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DISCUSSION DRAFT 10/20/94

This case comes before the court on appeal by Penny L. Kuprin ("Penny") from a decision of the Court of Appeals, in which court Penny had filed a Petition for Writ of Mandamus against Judge Richard J. FitzGerald. Penny's Petition in the Court of Appeals sought to prevent Judge FitzGerald from proceeding to adjudicate any matters involved in the Petition for the Dissolution of her marriage with Robert G. Kuprin ("Robert"). Judge FitzGerald is a regularly elected judge of the Jefferson District Court, and was serving as a special judge of the Jefferson Circuit Court pursuant to an order of Chief Justice Robert Stephens of this Court, an order which lies at the heart of this litigation.

The Petition for Dissolution was filed by Penny against Robert, with the style "Jefferson Family Court," as required by rules then (and now) in effect in Jefferson County. The process by which the style "Jefferson Family Court" became appropriate for the Petition for Dissolution began, so far as the public record is concerned, with a Concurrent Resolution of the 1988 General Assembly of Kentucky, designated HCR 30 in the regular session of the legislature that year. The "Whereas" sections of the Concurrent Resolution call attention to the fact that there are divided between the Circuit and District courts of the Commonwealth various duties related to marriages, parenting and the care and protection of children. Two of the three "Whereas" clauses were the following:

> WHEREAS, the jurisdictions of the various courts of the Commonwealth can and do overlap

> concerning matters of dispute or crisis within particular families, thereby causing fractionalization and disruption in judicial decision-making continuity; and
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> WHEREAS, 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.

For readers of this Opinion, we call special attention to the emphasis of the General Assembly on, among other issues, the legislature's hostile attitude toward "fractionalization," and its preference for "continuity of judicial decision-making."

The legislature, of course, was not alone in recognizing the effects of fractionalization[1]. The problems were urged by members of the family practice Bar upon their colleagues in the General Assembly, and have been commented on by the Court

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[1] No plan ultimately adopted by the legislature and/or the people will solve this problem in its entirety. With appropriate diversity of citizenship, the tort of sexual and physical abuse within a family unit is subject to the jurisdiction of the federal courts. The U.S. Supreme Court in Ankenbrandt v. Jon A. Richards and Debra Kesler, 504 US __, 119 L Ed 2d 468, 112 S. Ct. (1992) points out that in 1859, that court (in dictum and without foundation) disclaimed the "power" of the federal courts to hear divorce cases, which dictum was later carried forward to include custody cases. Since Congress re-enacted statutes granting jurisdiction to the federal courts, never addressing this matter, successive statutes have been "interpreted" to incorporate the domestic relations limitation on federal court jurisdiction. The U.S. Supreme Court said that this limited federal jurisdiction "is also supported by sound policy considerations," including "judicial economy" and "judicial expertise," 119 L Ed 2d at 492; but it held that the exception will not be extended to the tort of child abuse "to promote federal-state comity." 119 L Ed 2d at 483.

of Appeals in Sumner v. Roark, Ky., 836 S.W.2d 434 (1992), and Basham v. Wilkins, Ky. App., 851 S.W.2d 491 (1993). In the Sumner case Judge Schroder noted the opportunities for "manipulation" by parties seeking to abuse the fractionalized jurisdiction; and he noted, too, that parties involved in parental rights disputes must trudge back and forth between courts to obtain results reflecting the best interests of children. Again, in Basham, Judge Schroder was faced with the nearly insuperable task of delineating a rationale for the distinction between custody and support jurisdictions.

The Concurrent Resolution directed the convening of a Task Force under the aegis of the Legislative Research Commission, to be composed of officers of the legislative, executive and judicial branches of Kentucky government. The legislature charged that Task Force to make findings and conclusions which might establish "a family court or division of court," which in turn might reduce fractionalization and provide continuity.

The Task Force made a report in 1989 which amplified on the "Whereas" portions of the Concurrent Resolution. It listed ten findings, including the notion that fractionalization of family-type jurisdiction leads to a waste of time and to delays, in that (a) it "increases the time and expense involved in these cases," and (b) it creates "an inordinate delay between intake of a case and the final resolution." For reasons apparent below, we emphasize that

the quoted language is contained in two of the Task Force's ten "findings" paragraphs, and that fractionalization was found also to create problems other than time-wasting and delay.

The Task Force recommended action by this court, <u>and</u> by the General Assembly itself. Two of its four recommendations were as follows:

> (1) That the Kentucky Supreme Court establish, by Rule, a Pilot Family Court Project for the 1990-92 biennium, with at least one urban and one rural location.
>
> (2) That the 1990 Kentucky General Assembly fund such a Pilot Project, including implementation and evaluation.

Both branches of government did as the Task Force recommended.

The Chief Justice chose to act first in Jefferson County. Under rules which were in due course approved by this court, all family-type cases were to be treated in that county under a separate and unique procedure; and once a family entered the judicial system, all matters related to that family were to remain with the judge who began with the family. In March of 1991, "[i]n order to implement the Family Court Project in Jefferson County," the Chief Justice appointed three Jefferson Circuit Judges to act as Special District Judges, and three Jefferson District Judges (including Judge FitzGerald) to act as Special Jefferson Circuit Court Judges -- "until further orders of this Court." Under the 1991 Order, the District Judges were "empowered to serve and adjudicate any and all

matters of the Circuit Court coming before them during their tenure in the Family Court Project." Since the three Circuit Judges were given the power similarly to serve as District Judges, there were in effect six judges, each of whom had the power to deal with any family-type matter arising among the members of the family whose case first appeared on the docket of any of the six judges named in the 1991 Order. Thus, if that order is effective, lawful and constitutional, Judge FitzGerald became a Circuit Judge of Jefferson County, authorized to adjudicate such dissolution cases (including Penny's and Robert's) as should be assigned to him in accordance with the rules of the Family Court Project of Jefferson County.

In a narrow sense, the effectiveness, lawfulness and constitutionality of Chief Justice Stephens' 1991 Order turns on one sentence in Section 110 of the Constitution of Kentucky which provides:

> 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.

In a broader sense, even the meaning of that one sentence depends on further provisions of the Constitution. One of them is Section 109, which lists "a trial court of general jurisdiction known as the Circuit Court and a trial court of limited jurisdiction known as the District Court" as the lone trial courts of the Commonwealth. Those two courts, together

with this court and a single Court of Appeals, are the bodies into which the single Court of Justice "shall be divided."

Section 113 of the Constitution provides that the General Assembly shall determine just how "limited" shall be the jurisdiction of the District Court; and Section 112 provides that appellate jurisdiction shall be assigned to the Circuit Court as "provided by law", which court shall also exercise all other original jurisdiction "not vested in some other court."

It is correctly conceded by all parties to this litigation that the General Assembly is thereby given control over the jurisdiction of the two trial courts, and that the adoption of the new constitution did not change the long-standing rule in Kentucky that "the Legislature has no power to create a court not provided for in the Constitution." Hoblitzel v. Jenkins, 204 Ky. 122, 263 S.W. 764, 767 (1924).

The legislature has performed its duties under these constitutional provisions, and has assigned jurisdiction as between the District and the Circuit courts widely and in detail, including the creation of "fractionalized" treatment of family/marriage/parenting/childhood matters to which it addressed itself in the Concurrent Resolution of 1988.

Penny makes much of the fact that the family court project is operated in some measure separately from either the Circuit or the District Court, including, as she reflects in her own Petition for Dissolution, the use of the words "family

court." Penny argues that a new court has been created. As we have said, the Concurrent Resolution considered both the possibilities of the development of a "court or division of court", leaving open the possibility that the ultimate solution for the problem faced by the Task Force might be a constitutional amendment creating a truly new court. Penny's argument at this level might have been removed, had the Task Force and the rules approved by us used the word "division," as in the case of the creation of the small claims "division" of district courts. See Hibberd v. Neil Huffman Dotson, Inc., Ky. App., 791 S.W.2d 726 (1990). It is clear, however, that the use of the word "court" does not by itself make a court, any more than the four "courts" mentioned in the constitution are in addition to the unified "Court" of Justice. Words might have been used more precisely, both in the constitution and thereafter; but they are only words, and do not give rise to some constitutional infirmity.

A more significant question raised by Penny, however, is whether Chief Justice Stephens' order of March, 1991, went beyond his powers to appoint temporary judges to District Courts and the Circuit Courts, and constituted a reassignment of jurisdictions between those courts, a function that belongs to the legislative branch of government.

Penny notes correctly that *if* these events in Jefferson County are properly characterized as acts of District Judges granting divorces, which acts are certainly outside their

jurisdiction, the Clerk's office in Louisville is storing hundreds, perhaps thousands, of void dissolution decrees. See Wagner v. Peoples Building & Loan Ass'n, 292 Ky. 691, 167 S.W.2d 825 (1943) (judgments outside a court's jurisdiction are void). In such event, an extraordinary number of men and women are walking around Jefferson County thinking incorrectly that they are divorced, committing unknowing bigamy, and dangerously assuming they know the consequences of their intestacy and of devises to lawful issue. See Mathews v. Mathews, Ky., 731 S.W.2d 832 (1987) (void divorces prevent lawful remarriage).

Chief Justice Stephens' order, and the approval of rules by this court, were not the only acts which followed the recommendations of the Task Force. In addition to the actions of the judicial branch, the General Assembly in full measure responded to the Task Force's proposal for action by it. In each appropriate session since the recommendation directed to the General Assembly, including two occasions since Chief Justice Stephens appointed District Judges to act temporarily as Circuit Judges in these matters, the General Assembly (with the required concurrence of the governor) adopted budgets which funded the Jefferson County family court project. In each case, the Judicial Budget submitted to the legislature by the Chief Justice provided a specific line item called "Circuit Court - Implement a Family Court Pilot Project in Jefferson County." The General Assembly thereupon funded

precisely the number of dollars requested. In the funds-strapped budget of 1994, an expanded number of judges for the project were requested and approved for fiscal years ending in 1995 and 1996.

Before proceeding further, we must determine whether it is appropriate for us to reach the merits of this case. If, as Penny contends, a "mere" District Judge is about to enter a judgment in a dissolution case, any remedy against him by way of prohibition or mandamus should be filed in the Circuit Court, see Tipton v. Commonwealth, Ky. App., 770 S.W.2d 239 (1989), which court has been bypassed in the procedures adopted by Penny. If Penny's position is modified to reflect a contention that the proposed judgment would be a judgment in the Circuit Court, executed by an interloper, the portion of the judgment relating to dissolution is not subject to prohibition or mandamus at all, Goldman v. Eichenholz, Ky., 851 S.W.2d 463 (1993), and the financial and other aspects of the case could easily be reviewed by a normal appeal, again making prohibition or mandamus unavailable. Stallard v. McDonald, Ky., 826 S.W.2d 840 (1992). Fully litigating all issues on the merits would in no way deprive Penny of her right at any time to raise the matter of subject matter jurisdiction. Duncan v. O'Nan, Ky., 451 S.W.2d 626 (1970).

Nonetheless, we choose to proceed in this case because of the enormous public impacts we have described, both (a) the interest recognized by the legislature in reforming the

delivery of justice in family matters,[2] and (b) the risk of thousands of Jefferson Countians erroneously assuming that they are divorced. This is a classic case, then, demonstrating "a competing public interest of constitutional magnitude," and one where the procedures adopted by the parties and permitted by the courts have "already delayed a year and a half" the proper disposition of important issues. The Lexington Herald-Leader Company v. Beard, Ky., 690 S.W.2d 374, 376 (1985).

Both Penny and Robert frame their argument on the merits by reference to Legislative Research Com'n v. Brown, Ky., 664 S.W.2d 907 (1984), a leading modern authority of this court on the "mandate" of Kentucky's constitution to "prohibit incursion of one branch of government into the powers and functions of the others." Id. at 912 (emphases in the original). Much of the discussion of the court in Brown,

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[2]We are also not unmindful of the fact that our present constitution gives special powers to the Chief Justice, as the administrative head of the judicial branch of government. Though the parties correctly deal with this case as one involving the relationship between the judicial branch and the legislative branch, its ultimate resolution involves the establishment of the relationship between this court and its Chief. We are also not unmindful of the language of Kentucky Utilities v. South East Coal, Ky., 836 S.W.2d 407 (1994) to the effect that "[a]n issue involving the administrative authority of this Court must be determined by its Justices, rather than executive appointees. Id. at 408. As held in that case, the Chief Justice nor Justice Liebson need have disqualified himself by virtue of having participated in the 1991 Order or the development of the Jefferson Family Court, but having done so, the constitution itself plainly requires "executive appointees" to participate in this decision under a sentence in Section 110 of the Kentucky Constitution which was not involved in South East Coal.

which involved a series of attempts by the General Assembly to delegate or expand its own traditional means of operation, turned on whether the duties sought to be assigned or stretched called for this court to apply to the constitution "a strict construction" or "a so-called liberal construction." Id. at 914 and 913. Since Brown did not focus directly on any conflict between the legislative branch and the judicial branch, much less on constitutional provisions that point in opposite directions on the facts before the court, that opinion gives limited guidance in a practical way to the resolution of the issues in this case. Indeed, in a footnote, this court pointed out that our constitution itself confuses the theoretical question it faced in Brown, because "certain normal functions of one branch are specifically granted to another." Id. at 912. That is this case.

The historic interface between the executive and judicial branches, on the other hand, is finely textured and complex.[3]

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[3] The relationship between Congress and the federal judiciary, beginning with a different tradition and different constitutional language, encounters the same problems, resolving them quite differently than Kentucky, as we shall see below. Federal analysis begins with the very broad notion that "Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has the power to legislate." Prima Paint Corporation v. Flood & Conklin Mfg. Co., 388 US 395, 405, 18 L ed 2d 1270, 1278, 87 S Ct. 1801 (1967). For that reason, the federal rules of civil procedure are adopted pursuant to authority granted by statute, and are subject to being overruled by Congress. Business Guides, Inc. v. Chromatic Communications Enterprises, Inc. and Michael Shipp, 498 US 533, 552, 112 L Ed 2d 1140, 1159, 111 S Ct. 922 (1991). Similarly, the U. S. Supreme Court holds that "Congress may confer on the federal courts jurisdiction over any case or controversy that might

Unlike the existence of a bright line between those two branches as is suggested in the very different context of Brown, it is the rare case where the distinction in inherent roles is clear. See, for example, Lovelace v. Commonwealth, 285 Ky. 326, 147 S.W.2d 1019 (1941) (probation v. parole). Much more typical is the long-standing willingness of this court to allow a great deal of legislative involvement in the development of the procedural rules under which the judicial system functions every day. Without specific constitutional provisions, this court, as a matter of "comity," has allowed legislative rule-making in this area of "inherent" judicial power, so long as the operation of the courts was not

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call for the application of federal law." Verlinden V. B. v. Central Bank of Nigeria, 461 US 480, 492, 76 L Ed 2d 81, 91, 103 S Ct. 1962 (1983). The U.S. Supreme Court has been reluctant to make broad use of delegations of what we would think of as being uniquely judicial functions such as evidentiary privileges, believing those to be "particularly a legislative function." University of Pennsylvania v. Equal Employment Opportunity Commission, 492 US 182, 189, 107 L Ed 2d 571, 582, 110 S Ct 577 (1990). In the area of administrative law, the U. S. Supreme Court began at the same place as American Beauty Homes, infra, but pulled away from that position as early as United States Bernardin v. Duell, 172 US 576, 582, 43 L Ed 559, 561 (1899), and has development a body of law which Professor Davis calls "a little queer," and at best difficult to rationalize. Davis, Administrative Law Treatise (1958) at page 182. The U.S. Supreme Court's search for the public policy declared inferentially by various U.S. constitutional provisions is as complex as Kentucky's, and quite different. See, for example, Horwitz, "The Constitution of Change: Legal Fundamentality without Fundamentalism." 107 H.L. Rev. 32 (1993). With respect to Congress' authority to limit the powers of the courts (particularly the Supreme Court), see Calabresi and Rhodes, "The Structural Constitution: Unitary Executive, Plural Judiciary," 105 H.L. Rev. 1153 (1992)

"impaired," or made "unworkable" thereby. Burton v. Mayer, 274 Ky. 263, 118 S.W.2d 547, 549 (1938). "Cooperation" of these co-equal branches was often encouraged through the years. Commonwealth v. Furste, 268 Ky. 631, 157 S.W.2d 59 (1941); Clark v. Payne, 288 Ky. 819, 157 S.W.2d 63 (1942); Craft v. Commonwealth, Ky., 343 S.W.2d 150 (1961). The same approach continued in the period after the adoption of the present constitution, which expressly directs control of rule-making by this court.[4] O'Bryan v. Commonwealth, Ky., 634 S.W.2d 153 (1982); Combs v. Huff, Ky., 858 S.W.2d 160 (1993). See also McCoy v. Western Baptist Hospital, Ky. App., 628 S.W.2d 634 (1981).

On the other hand, this court has recognized areas of apparently per se "impairment" when confronted with legislative attempts to control more purely judicial-branch matters, limiting the use of judicial contempt powers, Arnett v. Meade, Ky., 462 S.W.2d 940 (1971), auditing the finances of the Bar, Ex Parte Auditor of Public Accounts, Ky., 609 S.W.2d

[4]Penny argues that KRS 26A.020, which establishes a procedure for replacing a Circuit Judge or a District Judge who could not function, and where there is a vacancy in such a position, provides a limit to the exercise of the power of the Chief Justice to appoint temporary judges which is directly granted to him by the constitution. That statute does not address, in addition to the case at bar, the possible need of a county which shares a circuit judge with another county, in the event of an unusual need for judges, such as a large airplane crash or a massive fire. If KRS 26A.020 were read to express an intention to limit the constitutional authority of the Chief Justice, as Penny suggests, which it does not, it would be analyzed under this "impairment" test if the court were asked to declare it to be unconstitutional.

682 (1980), applying general Open Records rules to court records, Ex Parte Farley, Ky., 570 S.W.2d 617 (1978), or judging the competence of witnesses, Gaines v. Commonwealth, Ky., 728 S.W.2d 525 (1987), Drumm v. Commonwealth, Ky., 783 S.W.2d 380 (1990).

More instructive for this litigation, though, has been this Court's willingness to share its familiar functions when it chooses and for reasons satisfactory to it, and the concomitant respect of that principle on the part of the General Assembly. See, for example, Lunsford v. Commonwealth, Ky., 436 S.W.2d 512, 514 (1969), in which the legislature enacted apparently binding rules involving criminal rights and procedure, but added that they "shall not be effective as a statute, but shall be construed as a concurrent resolution directed to the Court of Appeals."

A similar pattern can be seen when the legislature attempts to delegate functions to the judiciary which are not wholly appropriate to this branch of government. This court holds in a general way that "the Legislature is without authority to delegate such a legislative function to the courts." Boone County v. Town of Verona, 190 Ky. 430, 227 S.W. 804, 806 (1921). In the extraordinarily powerful case of American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission, Ky., 379 S.W.2d 450, 453 (1964), Commissioner Clay expressed the frustration of the judicial branch with the legislature's attempt to require the

courts to hold de novo hearings in highly charged, highly political zoning cases, and expressed a strong view, both on legislative interference with and delegation to the judiciary:

> In order that the independence of the three distinct departments of government be preserved, it is a fundamental principle that the legislature cannot invade the province of the judiciary. [citations omitted] It cannot take away judicial power. [citations omitted] Nor may it impose upon the judiciary nonjudicial duties. [citations omitted].

Even in the area of zoning, however, judicial fact-finding has been engaged in since American Beauty Homes, and approved by Kentucky courts, as in Bryan v. Salmon Corp., Ky. App., 554 S.W.2d 912, 917 (1977):

> The circuit judge found a compelling need to rezone the property . . . The changes found by the court dictated the compelling need. . . Here we have a housing shortage, a feasible way to extend urban services, and a demand for housing in the area.

On the other side of the interface between the judicial and legislative branches are those cases where the judiciary on its own moves into areas which are the daily grist of legislation. While acknowledging that we do not here even attempt to resolve the continuing debate about the judiciary's proper role, this court certainly understated the judicial practice when it said in Commonwealth Ex Rel. Cowan v. Wilkinson, Ky., 828 S.W.2d 610 (1992):

> Clearly the establishment of public policy is not within the authority of the courts. Id. at 614.

In the early stages of the development of the British/American judicial system, that was precisely what the courts ordinarily did. Justice Cardozo is quoted in Mash v. Commonwealth, Ky., 769 S.W.2d 42 (1989), aptly calling judge-made law a part of the "blend" of public policy formulation. Id. at 44. That "blend" is the converse of the "comity" which dominates the judiciary's tolerance of legislative incursions into the judicial arena. If it were not for "the common law," law libraries in Kentucky would be shrunken remnants of themselves. The above quoted statement is entirely true, however, when one focuses only on (a) the express grant of legislative power by the constitution, and/or (b) any matter on which the legislature has actually acted. Thus it is entirely correct to say:

> The establishment of public policy is granted to the legislature alone. It is beyond the power of a court to vitiate an act of the legislature on the grounds that public policy promulgated therein is contrary to what the court considers to be in the public interest. Id. (Emphases added)

Even that clear rule, however, is subject to this court's right to find "jural rights" expressly or impliedly in our constitution, see Wittmer v. Jones, Ky., 864 S.W.2d 885 (1993), and to limit the policy-making role of the legislature to prospective legislation, as this court has held it "crystal clear that courts are the proper forums to determine the issues presented in the interpretation of past transactions." Akers v. Baldwin, Ky., 736 S.W.2d 294, 309 (1987).

Even here, however, there is a functional equivalent of the doctrine of "comity," in that the legislature's expression of intent is given deference, even if it cannot be given controlling effect. The Court of Appeals most recently applied this principle in Wigginton v. Com. Ex. Rel Caldwell, Ky. App., 760 S.W.2d 885 (1988). ("[W]e have no problem with the court's decision to not apply KRS 406.031 retroactively. However, the enactment of that statute does provide guidance in that it clearly evinces a legislative intent to limit liability. . .").

In such cases as Rose v. Council for Better Education, Inc., Ky., 790 S.W.2d 186 (1989), this court has gone far to force the legislative branch to adhere to extraordinarily complex and difficult constitutional mandates, but, at the same time, urges "restraint" upon itself when it accepts the responsibility to judge the legislature's own rules. Philpot v. Patton, Ky., 837 S.W.2d 491, 494 (1992).

Indeed, when this court moves back and forth across the very difficult boundary line between proper and excessive reliance on the policies of the judiciary, it notes that it may be "somewhat presumptuous" in some of its determinations. City of Lexington v. Motel Developers, Inc., Ky., 465 S.W.2d 253, 256 (1971).

The power of this court to declare acts of the legislature unconstitutional is enhanced when the legislature steps into a judicial arena, even if the constitution gives

express power to the legislature so to act. Thus in Willis v. Johnson, Ky., 121 S.W.2d 904 (1938), where the legislature acted as mandated by the constitution to create judicial districts, this court took the unusual step to declare that "it is our duty to examine the facts in order to determine whether or not there was any evidence to support the legislative conclusion that a new district was necessary." Id. at 907. Such raw fact-finding is to be contrasted with the extreme unwillingness of this court to accept a delegation of the power to make judgments on political districts, even when the legislature chooses to ask the judiciary to make districting judgments. Fawbush v. Bond, Ky., 613 S.W.2d 414 (1981).

It is our duty, then, to examine this case in the light of the historic relationship between the legislative and judicial branches, noting that we are here dealing with a case, FIRST, where the constitution has (a) expressly delegated to the legislature a function in the judicial realm, and (b) expressly granted to the Chief Justice of the Supreme Court a power which he here purports to exercise, and SECOND, where each branch has sought and obtained the cooperation of the other.

And so we return to the application of Section 110 of the Constitution. Much of Penny's and Robert's briefs discuss whether or not the appointment of their trial judge was "temporary." In the most fundamental sense, it is futile to

determine in some general way whether Judge FitzGerald is acting in a "temporary" capacity. As Robert argues, since Judge FitzGerald serves until "further orders of the court," his tenure could terminate at any time. What could be more fleeting than an appointment at the discretion of the Chief Justice? In that same sense, though, all life is temporary. Who can say that any judge will serve out his or her entire term? As Penny says, by the time of the publication of this Opinion, nearly four years will have passed since Judge FitzGerald's appointment; and the General Assembly has as yet shown no signs of enacting a "permanent" solution to the problems addressed by the General Assembly, by the Task Force and by the family court project. Nor has the General Assembly shown any sign of ending Jefferson County's experiment. Out of context, the word "temporary" could mean almost anything -- or nothing.

The case most like this one in constitutional format is Craig v. O'Rear, 199 Ky. 553, 251 S.W. 828 (1923), in which the legislature[5] purported to appoint "temporary agents" to perform functions in establishing two schools for elementary school teachers, which functions the legislators were not willing to assign to executive "officers exercising a portion

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[5]As we note in footnote 2, we deal with this case as an activity of the judicial branch of government, while in fact it involved an act of the Chief Justice. Similarly, in the Craig case, the leadership of the general assembly actually exercised the powers of appointment. As in Brown, for purposes of these matters, it is appropriate so to treat these legal issues.

of the sovereignty of the state." Id. at 831. A part of this court's determination in Craig that the legislature could so act lay in the fact that the need addressed by the legislature would end of its own accord, once the schools were up and running (not to mention once they were funded by subsequent General Assemblies), and the "temporary" agents had been assigned only "functions [which] cease when the purpose is accomplished." Id. at 831. So, too, with the experiment in Jefferson County which is here examined.

A large part of the reasoning of the decision in Craig, however, involved the fact that the temporary actors were mere "agents" and not full-fledged "officers" of the sovereign. Thus, this court approved an assignment of relatively low status, which it might not have done had the assignment otherwise been a duty of a permanent officer. The matter of status, however, is expressly addressed by our constitution in this case. The Chief Justice is plainly allowed to grant Circuit Judge status to District Judges. Thus, we are left with the teaching of Craig that "temporary" appointments are involved where the appointees' "functions cease when the purpose is accomplished." The "temporary" nature of Judge FitzGerald appointment, by parity of reasoning, is measured, not by whether he can be expected to live forever or for the large portion of a Circuit Judge's eight-year term, but rather whether (under section 110 of the constitution) he will no longer serve when his service is no longer "necessary for the

prompt disposition of causes." While a different result might be required if some intention of permanence could be implied by a 20-year tenure for the 1991 order,[6] whether or not the present appointment is "temporary" will be answered at the same time we determine whether Judge FitzGerald's appointment was made "for the prompt disposition of causes." This is not a separate question at all. If the constitution and sections of the constitution are to be read "as a whole," Wood v. Board of Education of Danville, Ky., 412 S.W.2d 877, 879 (1967), it is certainly appropriate to read this one constitutional sentence as a whole. It is therefore more important that the 1991 Order was entered "[i]n order to implement the Family Court Project in Jefferson County," than that the appointments are "subject to further orders of this Court."

The question, then, narrows itself: Shall this court give effect to the act of the Chief Justice as a means to address "the prompt disposition of causes," an exercise of power in "cooperation" with the legislature's present

[6]In such event, the action of the Chief Justice would be analyzed in terms of whether he had acted (or will be acting 16 years hence) to meet a "necessity" for a temporary appointment under Section 110 of the Constitution, and analyzed as set out below. On the face of it, it appears that several years would be required to obtain a fair test of how the system would handle a reasonable number of completed dissolution actions, and a reasonable number of motions for changed custody and support which inevitably follow some of them. It is at least arguable that the immediate adoption of a "permanent" solution through constitutional amendment or statute would have produced unworkable results, thus actually delaying the discovery of a truly satisfactory permanent solution to the problem.

unwillingness to exercise its ultimate authority to alter the assignment of jurisdiction among the courts? The search for "promptness" is arguably visible at two levels, both in (a) the judicial economy sought by the experiment itself, and (b) the speed with which the legislature can arrive at its ultimate conclusion by the use of a one-county experiment, rather than by adopting immediately a generally applicable and detailed statute or constitutional proposal in uncharted waters. Shall we give a "so-called liberal construction" to the Section 110 power, to reflect the spirit of "comity" between the legislative and judicial branches of government, recognizing the "blend" of roles in which both the General Assembly and the Chief Justice have participated? Or shall this court determine, in accordance with some "strict construction," (a) that the goals of the Jefferson County Family Court Project go so far beyond "the prompt disposition of causes," and/or (b) that the Chief Justice could only reply to the legislature that it must enact any experiment through generally applicable legislation?

Were we making a judgment of the "necessity" called for by the constitution on our own, we would weigh several factors, (a) the relative "predominance" of the need for "promptness" in the establishment of the experimental program, (b) the "close relationship" between promptness and the other reasons supporting family dispute reform and the one-county test, and (c) the availability of other methods for

accomplishing the goal of promptness. This three-part test is suggested by Commissioner Clay in Chrisman v. Cumberland Coach Lines, Ky., 249 S.W.2d 782, 784 (1952), in the context of the court's determination of whether a mixed-purpose endeavor (a public transportation system owned by a private entity) constitutes a "public purpose."

On the other hand, we are not here making a de novo determination, but judging an action of the Chief Justice. Were we dealing here with the deed of another constitutional actor, it would be entitled to the presumption of having acted for the proper purpose, as in the case of a city legislative body exercising inherent power, City of Paducah v. Moore, Ky., App., 662 S.W.2d 491, 495 (1984) ("The City's motive in doing what they did is not before the court on this appeal except with respect to the ultimate result of the motive, the creation of a subterfuge in order to accomplish what they wanted to do."), or the state legislature itself acting under constitutional constraints, Holsclaw v. Stephens, Ky., 507 S.W.2d 462, 472 (1974) ("Nothing in the record before us suggests an attempt by the General Assembly to escape or avoid constitutional limitations applicable to city and county governments by the expedient of calling them by another name. If such were the case the act would amount to no more than a subterfuge and we would not hesitate to strike it down.")

So far as this record is concerned, there is not the slightest hint that Chief Justice Stephens did not determine