Supreme Court of Kentucky

NO. 94-SC-000334

PENNY L. KUPRION — **APPELLANT**

vs.

HON. RICHARD J. FITZGERALD, JUDGE
JEFFERSON DISTRICT COURT, DIVISION 14 — **APPELLEE**

and

ROBERT G. KUPRION — **REAL PARTY IN INTEREST**

APPEAL FROM COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

BRIEF FOR APPELLANT

Vessels case cite

IT IS HEREBY CERTIFIED that a copy of the foregoing Brief for Appellant was on this the 13 day of May, 1994, mailed to the Appellee, the Hon. Richard J. FitzGerald, Judge, Jefferson District Court, Division Fourteen, Jefferson Hall of Justice, 600 West Jefferson Street, Louisville, Kentucky 40202, and to Maureen Sullivan, Esq., Counsel for Real Party in Interest, Suite 600 North, First Trust Centre, 200 South Fifth Street, Louisville, Kentucky 40202.

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INTRODUCTION

This is an Appeal from an original action denying Appellant's Petition for Writ of Mandamus. This Appeal directly attacks the constitutionality of the Jefferson Family Court.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF CASE

On April 29, 1993, the Appellant, Penny L. Kuprion, filed a Petition for Dissolution of Marriage by tendering to the Clerk of the Jefferson Circuit Court a Verified Petition, Summons directed to her husband, the Real Party in Interest, and the appropriate filing fee. Pursuant to the computerized system used by the Clerk of the Jefferson Circuit Court, the matter was randomly assigned by algorithm to the Jefferson Family Court Cause No. 93-FD-01244. [Pursuant to the scheduling assignments at the time of the filing of the dissolution of marriage action, the Jefferson Family Court received seventy-five percent (75%) of all Petitions for Dissolution of Marriage and the remaining twenty-five percent (25%) were assigned to the Jefferson Circuit Court. On or about July 1, 1994, two (2) judges are scheduled to be added to the Jefferson Family Court and the Family Court is expected to hear one hundred percent (100%) of all Petitions for Dissolution of Marriage, as well as adoptions, termination of parental rights, child custody, status offenders and other "family related" matters.]

The Jefferson Family Court is structured at the time of this writing with seven (7) divisions. Divisions eight (8) and nine (9) could be added as of July 1, 1994, should judges presently elected as Circuit and District Court Judges volunteer for said service.

Pursuant to Family Court Rule 108, Division One is currently presided by the Hon. Ernest A. Jasmin, Jefferson Circuit Judge, and receives assignments for the last names "A" through "Cl". Division Two is presided by the Hon. Mary L. Corey, Jefferson District Judge, and is assigned cases for the last names "Cm" through "Go". Division Three is presided by the Chief Family Court Judge, the Hon. Richard A. Revell, Jefferson Circuit Judge, and receives assignments for "Gp" through "Ko". Division Four (4) is presided by the Hon. Richard J. FitzGerald, Jefferson District Judge, and receives assignments for "Kp" through "O". (Since the Petitioner's last name begins with the letters "Ku", her action was assigned to this division.) Division Five is currently presided by the Hon. James Green, Jefferson District Judge, and is assigned cases "P" through "Sn". Division Six is presided by the Hon. Stephen K. Mershon, Jefferson Circuit Judge,

who until January 1, 1993, presided in the same division as a Jefferson District Judge and receives assignments "So" through "Z". The final division of the Jefferson Family Court is a Paternity Division and was presided over by the Hon. Donald J. Eckerle, Jefferson District Judge. Since the decision of the Court of Appeals, Judge Eckerle has been replaced by the Hon. Henry F. Weber, Jefferson District Judge. It cannot be predicted how the addition of two (2) additional judges will affect case assignments. It further cannot be predicted whether the two (2) additional judges will be Circuit Judges, District Judges, or one (1) of each.

On March 20, 1991, the Supreme Court of Kentucky entered an Order which essentially swore in Jefferson Circuit Court Judges participating in the Jefferson Family Court as *Special* Jefferson District Court Judges. Likewise, Jefferson District Judges participating in the Family Court were sworn in as *Special* Jefferson Circuit Court Judges. Presumably, as District and Circuit Court Judges have rotated in and out of the Jefferson Family Court, similar Orders have been entered, however the Court Administrator has been unable to supply counsel with these Orders. Even though judges have rotated in and out of Family Court, there is no announced intention that all Jefferson Circuit Judges or all Jefferson District Judges rotate in and out of the Family Court. It should be noted that the Hon. Richard Revell, Chief Family Judge, the Hon. Mary Corey, Jefferson District Judge, the Hon. Stephen K. Mershon, Jefferson Circuit Judge (Jefferson District Judge until January 1, 1993), and the Appellee, the Hon. Richard J. FitzGerald, Jefferson District Judge have all presided in the Jefferson Family Court since its inception, a period of over thirty-seven (37) months. The aforementioned have had minimal contact with their Circuit and District dockets since accepting assignments in Family Court.

Recognizing that the authority creating the Jefferson Family Court was constitutionally flawed, the Petitioner moved the Family Court Judge to re-allot this matter to the Jefferson Circuit Court on grounds that the Court presently assigned to hear this matter is a District Court and lacked the subject matter jurisdiction necessary

to enter the Orders to accomplish the relief sought by the Petitioner. That Motion came before the Court on November 1, 1993, and the relief requested in the Motion was denied by Order entered on the same day.

Because it was alleged that the Court assigned by the Jefferson Circuit Court to hear the dissolution of marriage action lacked subject matter jurisdiction and because the Court refused, upon Motion, to vacate the Bench and transfer this matter to a Court which had subject matter jurisdiction (Jefferson Circuit Court or any Jefferson Circuit Judge), the Appellee petitioned the Commonwealth of Kentucky Court of Appeals for a Writ of Mandamus pursuant to C.R. 76.36. The Court of Appeals *(Appendix pp. 1-2)* in Cause No. 93-CA-002760-OA, by unpublished written Order, denied the Appellee the relief sought on March 25, 1994. A Notice of Appeal, as a matter of right, to the Supreme Court of Kentucky was filed with the Clerk of the Court of Appeals on April 18, 1994. *(Appendix pp. 3-10)*

The question of remedy, as well as whether or not original relief should have been sought in the Court of Appeals against a Jefferson District Judge, is answered by Jefferson Family Court Rule 1201. Said Rule states as follows:

> **" . . . in Family Court matters over which Circuit Court would otherwise have jurisdiction, any Appeal shall proceed by the Rules of Civil Procedure to the Court of Appeals."**

Since appeals must proceed to the Court of Appeals, it follows logically that any original action should likewise be commenced in that Court (Cause No. 93-CA-002760-OA). The Appeal from the adverse decision of the Court of Appeals is filed pursuant to C.R. 76.36.

ARGUMENT

I. A DISTRICT JUDGE LACKS SUBJECT MATTER JURISDICTION TO GRANT A DECREE OF DISSOLUTION OF MARRIAGE.

The Appellee in this case, the Hon. Richard J. FitzGerald, is the duly elected and qualified Judge of the Jefferson District Court, Division Fourteen. Judge FitzGerald was first elected in 1977 and has continuously been re-elected to the same position, the last time being in November, 1993, for a four (4) year term commencing January, 1994.

The definition of a *District Court* may be found in the Constitution of Kentucky § 109 where the entire court system is defined.

> "The judicial power of the Commonwealth shall be vested exclusively in one Court of Justice which shall be divided into a Supreme Court, a Court of Appeals, a trial court of general jurisdiction known as the Circuit Court, and a trial court of limited jurisdiction known as the District Court . . ." Ky. Const. § 109.

The district court shall be a court of limited jurisdiction and shall exercise original jurisdiction as may be provided by the general assembly (emphasis added). Ky. Const. § 114(6). The general assembly's grant of jurisdiction to the district court is criminal, KRS 24A.110; civil and probate, KRS 24A.120; and juvenile, KRS 24A.130. The district court has additional subject matter jurisdiction in paternity, KRS 406.021(2). Some of the jurisdictional statutes are concurrent with that of circuit court, but in no statute or act of the general assembly is there any attempt to grant either exclusive, co-extensive or concurrent jurisdiction with the district court having jurisdiction to hear or decide actions for dissolution of marriage. The circuit court has original subject matter jurisdiction over all cases not given exclusively to another court. While this alone would be sufficient to find district court's subject matter jurisdiction totally lacking, in divorce cases the general assembly has gone one step further. It has granted exclusive jurisdiction to circuit court. KRS 403.140 (1).

It is an elementary principle that a court cannot grant relief where it is lacking in subject matter jurisdiction. **Jackson v. Commonwealth**, Ky., 806 S.W.2d 643 (1991) and **Shepherd v. Commonwealth**, Ky., 739 S.W.2d 540 (1987). Since a district judge is lacking in subject matter jurisdiction, the remainder of this brief will be devoted to analyzing the situations where a district judge could possibly obtain jurisdiction over the subject matter. It will be clear that the Jefferson Family court, or the "Jefferson Family Court Project", as presently empowered by court rule, is not one of those situations. It will further be clear that the Constitution of Kentucky only allows courts which are defined by the judicial article, and that other courts, temporary or permanent, are unconstitutional. Above all, the authority to create courts is vested in the general assembly, not with the Supreme Court of Kentucky and certainly not with the Chief Justice.

II. THE SUPREME COURT CANNOT GRANT JURISDICTION TO DISTRICT JUDGES TO HEAR DISSOLUTION OF MARRIAGES.

The Jefferson Family Court, or "The Jefferson Family Court Project", actually began March 31, 1988, when the general assembly by H.C.R. 30, a concurrent resolution, chartered a Family Court Feasibility Task Force. The charter of the task force was to make findings and conclusions and those including "summaries of any legislation which it may recommend or pre-file, shall be reported to the Legislative Research Commission on or before September 1, 1989." H.C.R. 30, Section 3. To that end, the task force recommended a pilot project using both circuit and district courts. The recommendation included that the Chief Justice should decide exactly which location or locations should be included in the project.

Somehow, without further legislation (no further resolutions or statutes) the recommendations of the "Family Court Feasibility Task Force" began to get

implemented. Suddenly, Jefferson County was chosen by the Chief Justice and local circuit and district judges began volunteering to serve. On March 20, 1991, the Chief Justice signed an order which appointed three (3) Jefferson Circuit Judges and three (3) Jefferson District Judges as special judges of the other level of court for the duration of the project. So was born the Jefferson Family Court. The "Family Court" began with all the trappings and regality of a constitutionally sanctioned court. There was a swearing in ceremony. Attorneys were schooled in its special procedures. Papers and pleadings were to be styled a certain way. The "Court" even had its own rules of practice which were approved by the Supreme Court of Kentucky on July 28, 1993. After that came "official forms"; required filings; mandatory attendance at school; diplomas, and even an official seal.

It is well settled that a district court cannot hear divorce actions. The question is then whether there is a prescription by which a district judge may acquire jurisdiction to hear divorces on a regular or even daily basis.

It is irrelevant as to whether the Family Court is a "Court" or is a "project". It is equally irrelevant as to whether or not the "Court/Project" is temporary or permanent. § 110 (5)(b) of the Constitution of Kentucky states:

> "The Chief Justice of the Commonwealth shall be the executive head of the Court of Justice and he shall appoint such administrative assistants as he deems necessary. He shall assign temporarily any justice or judge of the Commonwealth, active or retired, to sit in any court other than the Supreme Court when he deems such assignment necessary for the prompt disposition of causes . . ."

It is apparently from this clause that the justification for family court emanates. The equation is, therefore, a resolution which creates a task force; a task force which makes recommendations; a Chief Justice who reads the report and decides to implement those recommendations, and a general assembly that includes some money in the biennium budget to accomplish the Chief Justice's purpose.

The constitutional revision process is found at Ky. Const. § 256. Amendments may originate in either house of the general assembly. If passed in each by a three-fifths

(3/5) vote, they are placed on the November election ballot for submission to the voters. If ratified by the voters, they become part of the Constitution. The judicial amendments which created Kentucky's present unified court system were ratified by the voters in November, 1975, and became part of the constitution on January 1, 1976. In order to implement the vast judicial reorganization necessitated by the judicial amendments, the general assembly met in extraordinary session in 1976 and enacted Chapters 23A, 24A, and 26A of the Kentucky Revised Statutes.

The general assembly is the author of the judicial amendments and their intent must be discerned from their statutory enactments to implement the judicial article. They speak directly to § 110 (5)(b) with KRS 26A.020. In this statute is the general assembly's expression of intent as to where and when the Chief Justice will be appointing special judges.

KRS 26A.020. Designation of retired justice or judge as special judge.

"--(1) When, from any cause, a judge of any Circuit or District Court fails to attend, or being in attendance cannot properly preside in an action pending in the court, or if a vacancy occurs or exists in the office of circuit or district judge, the circuit clerk shall at once certify the facts to the Chief Justice who shall immediately designate a regular or retired justice or judge of the Court of Justice as special judge. If either party files with the circuit clerk his affidavit that the judge will not afford him a fair and impartial trial, or will not impartially decide an application for a change of venue, the circuit clerk shall at once certify that facts to the Chief Justice who shall immediately review the facts and determine whether to designate a regular or retired justice or judge of the Court of Justice as special judge. Any special judge so selected shall have all the powers and responsibilities of a regular judge of the court.

(2) A retired justice or judge serving as a special judge shall be compensated as provided by KRS 21A.110. (Enact. Acts 1976 (Ex. Sess.), ch. 22, § 5.)"

The general assembly's clear intent is that Ky. Const. § 110 (5)(b) would limit the use of special judges to (a) failure to attend; (b) inability to preside; (c) vacancy in office, or (d) recusal. The powers of the Chief Justice as expressed in § 110 (5)(b) are executive, not legislative. They are administrative and managerial. They are intended to assure that the constitutional framework of the courts is preserved and that management of special judges be confined to the four (4) level court system.

The provisions of § 110 (5)(b) are clearly not intended to avail the Chief Justice the power to re-create the court system. Special judges are to be named to existing courts other than the Supreme Court. Supreme Court special justiceships are gubernatorial appointments. Ky. Const. § 110 (3). The power to appoint judges is to an existing court, i.e.. Rockcastle District Court, Menifee Circuit Court, Kentucky Court of Appeals. In the case at bar, district judges are appointed as special circuit judges, but they are not sitting in the Jefferson Circuit Court. The Jefferson Circuit Court has sixteen (16) divisions and none of them are vacant. The judges attend court everyday and none are suffering from physical disability. Recusal is on a case by case basis. In short, there is no need for the appointment of special judges other than the creation of the Jefferson Family Court. Are they piggy-backing into existing divisions? The answer is in the negative. The family court has its own clerk, its own assignment numbers, its own divisions, and even its own seal. If they were sitting in Jefferson Circuit Court, would we now have 19 divisions thereby necessitating the need for special elections?

The next issue to be addressed is the use of the word "temporarily" in § 110 (5)(b). Throughout the course of this litigation, the Appellee, the Real Party in Interest, and the Court of Appeals have used this word to determine that so long as family court was not permanent, its creation was within the spectrum of the Chief Justice's power. That construction is erroneous.

"*Temporarily*" cannot refer to creation of a court. "*Temporarily*" must refer to the term of the appointment of the judge to an existing court. The Special Judge does not become the regular judge of the court, but continues to sit until a disqualified case is fully heard, a judge returns from vacation or a disability, or a vacancy is filled by the governor or special election. There can be no creation of a court by the Chief Justice or by the Supreme Court. Courts are created by the legislature pursuant to Ky. Const. §§ 112 (3) and 113 (3). The legislature may be able to create temporary "Circuit" courts or temporary "District" courts by statutes adding extra divisions for a finite period of time and still pass constitutional muster. There is no way that the Supreme Court can. The

Supreme Court is not a legislative body and the creation of courts is a purely legislative function.

Imagine if you will using the word "temporarily" to achieve the construction necessary to sustain the family court. We would then read § 110 (5)(b) to mean that the Chief Justice has unbridled and absolute power in his capacity as chief executive over the entire system of courts. Today, we have a family court. There is nothing temporary about it. It is even expanding. Tomorrow, we could have a new set of courts. District Judges around the Commonwealth are sworn in as special circuit judges and special court of appeals judges. A chief justice determines a massive reallocation of cases is necessary. Without regard to county lines, districts or circuits, one group of judges gets all murders, another group of judges gets all burglaries. If the case involves both, it goes to a third group of judges. Appellate panels are selected by random lot and a judge does not actually return to his or her elected position until it is time for elections and time to deceive the electorate. This is justified on grounds that it is temporary and we can end it at any time.

The judicial amendments of 1976 were intended to avoid these scenarios. The constitution calls for a unified, fixed framework, four (4) level court system. There is no room in it for experimentation. The constitution determines what the court system looks like. § 113 (6)(b) states that a district judge's grant of jurisdiction comes from the general assembly, not from the Chief Justice under the guise of a special judgeship in a court which has no legislative or constitutional foundation.

III. THE JEFFERSON FAMILY COURT VIOLATES §§ 27 AND 28 OF THE KENTUCKY CONSTITUTION AND IS UNCONSTITUTIONAL.

The United States Constitution and the applicable court decisions have always recognized the doctrine of separation of powers. Although there is no clause in the

United States Constitution, the decisions have been uniform that the three (3) branches of government are co-equal. Kentucky has gone a step further. The state constitution recognizes the doctrine of separation of powers directly in its body in §§ 27 & 28. The latter section expressly states that "No person or collection of persons, being one of those departments, shall exercise any power properly belonging to either of others, except in the instances hereinafter expressly directed or permitted."

The power to assign jurisdiction of the courts is reserved to the legislative branch of the government. KRS 23A.010 is the General Assembly's grant of jurisdiction to the Circuit Court. The Circuit Court has jurisdiction of all justiciable causes not vested in some other court. In addition, it has appellate jurisdiction over cases which have been decided in the District Court. Jurisdiction of dissolution of marriage and child custody is the exclusive jurisdiction of the Circuit Court. KRS 403.140 and KRS 403.420. The jurisdiction of the District Court is defined in KRS 24A.010 and KRS 24A.020. The District Court has no equitable jurisdiction and is prohibited by the General Assembly and the Constitution from granting Decrees of Dissolution of Marriage unless the Court is sitting temporarily as a Circuit Court due to a recusal, vacancy or any other legal use of special judgeship. It is asserted that a District Judge sitting as a Special Circuit Judge must be doing so in an existing Circuit Court, not a newly created one which is created either permanently or temporarily by judicial edict through its rule making power. There is no constitutional authority for any court officer to merge circuit and district courts, and there certainly is no authority to create new "hybrid" courts.

There is simply no other construction that can be placed upon the creation of a "*Family Court*" other than the Supreme Court of Kentucky has invaded the constitutionally reserved province of the General Assembly. In **LRC v. Brown**, Ky., 664 S.W.2d 907 (1984), the Supreme Court held that the power of budgeting could not be delegated to the Legislative Research Commission by the General Assembly. The Court unanimously stated:

"The extent to which a country can successfully resolve the conflict among the three branches of government is, to a very great extent, the measure of that nation's capacity to self-govern.

The framers of Kentucky's four constitutions obviously were cognizant of the need for separation of powers. Unlike the federal constitution, the framers of Kentucky's constitution included an express separation of powers provision. They were undoubtedly familiar with the potential damage to the interests of the citizenry if the powers of the government were usurped by one or more branches of that government. Our present constitution contains explicit provisions which, on one hand, mandate separation among the three branches of government, and on the other hand, specifically prohibit incursion of one branch of government into the powers and functions of the others...

Moreover, it has been our view, in interpreting §§ 27 and 28, that the separation of powers doctrine is fundamental to Kentucky's tripartite system of government and must be 'strictly construed'." **LRC v. Brown**, Ky., 664 S.W.2d 907, 911-912 (1984).

In **Commonwealth v. Armstrong**, Ky., 709 S.W.2d 437 (1986), the Court held that the General Assembly had the power to provide for suspension or modification of a statute upon a finding that such action is mandated by the state's financial condition. The Court reasoned that the legislature must suspend spending where the result of the spending would be a deficit budget, the same being contraindicated by the state constitution.

The courts have always addressed the issue of separation of powers, vis a vis the executive versus the legislative branch. In **Akers v. Baldwin**, Ky., 736 S.W.2d 294 (1987), the Court was faced with resolution of a conflict between the legislative and judicial branches. When the General Assembly attempted by statute to require a mineral owner to pay damages to a surface landowner, the Court reacted by stating:

"The General Assembly has, by enacting this statute, reached across the years and has arbitrarily determined the rights of the parties and their successors to deeds and other documents. By declaring this act improper as being a clear incursion into judicial power, we do not denigrate or even comment on the nature of the reason the General Assembly so acted. It may well have been a legitimate public purpose that motivated the passage of this legislation. Nevertheless, the policy behind this bill is simply not relevant to our decision. Our sworn duty is to enforce the Kentucky Constitution. When an act of the General Assembly violates the principle of separation of powers, we are obligated to vitiate such legislative action. We do so now."

The Court has never had a problem with declaring a legislative act to be invalid when the legislature trods on ground which the Court perceives as being sacred to it. The same result was reached in **Ex parte Auditor of Pub. Accounts**, Ky., 609 S.W.2d 682 (1980), where the Court held that budgetary matters for the Kentucky Bar Association were judicial in nature and not within the province of KRS 43.010. The Court relied upon the 1976 Amendments to the Kentucky Constitution as a grant of all supervisory control where the funding for the judiciary is involved.

The Court is clearly the final arbiter when one (1) branch of government is invasive of the power of another. Now, in this case, the Court is faced with exactly that. The judicial branch has invaded an area -- jurisdiction, which is reserved expressly to the General Assembly. Ky. Const. §§ 110 (2)(a&b); 112(5); 113(6); KRS 24A.010; KRS 24A.020. In decreeing by Rule that a *Family Court* be created, which is part Circuit Court and part District Court, it has clearly exceeded its constitutional authority.

The Court rebuffed an attempt by the General Assembly to promulgate Rules of Appellate Procedure citing §§ 109 and 116 of the Constitution as granting the sole rule making authority for appeals as being vested in the courts. **Commonwealth v. Schumacher**, Ky. App., 566 S.W.2d 762 (1978). Following this logic and the clear expression that the separation of powers remains inviolate, one is left with the inescapable conclusion that if the legislature cannot interfere with areas reserved in the Constitution for the Courts then, conversely, the Courts are constitutionally prohibited from incursion into an area which is expressly reserved to the General Assembly. The Supreme Court of Kentucky does not have the power to create a hybrid version of Circuit and District Court; namely, a Court in which District Judges hear matters that the legislature has reserved for the Circuit Court and vice-versa.

The Courts have determined that the legislature cannot promulgate rules of appellate procedure. **Commonwealth v. Schumacher**, Ky. App., 566 S.W.2d 762 (1978). If the legislature has no power to invade the constitutionally reserved space of rule

making, then how, one might ask, can the court invade the legislature's right to create courts or the people's right to determine the structure of their court system?

The effect of a District Judge granting and decreeing Dissolution of Marriage is absolutely void. The same is true in adoption, termination of parental rights, child custody, and visitation. These are areas which the Constitution of Kentucky reserves to the Circuit Court and the General Assembly grants the Circuit Court exclusive jurisdiction. KRS 403.140, KRS 403.420, and Ky. Const. § 112 (5). A District Court is a Court of limited jurisdiction and it cannot attain jurisdiction over subject matter which it does not have. It cannot even be done by agreement of the parties. **Duncan v. O'Nan**, Ky., 451 S.W.2d 626 (1970), and **Rodney v. Adams**, Ky., 268 S.W.2d 940 (1954). Likewise, the Circuit Judges who participate in this Court are equally violative of the grant of exclusive jurisdiction in matters which affect juveniles, such as dependency and status offenders. A judicial rule, or the power to regulate practice and procedure, is not the equal of the substantiative power of jurisdiction. **Lunsford v. Commonwealth**, Ky., 436 S.W.2d 512 (1969).

Early decisions recognized that courts must be assembled under color of law. **Thompson v. Commonwealth**, 99 S.W.2d 705, 266 Ky. 529 (1937). As far back as 1924, it was stated that the general assembly had no power to create a court not provided for in the constitution. **Hoblitzal v. Jenkins**, 263 S.W. 764, 204 Ky. 122 (1924). If the legislature cannot create "Family Court", how can the Supreme Court?

Where a court is acting in excess of its jurisdiction over the subject matter, all of its rulings and judgments are void and of no effect whatsoever. **Waynes v. Peoples Bldg. & Loan Ass'n.**, 167 S.W.2d 825, 292 Ky. 691 (1943); **Lauther v. Moss**, 39 S.W.2d 501, 239 Ky. 290 (1931), and **Mathews v. Mathews**, Ky. App., 731 S.W.2d 832 (1987). Lack of jurisdiction is the only recognized defense to enforcement of a foreign Court's Order. **Hanshew v. Mullins**, Ky., 385 S.W.2d 186 (1964).

It is clear from the law -- the Supreme Court of Kentucky cannot create a court, either temporary or permanent. Jefferson County is allotted sixteen (16) circuit

judgeships (KRS 23A.080) and twenty-three (23) district judgeships (KRS 24A.090). To expand those numbers requires the legislature to act upon the recommendation of the Chief Justice. Ky. Const. §§ 112 (3) & 113 (2).

It should be noted that no vacancies exist either in the Circuit Court or in the District Court of Jefferson County. On election day, November 2, 1993, all of the District Judges who are participating in the "*Family Court Project*" were re-elected as District Judges. One (1) Circuit Court Judge, the Hon. Ernest A. Jasmin, was elected to fill the unexpired term in Circuit Court, Division One, for which he was appointed by the Governor.

Regardless of permanence or temporariness, the Family Court Project cannot escape the definition of having been labeled as a new and existing court which merges the jurisdiction of the Circuit Court and the District Court. Some may choose to define what has happened as an experiment toward a more permanent form of legislation. While that may be a good idea (tailoring the Court and debugging same prior to official enactment), even the experimental or temporary phase is not constitutionally permissible. not infirm

Nebraska has a unicameral legislature. Kentucky has a bicameral legislature. Some may feel that a unicameral legislature may be more suited to the citizenry than the present constitutional makeup of the General Assembly. Would it be permissible for the General Assembly to enter into "a unicameral legislature project"? The dividing lines between the House of Representatives and the Senate could be dissolved for a period up to and including further acts of the legislature. During the period of time that the project is in place, the legislature could continue to meet and pass legislation and forward the same to the Governor for signature and enactment. This may sound like a good idea, but it cannot be accomplished without a Constitutional Amendment. Ky. Const. § 29. Even the attempt to experiment must fail because the Constitution of the Commonwealth of Kentucky mandates that the legislature shall have two (2) branches; namely, a house and a senate. The government has three (3) branches -- executive,

legislative, and judicial and the Courts have resisted attempts to create a fourth branch. LRC v. Brown, Ky., 664 S.W.2d 907 (1984).

The people of the Commonwealth when amending their Constitution in 1976 decreed that the court system would be unified and uniform. That Circuit Court in Fayette, Rockcastle, Daviess, and Jefferson County would not only look the same, but would be the same. The same is true for District Court. The Amendments in the Judicial Article gave the power to fix the jurisdiction to the General Assembly, not to the Supreme Court. The Jefferson Family Court is clearly unconstitutional regardless of whether or not you consider it to be permanent or temporary. Its divisions which are chaired by District Judges (all of whom were recently re-elected as District Judges, not Family Court Judges) are acting in excess of their lawful jurisdiction. Any change in the unified court system structure **must** be by amendment to the Constitution of Kentucky. Any change in the statutory jurisdiction of a Circuit or District Court **must** originate in the General Assembly.

(IV) THE APPELLANT IS DENIED EQUAL PROTECTION OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND § 1 OF THE CONSTITUTION OF KENTUCKY.

Both the Fourteenth Amendment of the United States Constitution and § 1 of the Kentucky Constitution guaranty equal protection under the law and freedom from discriminatory treatment. As presently structured, the Jefferson Family Court violates these guarantees to a definable class of its litigants.

Under the present structure, parties are now being discriminated against because of the first letter of their surnames. While on its face, it may be simple to remedy the disparate treatment by simply changing the method of allocation of cases from one

based upon last name to one in which the allocation is purely at random, this will not solve the underlying problem. The discrimination is based upon the fact that large identifiable segments of the population are being forced to have their divorces heard by district judges for no other purpose other than last name. If changed to at random, those not discriminated against are allowed to have their divorces heard by circuit judges. There is no rational government basis for this discrimination.

There is a difference between a district and a circuit judge. Circuit judges have eight (8) year terms of office while district judges have four (4) year terms. Ky. Const. § 119. Circuit judges have higher salaries than do district judges and circuit judges have higher qualifications, eight (8) years required practice experience as an attorney at law rather than two (2) years. Ky. Const. § 122. Most important, in addition to the constitutional qualifications, circuit judges run for election to the bench under platforms which accurately disclose to the elective public that they will be handling divorces while district judges do not make the same declaration and, therefore, in essence deprive the voting public of their franchise in determining whether or not they can elect judges who hear their divorces.

Even if the project were changed to allow selection of judicial assignment at random, then the procedure would still be discriminatory. Persons who reside in Jefferson County, Kentucky, would be subject to disparate treatment when measured against all other citizens of the Commonwealth of Kentucky because all other citizens would be having their divorces heard by circuit judges. The legislature has guaranteed to the public that circuit judges will be hearing divorces. KRS 403.140 (1). Only in Jefferson County is this guarantee not being adhered to. Where a guaranteed right has been disregarded and said right is arbitrarily ignored, a denial of equal protection must be said to have taken place and the denial of that right must be cured. **Good v. Allain**, 823 F2d 64 (1987, CA5 Miss.)

Both the federal and state constitutions guarantee equal treatment. There is no sound logic for district judges to be hearing divorces in absence of the express grant of

authority and jurisdiction from the general assembly coupled with the Governor's signature. This is the way that laws are changed in the Commonwealth of Kentucky. District judges should not be hearing divorces until given the right to hear them by the general assembly. The Chief Justice and the Supreme Court cannot confer this right. Arbitrary and unchecked power to the Chief Justice for this purpose is expressly forbidden by the Constitution of Kentucky. Ky. Const. § 2. This section is superior to the grant of power in Ky. Const. § 110 (5)(b) under the provisions of Ky. Const. § 26, which expressly states that any general power [power of special judgeships under § 110 (5)(b)] is subordinate to the Bill of Rights.

Equal protection under law as stated in U. S. Const., Amendment 14 is restated in a combination of Ky. Const. §§ 2 & 3. The general assembly cannot discriminate against classes of persons. **Tabler v. Wallace**, Ky., 704 S.W.2d 179 (1985). Since the branches of government are equal, if the general assembly cannot discriminate in its legislation, the courts may not discriminate in their rule making.

V. THE COURT OF APPEALS ERRED IN DENYING APPELLANT'S PETITION FOR WRIT OF MANDAMUS.

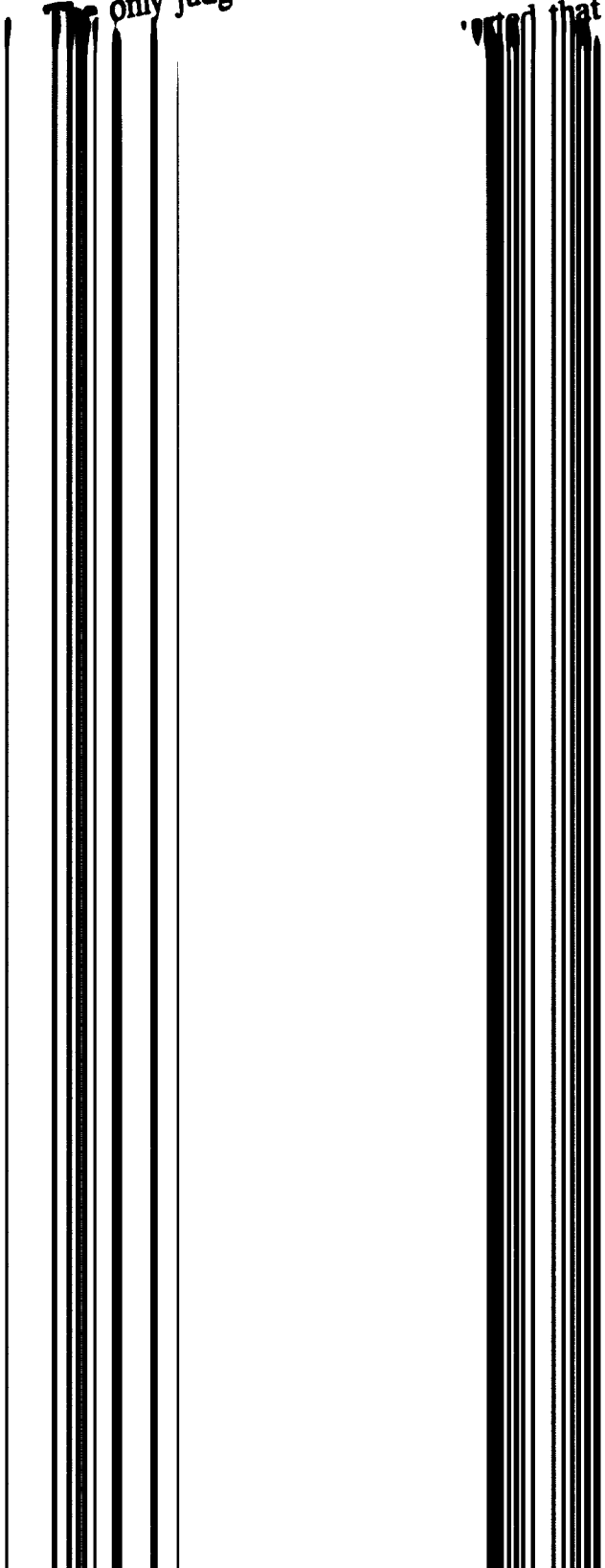
The Court of Appeals noted in its Opinion of March 25, 1994, that the Jefferson Family Court would not pass constitutional muster if it ever failed to be a temporary "project". The Court seems to imply that so long as this creature is not permanent, it is perfectly permissible.

Prior to arguing against this premise, the Appellant would like to take this opportunity to correct a blatant misstatement of fact by the Court of Appeals. It was stated in the Opinion:

> "As the Jefferson Family Court stands at present, there are seven divisions and all the district and circuit court judges in Jefferson County

rotate in and out of Family court (emphasis added)." Kuprion v. FitzGerald, 93-CA-002760-0A, p. 3 (unpublished).

The facts are that Family Court is not a regular rotation. First of all, Jefferson Circuit Judges do not rotate. Secondly, Family Court is not a regular rotation of the district



The only judges who have rotated have rotated out. A new judge coming in

[illegible] that a correct understanding of the issue

rotate in and out of Family court (emphasis added)." Kuprion v. FitzGerald, 93-CA-002760-0A, p. 3 (unpublished).

The facts are that Family Court is not a regular rotation. First of all, Jefferson Circuit Judges do not rotate. Secondly, Family Court is not a regular rotation of the district court. The only judges who have rotated have rotated out. A new judge coming in comes in only as a volunteer. It is asserted that a correct understanding of the issue depends on a correct understanding of the facts.

The Court of Appeals viewed the Jefferson Family Court as "a joint research product of the general assembly and the judiciary." It went on to state that "the final form of the family court will need to be set forth in statute by the general assembly. Kuprion v. FitzGerald, 93-CA-002760-0A, p. 4 (unpublished). One needs to ask if they are really saying what they write. The Family Court becomes unconstitutional the minute it stops being a "project" and starts being a "court". This is really fractured logic. First, where in the constitution is there any power to experiment with the basic foundations of the three (3) branches of government? Can we experiment by eliminating the state senate? How about eliminating the office of Governor? Maybe, we could eliminate other constitutional offices like railroad commissioner. It would be unconstitutional on its face and patently illegal. If you follow the reasoning of the Court of Appeals, its allowable as long as it is not permanent. Experimentation by elimination is never allowed unless the people consent by a change in their constitution.

Now, let us look at the opposite. Experimentation by enlargement. Three (3) branches of government is not enough, especially since the legislature has a 60 day work session every two (2) years. What should we do during the period of time that the legislature is in adjournment? The answer is that we delegate legislative power to a legislative agency, such as the Legislative Research Commission. Well, this cannot be accomplished either. The Supreme Court has ruled this power to be non-delegable. LRC v. Brown, Ky., 664 S.W.2d 907 (1984). This delegation cannot be accomplished by legislation. Certain powers are per se not delegable.

The power to assign jurisdiction to a court **cannot** be delegated. Courts derive their jurisdiction only from the general assembly. Ky. Const. § 113 (6). This means that the general assembly may not delegate the constitutionally defined power to assign jurisdiction to district judges to any third party, the Chief Justice, or to the entire Supreme Court or it means that the Supreme Court is going to have to overrule **LRC v. Brown**, Ky., 664 S.W.2d 907 (1984).

The purpose of the state constitution is to define the parameters of state government. The government of the United States guarantees this to its citizens and the citizens of the various states with a guaranty of a republican form of government. U. S. Const. Art. IV, § 4. Inclusive of that constitutional guaranty is the guaranty that the state constitution will be followed and enforced. The state constitution provides for a unified four (4) tier system of courts. It further provides that the general assembly assigns the jurisdiction of courts, Ky. Const. §§ 112 & 113, and that the general assembly creates new courts. Ky. Const. §§ 112 & 113. This power cannot be abrogated unless taken away by the citizenry. It cannot be delegated.

If a district judge lacks the power to hear divorces, that judge cannot get that power by blanket order from the Chief Justice. § 110 (5)(b) of the state constitution does not and cannot grant the power to the Chief Justice to stroke a pen and create a hybrid version of Kentucky Courts which is part circuit, part district and nowhere defined in the constitution. § 110 (5)(b) gives the Chief Justice the power to grant an existing circuit judge's circuit jurisdiction to a district judge who is sitting as a special judge in an existing circuit court. *i.e. The regular judge of the Jefferson District Court, Division Twelve, is hereby assigned as Special Circuit Judge to the Hardin Circuit Court, Division II, for ten (10) days.* As stated hereinbefore, this is what is contemplated by § 110 (5)(b). The administrative powers of the Chief Justice do not contemplate a legislative enactment, only a managerial function.

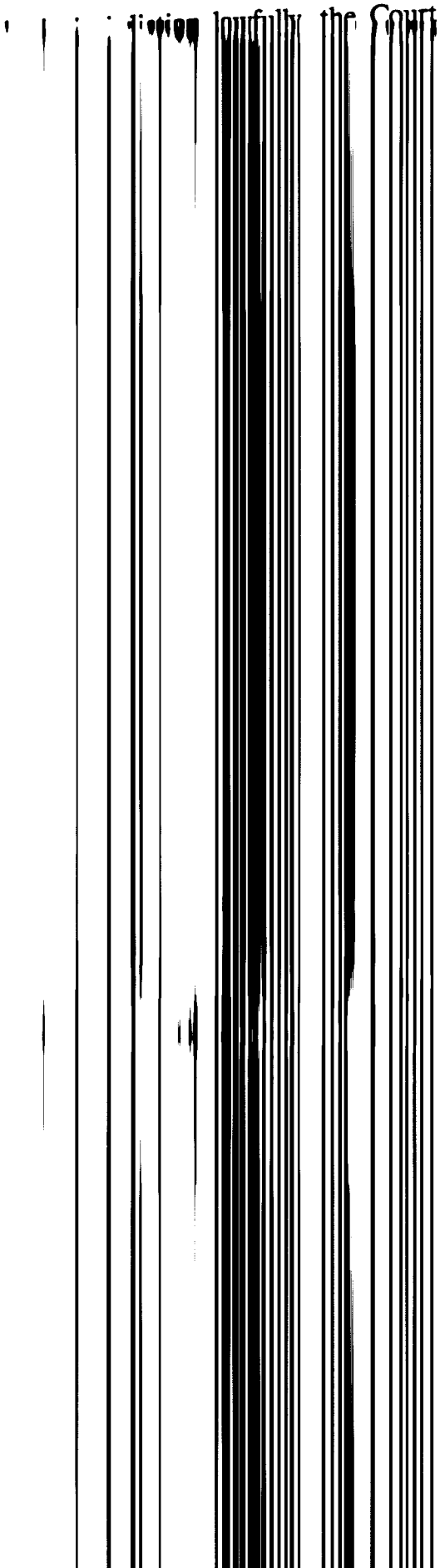
Lastly, the Court of Appeals has the cart in front of the horse. It does not take a legislative enactment for the final enactment of Family Court. It takes one in order to

accomplish this experiment. Prior to institution of a family court project, the legislature must first grant concurrent or co-extensive jurisdiction for district courts to hear family court matters. This has not been done and the 1994 general assembly has adjourned without taking any action on family court.

The Court of Appeals in its Opinion denying the Appellant's original relief resurrected the old Vietnam funds argument. If America wants the war to end, then Congress will stop funding it. That argument died twenty (20) years ago. Does funding a project alone render the project legal? Could the general assembly fund a "gambling casino project"? How about a "bordello project" or a "prayer in school" project? Each of these could be funded by legal appropriation means in the general assembly. Simply funding those projects does not make their activities legal. Persons who operate the casino still break the law. Persons who game in casinos still partake in illegal activity. A house of ill repute might be a boom to out-of-state tourism dollars and might be worth studying, but the legislative appropriation will not transpose the underlying activities' illegality. That requires separate legislation. So does a court project which takes district judges and has them hear circuit court cases when they are not sitting in an already existing circuit court. All of the existing circuit courts and divisions thereof (judgeships) are carefully defined in KRS 23A.020 through KRS 23A.070.

The constitution of the state cannot be ignored. The constitution and its intent control the outcome of this case. This case must not be decided by coming to a politically expedient decision and then twisting some word out of context beyond that which it was intended in order to justify it. Our state constitution calls for a fixed framework court system. No person or collection of persons short of the amendatory process has the power to change the court's structure. The Jefferson Family Court or the "Jefferson Family Court Project" is clearly unconstitutional. A district judge does not have jurisdiction to hear divorce cases. § 110 (5)(b) does not give the Chief Justice the power to grant a district judge this jurisdiction under the guise of a special judgeship. Special judgeships are limited to existing courts or delineated cases on an existing court

docket. They cannot be used for a class of cases which are not yet filed or are to be filed



docket. They cannot be used for a class of cases which are not yet filed or are to be filed in the future. Since the district judge cannot obtain jurisdiction lawfully, the Court assigned to hear this case is acting in excess of its lawful subject matter jurisdiction and the Court of Appeals has erred in denying the Appellant's original relief.

CONCLUSION

For the reasons so stated in this brief, it is respectfully urged that the Supreme Court of Kentucky reverse the Court of Appeals, order that the Writ of Mandamus shall issue, and declare the Jefferson Family Court or the Jefferson Family Court "Project" to be unconstitutional.

Respectfully submitted,

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