NLW

SUPREME COURT OF KENTUCKY

NO. 94-SC-000334

PENNY L. KUPRION — APPELLANT

vs.

APPEAL FROM COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 93-CA-002760-OA

HON. RICHARD J. FITZGERALD, JUDGE
JEFFERSON DISTRICT COURT, DIVISION FOURTEEN
Presently Sitting in Jefferson Family Court,
Division Four — APPELLEE

ROBERT G. KUPRION — REAL PARTY IN INTEREST

BRIEF FOR APPELLEE

Respectfully submitted,

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CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was this 22nd day of June, 1994, mailed to Ted W. Spiegel, Suite 201 North, First Trust Centre, 200 South Fifth Street, Louisville, Kentucky 40202; and to Thomas A. McAdam, III, 235 South Fifth Street, Louisville, Kentucky 40202.

MAUREEN SULLIVAN

INTRODUCTION

This Brief answers Appellant's Appeal of the Court of Appeals' denial of Appellant's Petition that the Court direct the Appellee to reallot a divorce case from the Jefferson Family Court Project to the Jefferson Circuit Court docket, and in so doing, declare the Family Court Project unconstitutional.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

This case presents a number of issues in Kentucky constitutional law which may only be fully appreciated in light of the history of the Jefferson Family Court Project, and of the specific action for dissolution of marriage which led to this Original Action seeking relief from the jurisdiction of the Family Court Project.

The Jefferson Family Court Project

The Appellant would have the Court believe that the Kentucky Supreme Court created the Jefferson Family Court as a permanent court, in contravention of the Kentucky Constitution. Nothing could be further from the truth. As a matter of fact, the Kentucky General Assembly passed a Concurrent Resolution dated March 31, 1988, directing the Legislative Research Commission to appoint a task force composed of sixteen members to examine the need for and feasibility of establishing a family court or division of court "exclusively devoted to the determination of matters including but not limited to dissolution of marriage, spousal maintenance, child custody and support, adoption, termination of parental rights, establishment of paternity, domestic violence, juvenile dependency and crime." Said task force was directed to make findings and conclusions, including summaries of any legislation which it might recommend or prefile. See Chapter 128 (HCR 30) of the Acts of the 1988 General Assembly.

In due time, a task force was so appointed, composed of sixteen persons, including five members of the General Assembly in accordance with HCR 30. The task force, after due consideration, recommended that rather than immediately creating a family court in Kentucky, a pilot family court project be initiated; the pilot project implemented by the Court of Justice, the Chief Justice, in his discretion, to determine the exact district judges; and that the 1990 Kentucky General Assembly fund the project, including implementation and evaluation. The task force further recommended that one of Kentucky's institutions of higher learning be asked to monitor the project, collect data and help evaluate the Family Court's success.

The procedure of utilizing an experimental family court to determine its feasibility prior to creation (by legislation or constitutional amendment, as the case may be) is in keeping with a trend across the country. For example, Florida's Report of the Family Court Subcommittee notes that a few circuits in Florida established 'family diversions' in an experimental project, that "numerous studies, surveys, articles and research projects, on both state and national levels, have addressed the question of family courts," and then observes:

> D. Proposed Implementation Strategy and Timetable
>
> Experience in those circuits that have already instituted family divisions teaches that a family division must be carefully planned before implementation. Thoughtful planning must address structure and procedure on the basis of local conditions and must also make provisions for the resources and

> service essential to an effective and successful family division.
>
> In the view of the need for careful study and planning, SB 3006, Section 10, creates a Commission on Family Courts. The members would include legislators, judges, and attorneys and advocates of children and family groups. The implementation of family divisions, addressing all relevant issues ranging from statutory changes to court structure to fiscal impact. The legislation calls for an interim report by December 1, 1990, and a final report by February 1, 1991. Thorough study and detailed recommendations by such a commission or similar group are essential to ensure successful implementations and prevention wasted resources on a venture that could fail and further frustrate the present family system.

Merrill Sobie wrote in an article appearing in the New York State Bar Journal, July, 1988, entitled "The Family Court: An Historical Survey,"

> "The New York Family Court this year celebrates its twenty-fifth anniversary. Hailed as an "experimental" tribunal, designed to resolve society's most intractable problems, including family dissolution, delinquency and child neglect, the court has been perceived as a radical development which altered the then existing legal rules governing family affairs."

As of this writing, the Chief Judge of the New York Family Court has been invited to speak at the 1994 Kentucky Bar Association Convention, suggesting a fair amount of interest in this concept among our bar.

Virginia had an experimental family court for some ten years while conducting studies as to its need and implementation, before making it permanent in court in 1993. See, e.g., Report

of the Judicial Council of Virginia on Implementation of the Family Court, Senate Document No. 42 (1994).

In any event, given this background, Chief Justice Robert Stephens, on March 20, 1991, in accordance with the discretion granted him by HCR 30, selected Jefferson County as the locus of the Family Court Project, and in order to implement said project, selected three circuit judges and three district judges. The three circuit judges were sworn as special district judges and the three district judges were sworn as special circuit judges, each empowered to serve and adjudicate any and all matters of the district and circuit court coming before them during their temporary tenure, pursuant to the Chief Justice's authority under §110(5)(b) to assign temporarily any justice or judge of the Commonwealth to sit in any court other than the Supreme Court. See Order, March 20, 1991, Appendix at A. The Order of March 20, 1991, contains the language "This appointment . . . shall remain in effect until further order of this Court."

The Supreme Court of Kentucky subsequently approved Rules of Practice for the Jefferson Family Court. In this context, it is intriguing to note that Appellant--who on this Appeal challenges the entire existence of the court, the subject matter jurisdiction of the Supreme Court to supervise it, and perforce the validity of these rules--has taken pains to point out each separate instance of her compliance with the Rules.

As Appellant has outlined in her Brief, the Family Court Project currently hears seventy-five percent (75%) of actions for

dissolution of marriage in the 30th Judicial District and twenty-five percent (25%) are heard on the regular Circuit Court Docket. Pursuant to increased funding authorized by the 1994 General Assembly (see infra), the Family Court has the opportunity to increase its session from six to eight judges in July 1994. At that time, all new dissolution actions will be heard in Family Court rather than on the regular Circuit Court docket. The Family Court session will continue to hear all adoptions, terminations of parental rights, dependency/neglect, paternity, and juvenile matters.

OF JUDGES

Assignment to the Family Court Project, then and now, was made on a voluntary basis. Since the Original order authorizing the Judges named to the Project, Circuit Judges Daniel Schneider and John Potter and District Judges Kevin Delahanty, Matthew Eckert, and Donald Eckerle, have left the Family Court Project. Circuit Judges Ernest Jasmin and Stephen Mershon (who volunteered to remain on the project following his election to the Circuit Court) and District Judges Mary Corey, James Green, and Paul Weber have since joined the Family Court.

Funding for the Family Court Project has been provided through appropriations by each General Assembly, within the context of the Judicial Branch Budget, since the passage of HCR 30 (Acts 1988). See Acts 1990, Chapter 444 (HB 306); Acts 1992, Chapter 439 (HJR 85) enacting FB 1992-94, Judicial Branch Budget Memorandum, April 1, 1992; Acts 1994, at Appendix B, HB 301, enacting Judicial Branch Budget, 1994-96, Appendix C. Funds were

appropriated by the 1994 General Assembly for the expansion of the Family Court Project. See Judicial Branch Budget, Appendix C, at [2].

The 1994 General Assembly also saw the introduction of legislation designed to make a Family Court, consisting of concurrent session of District and Circuit Courts, a permanent option for any judicial district in the Commonwealth. 94 RS BR 1029, SB No. 83, introduced Friday, January 7, 1994; 94 RS BR 1028, SB No. 84, introduced Friday, January 7, 1994. However, the General Assembly adjourned its regular session in April, 1994, without having acted upon this legislation.

While Appellant has sought to characterize this lack of action as an expression of the legislative will, this court may take judicial notice of the fact that the regular session of the General Assembly adjourned with much business left unfinished, of which SB 83 and 84 were a part. In fact, as of June 20, 1994, an extraordinary session of the General Assembly convened in order to pass the general budget for the Commonwealth for the 1991-96 biennium continued in progress. "Jones says Legislators broke Vows on Funding," Louisville Courier Journal, June 21,1994, at B 5.

While the fate of the Family Court Project is thus not yet determined, then, the Jefferson Family Court session continues on what is clearly an experimental and temporary basis. Nonetheless, Jefferson Family Court has continued to receive funds from the General Assembly and to operate pursuant to the

recommendations of the Supreme Court of Kentucky as mandated by the Kentucky Constitution and subsequent legislation.

Kuprion v. Kuprion

On April 29, 1993, Appellant, Penny L. Kuprion, filed her petition for Dissolution of Marriage, No. 93-FD-1244, in the Office of the Jefferson Circuit Court. As Appellant has outlined, her petition was assigned to the Court of the Appellee, Jefferson Family Court Division.

From the outset, Kuprion v. Kuprion, has embodied the primary assertion of advocates of "family court" systems: that many families which enter the court system for one reason also encounter other legal difficulties which may be handled most expeditiously by a judge already familiar with the family members in a legal context.

For example, the Appellant has filed four (4) petitions for Domestic Violence Orders pursuant to KRS 403.700 ff. against the Real Party in Interest, Robert G. Kuprion. All of these petitions were heard by the same judge, Appellee, pursuant to the alphabetical scheduling of cases in the Family Court. Appellee on each occasion heard testimony of the parties and of one or more of their three minor children as witnesses. It must be noted in this regard that each of the EPO/DVO Petitions was denied following each respective hearing.

Motion practice in other aspects of this case remained vigorous through the summer and fall of 1993. See Kuprion v. Kuprion, 93-FD-1244.

On October 27, 1993, the trial court heard Appellant's Motion to re-allot this matter to the Jefferson Circuit Court on the ground that Appellee is a judge of the Jefferson District Court, which lacks subject matter jurisdiction to hear a dissolution action. See Brief of Appellant, Appendix Exhibit 7. Pursuant to Appellee's authority as a duly sworn Special Circuit Judge pursuant to Ky. Const. §110(5)(b), Appellee denied the Motion as being without merit. Brief of Appellant, Appendix Exhibit 8.

Kuprion v. Fitzgerald

On November 18, 1993, Appellant filed her "Petition for Writ of Mandamus" pursuant to CR 76.36 in the Court of Appeals of Kentucky, seeking relief from the jurisdiction of the Jefferson Family Court. Appellee filed a pro se response to this Petition on November 29, 1993. The Real Party in Interest, Robert G. Kuprion, was omitted from Appellant's Action. On this and other grounds, he filed his Motion to Dismiss and for Attorney's fees on December 1, 1993.

On January 11, 1994, the Court of Appeals of Kentucky on its own motion ordered oral argument in this case. Oral argument took place on February 9, 1994, at Louisville, before Judges Gudgel, Schroder, and Miller. In the meantime, the original trial date of Kuprion v. Kuprion was passed by agreement from January 29, 1994, to April 29, 1994, due to the pending original action.

On March 25, 1994, the Court of Appeals issued its Opinion and Order Denying Writ of Mandamus, on the basis that the Family Court Project was duly authorized by HCR 30 (Acts 1988) and carried out in a constitutional manner by the Chief Justice pursuant to the resolution and to his authority under §110(5)(6):

> In analyzing the family court, we view the pilot program in Jefferson County as a joint research product of the General Assembly and the Judiciary. We agree with the petitioner to the extent that the final form of the family court will need to be set forth in statute by the General Assembly. However, that does not mean that one branch cannot aid or assist another branch of government in analyzing ways to make our system of government more efficient. Clearly, with the "special funding" by the General Assembly for this pilot program, the General Assembly is giving tacit approval to the "recommendations" of Chief Justice. When the General Assembly decides it has had enough, it merely stops the special funding and the judicial system reverts back to the remaining statutory guidelines which do not include a "family court." If on the other hand, the General Assembly decides a family court is desirable, it can amend Chapters 24A and 23A of the Kentucky Revised Statutes to trade jurisdiction on certain matters so that the family court falls within the constitutional framework of Sections 112(5) and 113(6) of the current Kentucky Constitution.

Opinion and Order, Kuprion v. Fitzgerald, 93-CA-002760-OA, March 25, 19914, at 4 - 5 (unpublished).

The Court of Appeals further held that the Family Court's temporarily concurrent jurisdiction, made possible by the Chief Justice's Order appointing the Appellee, inter pares, as a Special Circuit Judge, did not violate this Commonwealth's explicit separation of powers in Ky. Const. §27 and §28. The

Court found that the Chief Justice's appointments under Ky. Const. §110(5)(b) were temporary, in spite of the lack of a termination date on the 1991 Order:

> In fact, if the petitioner reviews previous orders appointing special judges, she will notice that many specify the special judge handle a particular case which may be scheduled for a particular time. However, the special judge is still implicitly authorized to continue the case or even take more than one day to dispose of the case. Even without a definite time limit on the special appointment, no one doubts that the order is a "temporary" appointment. Likewise in the case sub judice, the pilot project implicitly restricts the appointments to being "temporary."

Id. at 6. Despite Appellant's argument at oral argument that the appointment of Special Judges may only take place under the conditions governed by KRS 26A.020, the Court of Appeals specifically ruled that "(u)nder §110 of our current constitution, the Chief Justice can appoint any judge to sit on any court except the Supreme Court." Id. at 7.

The Court of Appeals denied the Motion of the Real Party in Interest to dismiss the case and grant attorney's fees. Id.

On April 18, 1994, Appellant filed her Notice of Appeal to this Court. On April 26, 1994, Appellant filed her Motion-Affidavit for Recusal of Justices, requesting that all the Justices of this Court, save Justice Stumbo, recuse themselves from hearing this case. Appellee responded on May 6, 1994. Two Justices recused themselves from this case by Order dated May 31, 1994.

On April 29, 1994, the case of Kuprion v. Kuprion, 93-FD-01244, went to trial before Appellee. Despite the Appellant's assertions that Appellee's Court lacks subject matter jurisdiction over her case, Appellant sought no stay of the proceedings and, indeed, presented an entire day of proof. Following this first day of trial, the Decree of Dissolution tendered by Appellant was signed and entered. Due to trial scheduling difficulties with the Court, Kuprion v. Kuprion has now been continued to August 10 and 11, 1994.

ARGUMENT

I. THE APPELLEE HAS SUBJECT MATTER JURISDICTION TO GRANT A DECREE OF DISSOLUTION OF MARRIAGE.

In the interest of clarity, and because the two contentions are inextricably intertwined, Appellee here addresses Appellant's first two arguments on this Appeal.

Appellant first contends that "(a) district judge lacks subject matter jurisdiction to grant a decree of dissolution of marriage." Appellant's Brief at 4, citing Ky. Const. §114(6); KRS 24A.110-130; KRS 406.021, KRS 403.140.

Appellee agrees with Appellant that the cited statutes give Appellee no jurisdiction, in his role as a District Judge, to hear a dissolution action. Appellant's argument in this regard, however, is flawed ab initio because it refuses to acknowledge that Appellee is duly sworn as a Special Circuit Judge pursuant to Ky. Const. §110(5)(b) in order to hear cases which fall within the exclusive jurisdiction of the Circuit Court.

Appellant's main argument in this regard, however, specifically attacks this appointment, despite the clear language of §110(5)(b):

> 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 finds 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. The chief justice shall submit the budget for the Court of Justice and perform all other necessary administrative functions relating to the court.

Here, Appellant claims that the Chief Justice may not use §110(5)(b) to appoint a District Judge a temporary Special Circuit Judge in order to hear dissolution actions under the aegis of the Jefferson Family Court Project. Each of the reasons Appellant gives for this remarkable position, however, falls flat.

A. §110(5)(b) and KRS 26A.020

Appellant first claims that KRS 26A.020 constitutes the General Assembly's "expression of intent" limiting the appointment power under §110(5)(b) to situations wherein a judge is not available to sit in a given court. The statute reads:

> 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 the 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.)

Clearly, the statute sets out what is to take place when a judge is unavailable to fill his or her seat. However, Appellant cites no authority suggesting that unavailability of the sitting judge is the sole ground on which the Chief Justice can make a temporary appointment "for the prompt disposition of causes. "To the contrary, this Court has recently upheld the appointment of a retired Circuit Judge as a Special Judge in order to allow him to wind up his caseload--despite the fact that his successor had already taken office. See Regency Pheasant Run Ltd. v. Karem, Ky., 860 S.W.2d 755 (1993).

In Jefferson County, the Chief Justice has also seen fit to appoint retired Circuit Judge Laurence Higgins as Special Circuit Judge for the purpose of hearing the massive amount of asbestos litigation in Jefferson Circuit Court, which would otherwise hamper the dockets of each division of that court. Judge Higgins is not appointed to any particular division--indeed, as Appellant

points out, none are vacant--but sits in whatever courtroom is free during the weeks in which he hears cases.

Finally, in Huntzinger v. McCrae, Ky. App., 818 S.W.2d 613 (1991), a chief regional circuit judge himself appointed a special judge from the District bench, outside that judicial region, to hear some cases in order to expedite their dispositions. It is unclear from the opinion whether or not the circuit judge was unavailable to sit. Huntzinger, 818 S.W.2d at 615. However, the Court of Appeals found that the fact that the Chief Justice had not appointed the Special Judge was not a "material" departure from the statute, and upheld the Special Judge's dismissal of a complaint! Id.

From the foregoing, it appears clear that KRS 26A.020 does not limit the Chief Justice's appointment power under §110, but merely prescribes an orderly procedure by which it is to be exercised when a judge is actually unavailable to sit in his or her division.

B. "Temporariness" under §110(5)(b)

Appellant's other argument against the validity of Appellee's appointment as Special Circuit Judge is that the Order of March 20, 1991, is not temporary because it did not give a date certain on which the special judgeship will expire. Instead, Chief Justice Stephens ordered the appointments of Appellee and his colleagues "until further Orders of Court." This argument, too, fails.

In this regard, Appellant first claims that the word "temporary," as relied upon "by Appellee, the Real Party in Interest, and the Court of Appeals...cannot refer to creation of a court." Brief for Appellant at 8. While this statement is true, it is no more than sophistry in this context. No one but Appellant has ever asserted that §110(5)(b) refers to "creation of a court."

At the risk of being repetitive, the facts of the Family Court Project are that it is a concurrent session of already existing District and Circuit Court divisions convened in response to HCR 30 (Acts 1988). Its purpose is to enact an experiment to see if cases involving different aspects of family relations can be handled more effectively under the "one judge, one family" approach. To that end, existing divisions of District and Circuit Court were temporarily detailed to this project on a voluntary basis. Volunteer District Judges were temporarily sworn in as Special Circuit Judges in order to hear adoptions, terminations, and divorces. Volunteer Circuit Judges were temporarily sworn in as Special Circuit Judges to hear issues of paternity and juvenile cases. No new divisions of Court were created.

While it is true that this concurrent session is called "Jefferson Family Court," it is no more a separate court than is "Traffic Court" in Franklin County (which is a session of the Franklin District Court that meets on Wednesdays at 1:00 p.m.), or "Probate Court" in any judicial district of this Commonwealth.

The temporariness here lies in the words of HCR 30; the subsequent need for legislative funding of this project in each biennium as part of the Judicial Branch Budget, which could be withdrawn by any succeeding General Assembly; and the overreaching knowledge that a permanent "Family Court" option such as SB 83 and 84 must at some point be accepted or rejected by the General Assembly. The fact that the General Assembly had such an option before it and did not act, as noted supra, should in no way reflect upon the merits of SB 83 and 84.

Appellant contends, however, without logic, that the Court's Order is not temporary and, further, that the Supreme Court has thus created a permanent court not constitutionally recognized (see also Argument II, infra.) It is here that the Petitioner's argument is fatally flawed. Appellant apparently operates under the misconception that in order for something to be deemed temporary it must have a definite time span.

The law is obviously not this nearsighted. The word "temporary" simply means transient or passing - not permanent. Lord Manufacturing Co. v. Nemeny, D.C.Pa. 65 F.Supp 711; Shelton v. Shelton, Tenn 280 S.W.2d 803. Simplex Precast Industries, Inc. v. Biehl, Pa. 149 A.2d 121; "Temporary" is a word of much elasticity and considerable indefiniteness; it has not fixed meaning in the sense that it designates any fixed period of time. Kahn v. Lockhard, Mo. 392 S.W.2d 30; State Farm Mutual Auto Ins. Co. v. Johnson, Cal. 107, Cal. Rptr. 149; Little v. Safeguard Ins. Co., La. 137 So.2d 415; Weitzner v. Stichman, N.Y. 64 NYS.2d

40. The Court can take judicial notice of the fact that temporary custody, for example, has no time limit, and any trial judge will readily concede he or she has often granted temporary custody which has exceeded in duration permanent custody granted in another case. In Rogers v. City of Louisville, Ky., 176 S.W.2d 387 (1943) the Court stated

> "When appellant pleaded that his operation of the trunks over the streets of the city was temporary, he only averred that the operation was not to be permanent, as Funk & Wagnall's New Standard Dictionary **defines temporary as not permanent.**"

Black's Law Dictionary (1989 ed.) defines "until" as:

> "Up to time of a word of limitation, used ordinarily to restrict that which precedes to what immediately follow it, and its office is to fix some point of time or some event upon the arrival or occurrence of which what precedes will cease to exist. State v. Kehoe, 144 P. 162, 49 Mont. 582; Irwin v. Irwin, 167 NYW 76, 179 App. Div. 871; Empire Oil and Refining Co. v. Babson, 182 Okl. 336, 77 P.2d 682."

Hence, while the appointment of the special judge is indefinite in time, "until further order of court" limits the appointment by fixing some event upon the occurrence of which the appointment will cease to exist. As the Court of Appeals found, it thus clearly fits the legal definition of temporary; the Chief Justice has in no way exceeded his constitutional authority. While Appellant may question the wisdom of using district judges temporarily as circuit judges, or vice versa, as we have seen, it is clearly, permitted by Kentucky Constitution Sec. 110.

In order for Appellant to prevail, this Court would have to declare that Justice Stephens has created a permanent family court and that the judges presently serving therein are permanently so appointed. This is neither factually or legally supportable. Appellant's request for a Writ of Mandamus should accordingly be denied.

II. THE JEFFERSON FAMILY COURT PROJECT COMPLIES WITH KENTUCKY LAW REGARDING SEPARATION OF POWERS.

Appellant's second--and central--argument on appeal is that the Jefferson Family Court Project violates §27 and §28 of the Kentucky Constitution in that it has usurped the legislative power to assign jurisdiction of subject matter to the respective levels of the unified Court of Justice as described in Ky. Const. §109.

Appellant first correctly describes the domestic jurisdiction of the Circuit Court:

> 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...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.

Brief for Appellant at 10. Appellant here plainly admits that a District Court judge may sit as a Special Circuit Judge in a dissolution case if his or her appointment as a Special Circuit Judge is legal and proper. As the issue of the legality of Appellee's appointment has been addressed fully at I., supra, one perforce returns to the conclusion that Appellee is properly presiding over Appellant's divorce.

In this context, Appellant also attempts to revive the issue of whether the fact that Appellee is not sitting as a Special Circuit Judge in an unoccupied division of Jefferson Circuit Court constitutes an unconstitutional creation of a new division of Jefferson Circuit Court or of a "hybrid" court. Again, this issue has been dealt with at length in the context of appointments under §110. See Regency Pheasant Run, Ltd., supra; Huntzinger, supra; see also, generally, supra at 13, 14. Clearly, there is ample precedent for the temporary appointment of judges to occupy courts in order to deal with caseload problems.

Aside from the overlap of issues, however, Appellant's argument here poses the central question: is the Family Court Project a separate, judicially created court within the Court of Justice? If so, Appellant is correct in stating that it is an unconstitutional court regardless of the legality of Appellee's §110(5)(b) appointment. Ky. Const. §27, §28, §109.

Appellant cites practically every Kentucky separation of powers case to reach the appellate level since the 1898

Constitution in order to make the point that this Court has always zealously guarded against encroachments by one branch of government upon another. This does not come as any surprise. However, Appellant fails to shine any light upon the problem of whether the Chief Justice's "cross-swearing" of the Family Court judges encroaches upon the legislative will.

It should be noted that the broad powers granted to this Court and to the Chief Justice with the passage of the 1975 Judicial Article have created some overlap, and therefore some tension, between the judiciary and the General Assembly. See D. McSwain, Note, "Judicial v. Legislative Power in Kentucky: A 'Comity' of Errors," 71 Ky. L.J. 829 (1983). However, there has never been any question but that this Court has authority to act upon its responsibilities under §110 of the Kentucky Constitution. See, e.g., Regency Pheasant Run, Ltd., supra; Kentucky Utilities Co. v. South East Coal, Ky., 836 S.W.2d 407, 408 (1992); Ex parte Farley, Ky., 570 S.W.2d 617 (1978). Moreover, the Chief Justice's supervision of any project undertaken by the judiciary would seem to be mandated. Ky. Const. §110, §116; cf. Howerton v. Price, Ky., 449 S.W.2d 746, 748 (1970).

Factually, what exists here is a legislative authorization--HCR 30 (Acts 1988)--delegating authority to the Legislative Research Commission to appoint a task force to study, inter alia, whether

> the establishment of a court or division of court particularly devoted to and

> specializing in family law might promote such continuity of judicial decision-making as well as foster development of expertise in the management and disposal of family law cases by the Kentucky judiciary...

Id. A task force was duly appointed. The Task Force recommended back to the LRC that a pilot project be undertaken; that both District and Circuit Judges participate; and that the Chief Justice supervise in his capacity as executive head of the Court of Justice pursuant to §110(5). This was duly performed.

The Task Force further recommended that the General Assembly fund the Family Court pilot project in each succeeding biennial budget. The General Assembly has done so. Funding has been limited primarily to the hiring of court-designated social workers, to training for Court personnel, and to some extent for salary supplementation for the Special Circuit Judges. See Appendix at C. This funding is enumerated in the Judicial Branch Budget Memoranda of the 1990, 1992, and 1994 General Assemblies. See p. 6, supra.

Appellant relies heavily upon the case of LRC v. Brown, Ky., 664 S.W.2d 907 (1984) in support of her contention that the judiciary has invaded the legislative province in conducting the Family Court Pilot Project. In LRC v. Brown, sometimes referred to as "Kentucky's Marbury v. Madison," this Court struck down a number of statutes impermissibly delegating legislative power to the Legislative Research Commission. In doing so, the Court set forth, inter alia, standards for legislative delegation of power to administer or implement laws. Id. at 915.

Appellant apparently is suggesting that if the LRC can't make legislation, neither can the Chief Justice. This, however, is not what has happened with respect to the Family Court.

The Jefferson Family Court Project was authorized by the legislative grant of power in HCR 30 (Acts 1988) to the Task Force "to examine the need for and feasibility of establishment of a Family Court or division of court." Clearly, the suggestion of a pilot project goes to the issue of feasibility. However, the Pilot Project was enacted using existing judicial resources in the only constitutional manner available at the time. The Chief Justice used his appointment powers under §110(5)(b), to appoint three circuit judges Special District Judges, in order to give them juvenile and paternity jurisdiction for the duration of the project; and to appoint three District Judges who were otherwise constitutionally qualified to serve (i.e., more than eight years' practice) as Special Circuit Judges. The Chief Justice created no new judges, and no new courts.

To the extent that legislative approval was necessary, it is implicit in the continued supplemental funding of the Family Court Project in each succeeding biennium with approval of the Judicial Branch Budget Memoranda. In fact, this Court has ruled that the adoption of each branch budget memorandum is a legislative mandate; for example, if there is a revenue shortfall, each branch must cut funding in accordance with its adopted Memorandum. See LRC v. Brown, 664 S.W.2d at 926.

Finally, as has been discussed above, the appellation "Family Court" (abhorrent as it may be to Appellant) does not render it a separate court under §109, nor does a discrete geographical location in the courthouse, any more than the names "Traffic Court, "VET Court," "Probate Court," or "Felony/Misdemeanor" violate §109.

It is abundantly obvious from all this that the Jefferson Family Court is not a newly created court outside the unified Court of Justice. It is a constitutionally authorized experiment in the marshalling of judicial resources already in existence. As such, it complies with Ky. Const. §27 and §28 in preserving the separation of powers. In that it uses temporarily assigned resources, which are already part and parcel of the Court of Justice, it complies with §109. The Family Court Project is constitutional.

III. APPELLANT'S RIGHT TO EQUAL PROTECTION OF LAW IS NOT VIOLATED BY HER CASE'S ASSIGNMENT TO JEFFERSON FAMILY COURT.

Appellant next argues on her appeal that her right to equal protection of the laws under U.S. Const., Amdt. XIV, and Ky. Const. §1, has been violated in that she and a "definable class" of litigants have suffered discrimination by virtue of having been assigned to District Judges sitting as Special Circuit Judges in the Jefferson Family Court. Appellant submits that this would be the case regardless of whether cases were assigned alphabetically (as they are now) or in another manner.

First, this argument was not broached in the Court of Appeals. Since it appears here for the first time, it is subject to analysis under CR 61.02, which requires that Appellant demonstrate that this constitutes "palpable error" resulting in "manifest injustice" to her before this Court may consider it on appeal. However, even in criminal cases, errors of a constitutional nature may be waived by counsel's failure to raise an objection in the trial court. See Salisbury v. Commonwealth, Ky. App., 556 S.W.2d 922 (1977). Further, on appeal, a party may not attempt to add items to the record not considered by the trial court in rendering its judgment. Fortney v. Elliott's Adm'r, Ky., 273 S.W.2d 51 (1954).

In determining whether this argument constitutes a "palpable error" under CR 61.02, then, this Court must examine it in light of what it alleges and whether it was available to the Court of Appeals for its consideration. This examination reveals that--regardless of whether preserved or not--Appellant's claim is fatally flawed.

In short, Appellant maintains that Appellee and some of his colleagues are hearing divorce cases in their respective capacities as District Judges. This, she argues, is impermissible under the Kentucky Constitution and denies her and other equal protection of the laws.

Appellee reiterates--yet again--his agreement with Appellant. District Judges, qua District Judges, may not hear divorce cases. However, Appellee again reiterates that he is a

duly appointed Special Circuit Judge, pursuant to Ky. Const. §110(5)(b), for purposes of hearing family law cases under the aegis of the Jefferson Family Court Project. Appellee admits to his having been so sworn on March 20, 1991. He hears divorce and custody cases in that capacity, and that capacity only. To do otherwise, is constitutionally impossible for him, as it is for any other District Judge in this Commonwealth.

It is clear, then, that no manifest injustice has resulted to Appellant from having Appellee hear her dissolution action. He is constitutionally empowered to do so. Moreover, in that she admits that he is a duly sworn Special Circuit Judge, her underlying argument that she suffers from alphabetical discrimination --or any other form thereof--falls flat. This Court should recognize this argument for what it is: a canard, designed to raise the spectre of federal constitutional implications, but nonetheless a canard. Accordingly, this Court should deny Appellant relief on this ground as well.

IV THE COURT OF APPEALS PROPERLY DENIED APPELLANT'S "PETITION FOR WRIT OF MANDAMUS"

Appellant has requested that this Court grant her relief in the form of mandating that the trial court (1) "re-allot" the divorce case and (2) declare the Family Court unconstitutional. However, she is not entitled to the extraordinary relief contemplated by the writ.

At the outset, it is well-settled law that mandamus is available to a petitioner where a lower court is proceeding

outside its jurisdiction and there is no adequate remedy by appeal. Stallard v. McDonald, Ky. App., 826 S.W.2d 840, 842 (1992), citing Tipton v. Commonwealth, Ky. App., 770 S.W.2d 239 (1989). Likewise, it is axiomatic that the issue of lack of subject matter jurisdiction may not be waived. Lilly v. O'Brien, Ky., 224 Ky. 474, 6 S.W.2d 715 (1928). The assertion that the trial court lacks subject matter jurisdiction over divorce cases, indeed, forms the primary rationale for Appellant's action in this Court.

However, in that Appellant admits that the trial judge and Co-Respondent herein was duly sworn a Special Circuit Judge before the Supreme Court of Kentucky, and that Section 110 of the Kentucky Constitution expressly grants the Chief Justice of the Supreme Court the power to appoint such judges, Appellant has already in effect admitted that the trial court has subject matter jurisdiction over this action. In fact, Appellant has proceeded to trial in this action.

In any case, as noted above, Appellant has pleaded the issue of removal of this case from the Family Court in the trial court, albeit (as now) in a less than artful manner. See Kuprion v. Kuprion, 93-FD-1244, Motion to Reallot Case, 10/28/93 (at 40-42), which Motion was denied; Id., Pretrial Order, 11/08/93 (at 49). Appellant thus has preserved any potential error for appeal, and has no need of this extraordinary relief.

Moreover, Appellant here seeks to demonstrate that the Court of Appeals erred in its conclusion that the Jefferson Family

Court is a legislatively authorized and funded project, which is supervised by the Supreme Court and utilizes existing constitutional authority to conduct research into the efficacy of a "family court." Unfortunately, however, Appellant appears to have concluded that if all else fails it is appropriate to ridicule the Court of Appeals.

First, Appellant corrects the Court of Appeals' statement that "all the...judges in Jefferson County, rotate in and out of Family Court." Kuprion v. Fitzgerald, 93-CA-002760-OA, at 3. It is true, as Appellant states, that the judicial service in Family Court Project is voluntary rather than a regular "rotation." Moreover, it is true that Circuit Judges in Jefferson County do not "rotate" between divisions such as traffic court, civil court, and Probate Court as do Jefferson District Judges.

In point of fact, it is irrelevant whether or not Family Court is a mandatory rotation for judges. However, while Appellant appears scandalized by the voluntary nature of the project, Appellant fails or refuses to grasp the significance of the voluntariness of judicial assignments to this division. Persons having business with the Jefferson Family Court, perhaps more so than in any other division of the Court of Justice in Jefferson County, are being heard by judges who want to hear them. In that domestic relations cases are the messiest and most depressing variety of litigation, this is a boon to the public at large and reflects well upon all who are officers of the Kentucky Court of Justice.

Finally, Appellant engages in a series of alarmist suggestions about patently unconstitutional acts which she suggests could become reality if this Court upholds the Court of Appeals' decision in this case. Without answering them one by one here, these arguments smack of the old suggestion that equal rights for women would lead to same-sex restrooms. Appellant's suggestions are irresponsible as well and constitutionally indefensible. See LRC v. Brown, supra; McSwain, Note, supra.

In fine, the Court of Appeals correctly determined that the Jefferson Family Court is a temporary "joint research project" of the judiciary and the General Assembly, and that it is structured in a constitutionally permissible manner. Further, the Court of Appeals found that Appellee was constitutionally vested, in his capacity as Special Circuit Judge, with subject matter jurisdiction to hear Appellant's divorce. Both procedurally and substantively, the Court of Appeals acted properly in denying the writ.

CONCLUSION

Appellant has failed to demonstrate any ground on which this Court may grant her relief. Appellant has consistently failed to establish that Appellee is presiding over her dissolution action in an improper or unconstitutional manner, in that Appellant continues to assert that Appellee is hearing her divorce in the capacity of a District Judge while at the same time admitting that he is duly sworn as a Special Circuit Judge pursuant to Ky. Const. §110(5)(b). Likewise, Appellant has failed to establish

that the Family Court Project amounts to an unconstitutional new court in violation of Ky. Const. §27, §28, or §109. Appellant is before a duly constituted Special Circuit Judge who has power to grant her a Decree of Dissolution of Divorce; that being the case, she enjoys the equal protection of the laws in accordance with the United States and Kentucky Constitutions. Finally, for both procedural and substantive reasons, the Court of Appeals properly denied her Petition for Writ.

WHEREFORE, Appellee respectfully requests that this Honorable Court AFFIRM the Opinion and Order of the Court of Appeals of Kentucky in Kuprion v. Fitzgerald, No. 93-CA-002760-OA, March 25, 1994, denying Appellant's "Petition for Writ of Mandamus" pursuant to CR 76.36.

Respectfully submitted,

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