. City of St. Louis*, 331 Mo. 454, 53 S.W.2d 864 (1932).

59. *Bennet's Adm'r v. Russell's Adm'x*, 34 Mo. 524 (1864).

60. *Id.* See also *Tucker v. Allen*, 47 Mo. 488 (1871); *Fernandes Grain Co. v. Hunter*, 217 Mo. App. 187, 274 S.W. 901 (St. L. Ct. App. 1925); *Reeves v. McGlothlin*, 65 Mo. App. 537 (K.C. Ct. App. 1896).

61. *Thatcher Implement & Mercant. Co. v. Brubaker*, 193 Mo. App. 627, 187 S.W. 117 (K.C. Ct. App. 1916).

62. *Fernandes Grain Co. v. Hunter*, 217 Mo. App. 187, 274 S.W. 901 (St. L. Ct. App. 1925).

63. *Higgins-Wall-Dyer Co. v. City of St. Louis*, 331 Mo. 454, 53 S.W.2d 864 (1932).

64. *Bridgeman v. Bridgeman*, 23 Mo. 272 (1856); *Vaughn v. Graham*, 11 Mo. 575 (1848); *State ex. rel. Kennedy v. Union Merchants' Exch.*, 2 Mo. App. 96 (St. L. Ct. App. 1876).

65. *Cochran v. Bartle*, 91 Mo. 636, 3 S.W. 854 (1887); *Taylor v. Scott*, 26 Mo. App. 249 (St. L. Ct. App. 1887).

66. 422 S.W.2d 95 (St. L. Mo. App. 1967).

67. *Id.*

68. By a count of the American jurisdictions this is not a majority rule. There are twenty-one states which by statute or court decision follow this rule. See statutes cited note 7 *supra*.

policy was opposed to allowing persons to bind themselves prior to a controversy. Additional reasons advanced for this rule were lack of predictability of result,⁶⁹ and the fact that results of past arbitration cases would not generally be available to the parties.⁷⁰ Both of these considerations stem from the fact that arbitration decisions are not reported⁷¹ and the fact that, while arbitration associations have the machinery available to keep records and thus have precedent to cite, the individual small businessman will be unable to maintain such records. Another objection to arbitration proceedings was a fear of possibly unfair results which could be obtained if the rules of evidence were not followed.⁷² This fear may have been somewhat exaggerated because eighty percent of the arbitrators appointed are lawyers⁷³ who, while not bound by strict rules of evidence, are undoubtedly familiar with them and arguably will not subvert their spirit.

The factors of encroachment on liberty and unnecessary clogs on business cited by the *Dworkin* court constitute not only good reasons for not extending the revocability rule to appraisals, they also present an excellent rationale for abrogating the rule altogether. The recent trend in the courts has been to question the rule which invalidates agreements to arbitrate future disputes.⁷⁴ This is also the definite trend in the legislatures.⁷⁵ The philosophy underlying this can be seen in a case decided in 1899 by the Montana Supreme Court,⁷⁶ which, while adhering to the statutory prohibition,⁷⁷ noted the weakness of the rule:

[I]f it were not so firmly and well-nigh universally established, we apprehend that it would be overturned, as resting upon no solid foundation of reason. Its operation should not be extended by construction, nor should it ever be invoked to nullify or impair contractual provisions not clearly infected with the supposed evils intended to be cured or prevented.⁷⁸

As long as the parties, at arms length, provide for an amicable adjustment by arbitration it is difficult to find any good reason why the provision should be unenforceable.⁷⁹

In one of the early cases abrogating the common law rule of revocability, the Colorado Supreme Court said of the rule:

69. Annot., 135 A.L.R. 79 (1941).

70. M. DOMKE, COMMERCIAL ARBITRATION 14 (1965).

71. *Id.*

72. Note, *Commercial Arbitration: Expanding The Judicial Role*, 52 MINN. L. REV. 1218 (1968).

73. M. DOMKE, COMMERCIAL ARBITRATION 14 (1965).

74. Annot., 135 A.L.R. 79, 92 (1941).

75. See statutes cited note 3 *supra*.

76. *Cotter v. Grand Lodge A.O.U.W.*, 23 Mont. 82, 57 P. 650 (1899).

77. See MONT. REV. CODES ANN. § 93-201-1 (1947).

78. *Cotter v. Grand Lodge A.O.U.W.*, 23 Mont. 82, 57 P. 650 (1899).

79. *Delaware & Hudson Canal Co. v. Pennsylvania Coal Co.*, 50 N.Y. 250, 258 (1872); 26 WASH. U.L.Q. 561 (1941). Even though this sentiment is expressed in a New York case it should be noted that this case was decided at a time when the New York statute was identical to present Missouri law.

The reason upon which it was based does not appeal to us. Inasmuch as parties to a dispute may decline to litigate, we see no reason why they may not contract to so refrain, or contract to settle their differences in any other lawful manner.⁸⁰

The Colorado court took this step on its own, without action on the part of the legislature, under a statute very similar to Missouri section 435.020.⁸¹ Section 435.010 would, however, bar such a judicial modernization in Missouri.

Although the rule of revocability may have been a good rule when business was local and small in scale,⁸² the nineteenth and twentieth centuries have seen an expansion of business and a corresponding growth in business disputes.⁸³ The number of courts has not grown in the same proportion.⁸⁴ Today, disputes are more numerous and more complex,⁸⁵ and expenses and delays in litigation have multiplied⁸⁶ because courts are unable to handle the increased caseloads. Furthermore, courts today, in view of this burden of increasing caseloads, are less concerned about encroachments on their jurisdiction. The rather obvious solution to this problem is to allow the businessman to pick experts in his line of business to hear and settle commercial disputes quickly and justly.⁸⁷

One of the primary factors behind the growing desire for arbitration is the ease and rapidity with which disputes are resolved. Arbitration is speedier than litigation because in each case the panel of arbitrators chosen by the parties is able to get to the case immediately, and is not hindered by a crowded court calendar.⁸⁸ Arbitration is more expedient due to simplified procedures and informality in presenting evidence.⁸⁹ The use of experts as arbitrators removes the need for each side to call expert witnesses to explain trade practices to the court.⁹⁰ Evidence will be received before it becomes stale, and capital will not be tied up for long periods in anticipation of possible future judgments.⁹¹ Arbitration is less expensive to the parties, as some arbitrators serve without pay, fewer records are required, and less time by the businessman and his attorney is spent in arbitration than in litigation.⁹² The public also benefits from this sav-

80. *Ezell v. Rocky Mountain Bean & Elevator Co.*, 70 Colo. 409, 232 P. 680 (1925).

81. 314 COLO. CODE CIV. PRO. § 1 (1921):

That all controversies, which may be the subject of a civil action, may be submitted to the decision of one or more arbitrators, in the manner and with the effect indicated in this act.

82. Grossman, *Commercial Arbitration in Missouri*, 12 ST. L. L. REV. 229, 230 (1927).

83. *Id.* at 231.

84. *Id.*

85. *Id.*

86. *Id.* at 231-32.

87. *Id.* at 232.

88. Note, *Commercial Arbitration: Expanding The Judicial Role*, 52 MINN. L. REV. 1218, 1219 (1968).

89. *Id.*

90. *Id.* at 1220.

91. *Id.*

92. *Id.* at 1221-22.

ing because *all* expenses of arbitration are born by the parties themselves.⁹³

In addition, the parties are given more freedom to contract, to determine the place and time of arbitration, to choose the applicable law, and to conduct private proceedings, thereby protecting business reputations, trade secrets, and useful business relationships.⁹⁴ To parties who desire continuing contractual relations in the future, a prompt decision, reasonably arrived at, is more valuable than a decision derived through the judicial process after months or years of costly litigation.⁹⁵

It should also be pointed out that an agreement to arbitrate does not attempt to oust the courts of jurisdiction any more than does a release of all right of action.⁹⁶ The court is at most deprived of deciding the merits of the case but still has jurisdiction to entertain an action and issue a decree in conformance with the award.⁹⁷ In addition, if there is any impropriety in the arbitration proceeding, the court may disregard the award and determine the issue on its merits.⁹⁸

It has been suggested by some writers that there is no good reason for a rule of revocability, other than preventing parties from unwisely binding themselves.

Since there is nothing immoral, or detrimental to the public in stipulations to arbitrate any and all disputes that may arise between the parties to a private contract, it seems that the most that can be said in support of the rule against such stipulations is that they are, in general, unwise. But unwisdom is surely a strange ground for the invalidation of contracts.⁹⁹

The factors favoring the adoption of a more permissive arbitration statute seem to outweigh by far the arguments against it. This is especially true when it is kept in mind that a permissive statute does not force every contract dispute into arbitration. All that is sought is the opportunity to enter into enforceable arbitration agreements, for those parties desiring to do so.

IV. PROPOSED CHANGES IN THE MISSOURI STATUTE

There have been some rather strong criticisms of the present Missouri statute:

The Missouri statute of arbitration was adopted in 1825, and continued practically unchanged since then. The section just quoted [present section 435.010] was adopted by our legislature in 1909. It is a blot upon our statute book. There is no reason, no sense, no excuse for it. . . . This section should not only be repealed, but, to the contrary, agreements to arbitrate should expressly be made irrevocable after they have once been fairly entered into.¹⁰⁰

93. *Id.* at 1221.

94. *Id.*

95. Foster, *Arbitrations and Appraisals in the Missouri Courts*, 1954 WASH. U.L.Q. 49 (1954).

96. 26 WASH. U.L.Q. 561, 562 (1941).

97. *Id.*

98. *Id.* at 562-63.

99. Annot., 135 A.L.R. 79 (1941).

100. Werner, *Progress in Voluntary Tribunals*, 4 ST. L. L. REV. 61, 66 (1919).

Clearly, the existence of the revocability rule in Missouri is anachronistic and some change is indicated. Chapter 435 could be improved in any of three ways: (1) repeal of present section 435.010; (2) repeal of entire chapter 435 and replacement with the amended New York Act;¹⁰¹ (3) repeal of entire chapter 435 and replacement with the Uniform Arbitration Act.¹⁰²

The simplest method would involve the repeal of section 435.010, the only offensive provision in chapter 435, thereby allowing judicial adoption of a rule specifically enforcing arbitration agreements. This would be a satisfactory change in that it could be anticipated, given the flexibility of the courts, that a rule fair to all would be formulated by judicial decision. The uncertainty with which contract draftsmen would be faced in the interim mitigates strongly against this approach, however.

Bearing in mind that most of chapter 435 was borrowed from New York, there is a certain logic in following that state's lead in amending its arbitration statutes. There are three basic differences in these two statutes: (1) New York law allows the specific enforcement of agreements to arbitrate future disputes;¹⁰³ (2) in New York a submission of an existing dispute is irrevocable;¹⁰⁴ and (3) in New York one party to an arbitration agreement can force arbitration by a simple motion in court, while in Missouri only an award can be specifically enforced.¹⁰⁵ New York amended its original arbitration statute in 1919, after Missouri had copied it,¹⁰⁶ for three basic reasons: (1) the judicial procedure of the original act was not adapted to settling modern business disputes; (2) cost of litigation was too high; and (3) the judge and jury have no technical qualifications to decide commercial disputes and expert witnesses tend to confuse them.¹⁰⁷ It seems Missouri would be well advised to follow the example of a leading commercial state in the nation and thus profit from its experience in the field of commercial arbitration. Were Missouri to adopt the New York act, it would have not only a modern arbitration statute but a body of ready-made case law interpreting that modern statute.

Another alternative would be to adopt the Uniform Act. The Uniform Act is presently in force in at least seven jurisdictions.¹⁰⁸ The major difference in the Uniform Act and chapter 435 is section 435.010. The Uniform Act expressly authorizes specific enforcement of agreements to

101. N.Y. CIV. PRAC. §§ 7501-14 (McKinney 1963). For a comparison of the Missouri and New York statutes, see Grossman, *Commercial Arbitration in Missouri*, 12 ST. L. L. REV. 229 (1927).

102. 9 U.L.A. 78 (1957) [hereinafter referred to in the text as Uniform Act and cited in the footnotes as UAA].

103. Grossman, *Commercial Arbitration in Missouri*, 12 ST. L. L. REV. 229, 240 (1927).

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 240-42.

108. ALASKA STAT. §§ 09.43.010 (Supp. 1970); ARIZ. REV. STAT. ANN. § 12-1501 (1962); ILL. REV. STAT. ch. 10, §§ 101-23 (1968); MD. ANN. CODE art. 7, §§ 1-23 (1965); MASS. ANN. LAWS ch. 251, § 1 (1959); MINN. STAT. § 572.08 (1965); WYO. STAT. ANN. § 1-1048.1 (1957).

arbitrate.¹⁰⁹ A further difference is that the Uniform Act provides a procedure to compel or stay an arbitration proceeding¹¹⁰ (the Missouri statute has no need for such a provision.) There are, of course, other differences in the Uniform Act and the Missouri statutes. The Missouri statute does not provide for court-appointed arbitrators in lieu of party-appointed arbitrators, whereas the Uniform Act does.¹¹¹ The Uniform Act expressly provides for the right of the parties to present evidence,¹¹² while Missouri grants this right only inferentially in that an award can be set aside for failure of the arbitrators to hear material evidence.¹¹³ Another difference is that the Uniform Act allows the arbitration to proceed without all arbitrators present,¹¹⁴ while Missouri requires all to be present.¹¹⁵ The Uniform Act also provides for the right to counsel,¹¹⁶ payment of witness fees,¹¹⁷ a time limit on making an award,¹¹⁸ and that any application to the court can be made by motion,¹¹⁹ while the Missouri statute has no similar provisions. The Missouri statute provides for arbitrators' fees of two dollars and fifty cents per day¹²⁰ and that any confirmation of an award must be made in open court,¹²¹ while the Uniform Act is silent on these points.

The Uniform Act and the Missouri statute are similar in their remaining provisions. Both require a majority of arbitrators to act,¹²² and grant a power on the part of the arbitrators to select the meeting time and place and to provide notice for the meeting.¹²³ The Uniform Act gives arbitrators the power to conduct depositions¹²⁴ and the Missouri statute gives them the power of magistrates.¹²⁵ The two statutes are very similar in the provisions setting out grounds for vacating an award,¹²⁶ obtaining a rehearing,¹²⁷ rendering judgment,¹²⁸ determining judgment format,¹²⁹ and selecting venue.¹³⁰

It is submitted that any of the above three reform suggestions will

109. UAA § 1.

110. *Id.* § 2.

111. *Id.* § 3.

112. *Id.* § 5 (b).

113. § 435.100, RSMo 1969.

114. UAA § 5 (c).

115. § 435.040, RSMo 1969.

116. UAA § 6.

117. *Id.* § 7 (d).

118. *Id.* § 8 (b).

119. *Id.* § 16.

120. § 435.280, RSMo 1969.

121. § 435.080, RSMo 1969.

122. UAA § 4; § 435.060, RSMo 1969.

123. UAA § 5 (a); § 435.050, RSMo 1969.

124. UAA § 7 (b).

125. § 435.040, RSMo 1969.

126. UAA § 12 (b); § 435.120, RSMo 1969.

127. UAA § 12 (c); § 435.130, RSMo 1969.

128. UAA § 14; § 435.150, RSMo 1969.

129. UAA § 15; § 435.160, RSMo 1969.

130. UAA § 18 is identical with the normal venue provisions in Missouri under Supreme Court Rule 51; however, the venue provisions are not set out in the arbitration statutes.

improve the climate for commercial arbitration in Missouri. At the very least, however, section 435.010 should be repealed and replaced with sections 1 and 2 of the Uniform Act. It is probably preferable, however, for the sake of completeness and uniformity, for Missouri simply to adopt either the current New York statutes or the Uniform Act.

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