RENDERED: NOVEMBER 23, 1994
TO BE PUBLISHED

Supreme Court of Kentucky

94-SC-334-MR

PENNY L. KUPRION — APPELLANT

V.

APPEAL FROM COURT OF APPEALS NO. 93-CA-2760-OA
JEFFERSON FAMILY COURT 93-FD-1244

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

AND

ROBERT G. KUPRION — REAL PARTY IN INTEREST

OPINION OF THE COURT BY JUSTICE WINTERSHEIMER

AFFIRMING

This appeal is from a decision of the Court of Appeals which denied a writ of mandamus challenging the constitutionality of what is known as the Jefferson Family Court, seeking to have the "Family Court" declared unconstitutional and requiring the "Family Court Judge" to transfer the case to a division of the regular circuit court.

The issues presented are whether a district judge lacks subject matter jurisdiction to grant a decree of dissolution; whether the Chief Justice can grant district judges the power to hear dissolution cases; whether the Jefferson Family Court violates Sections 27 and 28 of the Kentucky Constitution; whether the appellant is denied equal protection of the law under the

Federal and State Constitutions and whether the Court of Appeals erred in denying mandamus.

On April 29, 1993, Penny L. Kuprion filed a petition for dissolution of marriage with the clerk of the Jefferson Circuit Court. A decree of dissolution was entered on April 29, 1994. Pursuant to the computerized system used by the clerk, the matter was assigned to the Jefferson "Family Court" to be presided over by the Honorable Richard J. Fitzgerald, a Jefferson County District Judge. Claiming that the "Family Court" was unconstitutional, she moved the Family Court Judge to reassign the matter to Jefferson Circuit Court. Her motion was denied. She then sought a writ of mandamus to request that her case be reassigned to the Jefferson Circuit Court and that the Family Court project be declared unconstitutional. The Court of Appeals denied mandamus and this appeal followed.

Our task is to determine the nature of what has been established in Jefferson County and whether it passes constitutional muster. We cannot deem a legislative resolution or judicial order constitutional merely because it may seem in our view to be expedient, necessary or wise, or even if it enjoys strong popular support. The Kentucky Constitution is, in matters of state law, the supreme law of this Commonwealth to which all acts of the legislature, the judiciary and any government agent are subordinate. It is our responsibility to consider only whether the action meets or violates constitutional requirements.

The Kentucky General Assembly, on March 31, 1988, passed a concurrent resolution directing the Legislative Research Commission to appoint a Task Force to examine the need for and

feasibility of establishing a Family Court or division of court. 1988 Ky. Acts Ch. 128, HCR 30.

It should be observed that members of the public and even the legal profession might easily be lulled into the colloquial concept of "Family Court." The better definition would be to label it as a "Family Court Project." It should be recalled that within district court there are already the titles of "traffic court" and "probate court," as well as "juvenile court" and "small claims court," which were created by statute. KRS 24A.110(1); KRS 24A.120(2); KRS 24A.130; KRS 24A.230.

The Task Force was directed to make findings and conclusions, including summaries of any legislation it might recommend. The 16-member Task Force included five members of the General Assembly and, after due consideration, recommended that rather than immediately create a Family Court in Kentucky, a pilot Family Court project be initiated; that the pilot project be implemented by the Court of Justice; that the Chief Justice select the district judges; and that the 1990 General Assembly fund the project, including implementation and evaluation.

The Task Force report in 1989 amplified the preamble to the concurrent resolution which established it by making ten findings, including the idea that fractionalization of family jurisdiction leads to a waste of time and delays, that it increases the time and expense involved in these cases and creates an inordinate delay between intake and final resolution.

The Task Force recommended to the Supreme Court and to the General Assembly that the Supreme Court establish by rule, a pilot project for the 1990-92 biennium with at least one urban

and one rural location and that the General Assembly fund the project. The recommendations of the Task Force were first implemented in Jefferson County where, once a family dispute entered the system, all matters related to it were to remain with the one judge who was initially assigned to the case.

The procedure of using an experimental Family Court Project to study the feasibility prior to establishment by the legislature or constitutional amendment reflects the practice followed in Florida, New York and Virginia.

In 1991, the Chief Justice selected three circuit judges to be sworn in as special district judges and three district judges to be sworn in as special circuit judges. His 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. Currently the Family Court project hears 75 percent of the actions for dissolution of marriage, and 25 percent are heard in the circuit court. In 1994, the General Assembly increased funding to permit the size of the project to increase from six to eight judges in July, 1994. It is expected that all new dissolution actions will be placed in the Family Court project rather than on the regular circuit court docket. The Family Court project continues to hear all adoptions, terminations of parental rights, dependency/neglect, paternity and juvenile matters.

The assignment of judges to the Family Court project is made on a voluntary basis. The district judge in this case, as well as all other district judges who have been appointed as special

circuit judges, have the necessary constitutional qualifications to serve as circuit judge. Ky. Const. §122.

Penny L. Kuprion claims that a district judge lacks subject matter jurisdiction to grant a decree of dissolution of marriage. She cites Section 114(6) of the Kentucky Constitution and KRS 24A.110-130; KRS 406.021 and KRS 406.140. We must agree that a district judge in his capacity as district judge has no jurisdiction to hear a dissolution case. However, in this situation the district judges involved are properly sworn as special circuit judges pursuant to Section 110(5)(b) of the Kentucky Constitution in order to hear cases which fall within the exclusive jurisdiction of the circuit court. The district court cannot hear divorce cases; Only the circuit court has that power.

It is inherent in the nature of the judicial branch that in a multi-judge court, the actions of a single member including the Chief Justice acting in an administrative capacity are subject to review. The reviewing court can take notice of a presumption of regularity to be accorded to the actions under review which does not preclude a review of the substance and constitutionality of such actions. Here the actions and orders of appointment were not improper. Accordingly, we now consider the constitutional aspect of the actions.

We must reject her claim because Section 110(5)(b) in pertinent part states that the Chief Justice shall assign temporarily any justice or judge of the Commonwealth to sit in any court other than the Supreme Court when he deems such assignment necessary for the prompt disposition of causes.

She also argues that the Chief Justice may not use Section 110(5)(b) to appoint a district judge as a temporary special circuit judge in order to hear dissolution actions under the authority of the Jefferson Family Court project because KRS 26A.020 provides in part what is to take place when a judge is unavailable to perform judicial duties.

We disagree. The appellant can cite no authority for the proposition that unavailability of a sitting judge is the sole grounds on which the Chief Justice can make a temporary appointment for the prompt disposition of causes. This Court sustained the appointment of a retired circuit judge as a special judge to allow him to complete his caseload despite the fact that his successor had already taken office. Regency Pheasant Run Ltd. v. Karem, Ky., 860 S.W.2d 755 (1993).

The Chief Justice has also appointed a retired circuit judge as a special circuit judge to hear the voluminous asbestos litigation in Jefferson Circuit Court because it would otherwise clog the dockets of every division of that court. Huntzinger v. McCrae, Ky.App., 818 S.W.2d 613 (1991), permitted a chief regional circuit judge to appoint a special circuit judge from outside the region. Although it is unclear whether the regular circuit judge was unavailable to sit, that panel of 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.

It should be remembered that Section 109 of the Constitution established a trial court of general jurisdiction, known as a circuit court, and a trial court of limited jurisdiction, known

as the district court, as the only trial courts in Kentucky. Those two courts, together with the Supreme Court and the Court of Appeals, are the only judicial entities into which the single Court of Justice shall be divided. Section 113 of the Constitution provides that the General Assembly shall determine jurisdictional limitations for the district court and Section 112 provides that appellate jurisdiction shall be assigned to the circuit court as provided by law. The circuit court also exercises all other original jurisdiction not vested in some other court. It is further recognized that the legislature has no power to create a court not provided by the Constitution. Hoblitzel v. Jenkins, 204 Ky. 122, 263 S.W. 764 (1924).

We must conclude that KRS 26A.020 does not limit the appointment power of the Chief Justice pursuant to Section 110, but only establishes a procedure by which it is to be exercised when a judge is actually unavailable to sit.

Section 110(5)(b) provides the necessary authority for the Chief Justice to assign a judge temporarily to any court other than the Supreme Court for the prompt disposition of causes. The discretion of the Chief Justice in making such an appointment is limited to that necessary for the prompt disposition of causes. In this case, such discretion was supported by the report of the Family Court Feasibility Task Force and the adoption of HCR 30.

The second prong of Penny Kuprion's argument against the validity of Judge Fitzgerald as a special circuit judge is that the order of the Chief Justice dated March 20, 1991 is not temporary because it did not give a date certain on which the

appointment would expire. The order recites that the appointment shall continue "until further orders of the court."

Section 110(5)(b) of the Constitution does not confer unbridled, absolute or unlimited power on the Chief Justice in his capacity as Chief Executive of the court system. The Section refers only to temporary appointments of judges to provide for the prompt disposition of causes. It should be pointed out that the word "temporary" relates only to the appointment of the judge. In no way can a temporary court be created by an order of the Chief Justice. Such an extraordinary action must be rooted in fact and the reason for the temporary appointment should be noted in the order of appointment. Section 113(6)(b) states that the grant of jurisdiction for a district judge comes from the General Assembly and not from any other entity. The appointment of special judges has a foundation in the language of Section 115.

The situation here is that the Family Court project is a concurrent session of the already existing district and circuit court divisions and is convened in response to HCR 30. The purpose of the project is to determine if domestic cases involving aspects of family relations can be adjudicated more effectively under the so-called "one judge, one family" approach. The project is based on the temporary assignment of district and circuit judges as special judges to serve in a temporary capacity. No new divisions of the court have been created.

Penny L. Kuprion maintains that a new court has been created. The concurrent resolution considered both the possibilities of the development of a court or a division of

court, leaving open the possibility that the ultimate solution of the problem faced by the Task Force might be a constitutional amendment creating a truly new court. This argument might have been rendered moot if the Task Force and the orders of this Court used the word "division" as in the case of the creation of a Small Claims Division of district courts. See Hibberd v. Neil Huffman Dotson, Inc., Ky.App., 791 S.W.2d 726 (1990). It is obvious 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. The words might have been used more precisely, but they do not give rise to any constitutional infirmity.

A particularly telling aspect of the temporary nature of this situation can be seen in the necessity for legislative funding of this project in each biennium as part of the judicial budget. This funding could be suspended by any succeeding General Assembly. Hayes v. State Property, Ky., 731 S.W.2d 797 (1987). The cases which have considered the relationship between budget questions and statutes reflect the fact that budgeting can be in many ways the most dramatic means by which a legislature can express itself. Cf. Commonwealth, ex rel Armstrong v. Collins, Ky., 709 S.W.2d 437 (1986); Smith v. Kentucky State Racing Com'n, Ky.App., 697 S.W.2d 153 (1985). "Since the budget is the principal instrument of resource allocation and policy planning, it reflects state government's public policy priorities." See P. Miller, Kentucky Politics and Government: Do We Stand United (1994) at p. 227.

The introduction of Senate Bills 83 and 84 by the 1994 General Assembly and the adjournment of that body without having acted upon the legislation is of no consequence in our consideration. It is mere dicta to say that it would be helpful if the General Assembly had indicated a time frame in which to conduct the Family Court project and had required a report to be submitted to it within that time frame. However, it does not affect our consideration of the concept of a temporary appointment.

The word "temporary" means transient or passing but not permanent. Cf. Rogers v. City of Louisville, Ky., 176 S.W.2d 387 (1943). "Temporary" is a word of much elasticity and it has no fixed meaning in the sense that it designates any fixed period of time. Kahn v. Lockhard, Mo., 392 S.W.2d 30 (1965). Perhaps the most colorful definition of the word "temporary" is "for a brief period of time, transitory, or limited, or on the highway of time, a cul-de-sac, but not a limitless boulevard of eternity." Simplex Precast Industries, Inc. v. Biehl, 149 A.2d 121 (Pa., 1959).

Here the appointment of a special judge is for an indefinite time, but the language of the order limits the appointment by stating "until further order of the Court" which recognizes that upon the occurrence of some event the appointment will cease to exist. The Chief Justice has not exceeded his constitutional authority.

A very old Arkansas decision indicated that a judicial reassignment statute would be unconstitutional because "temporarily" in the state constitution is not a permanent or

lasting interchange of judges. Knox v. Beirne & Burnside, 4 Ark. (4 Pike) 460-464. The power of the Chief Justice is not absolute. It must be exercised under the authority granted by the constitution and is subject to review by the entire Supreme Court. The use of the authority is simple because the power is simply stated in the Constitution. The authority is fact related to the prompt disposition of causes with some element of discretion.

We must pause to consider the status of the actions of the Chief Justice. We find them to be acts of discretion that are not an abuse of that discretion. By means of comparison, we frame our standard of review along the lines of a clear abuse of discretion by a trial court. The term is usually related to trial court activities, but can be applied to the use of judicial authority in any respect, particularly when the authority is conferred by the Constitution. "Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." Kentucky National Park Com'n v. Russell, 301 Ky. 187, 191 S.W.2d 214 (1945) (referring to Harvey Coal Corp. v. York, 252 Ky. 605, 67 S.W.2d 977 (1924)). See Also City of Louisville v. Allen, Ky., 385 S.W.2d 179 (1964). The exercise of discretion must be legally sound. See 5 Am.Jur.2d §774 Appeal and Error P. 217 (1962).

City of Louisville v. Allen, Ky., 385 S.W.2d 179 (1964), provides a number of very sound definitions for the term "discretion."

> "'Discretion' of court is a liberty or privilege allowed to a judge, within the confines of right and justice, to decide and act in accordance with what is fair, equitable, and wholesome, as determined by the peculiar circumstances of the case . . . ." Cited in In re Welisch, 18 Ariz. 517, 163 P. 264 (1964).
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> "This discretion, when applied to a Court of Justice, means sound judicial discretion guided by law. . . . It must not be arbitrary, vague and fanciful, but legal and regular." Watt v. Stanfield, 36 Idaho 366, 210 P. 998, 1000 (1960).
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> "Discretion implies that in the absence of positive law or fixed rule the judge is to decide a question by his view of expediency or of the demands of equity or justice. Citing People v. Surplice, 203 Cal.App. 2d 784, 21 Cal.Rptr. 826."

The need to address the problem of what has come to be known as "Family Court Practice" was demonstrated by the Task Force in sufficient detail. The authority of the Chief Justice is established by Sections 110 and 116 of the Constitution. The Chief Justice was within his constitutional authority to accept the report of the Task Force and then to exercise his sound discretion as to how and where to implement the request of the Task Force.

The third argument is that the Jefferson Family Court project violates Sections 27 and 28 of the Kentucky Constitution and is therefore unconstitutional. The issue is whether the establishment of the Family Court project has usurped the legislative power to assign jurisdiction of subject matter to the circuit court as provided in Section 109 of the Constitution and detailed by KRS 23A.010.

It involves the question of whether the Family Court project is a separate judicially created court within the Court of

Justice and consequently unconstitutional despite the legality of appointment pursuant to the Constitution.

It should be observed that the judicial amendment of 1975 and the constitutional sections created by it may have resulted in some overlap of authority. See D. McSwin, note, Judicial v. Legislative Power in Kentucky: A Comity of Errors, 71 Ky. L.J. 829 (1983). However, there has never been any question that the Supreme Court has authority to act upon its responsibilities pursuant to Section 110 of the Constitution. Ex Parte Farley, Ky., 570 S.W.2d 617 (1978); Regency Pheasant Run, Ltd., supra.

There is legislative authorization through which HCR 30 delegates authority to the Legislative Research Commission to appoint a Task Force to study the establishment of a court or division of court devoted to family law problems and the management and resolution of family law cases. The Task Force recommended that the Chief Justice supervise the project in his capacity as head of the Court of Justice pursuant to Section 110(5) of the Constitution. The pilot project was developed using the existing judicial resources in the only constitutional manner available. The Chief Justice cannot and did not create any new judges or any new courts.

The Family Court project does not establish a new or separate court pursuant to Section 109 of the Constitution. The project has resulted in a constitutionally authorized judicial unit known as Family Court which uses judicial resources already in existence. Thus it complies with Sections 27 and 28 of the Constitution in preserving the separation of powers. The use of temporarily assigned judges who are already a part of the Court

of Justice complies with Section 109 of the Constitution. Consequently the Family Court project is constitutional.

Penny L. Kuprion has not been denied equal protection of the law guaranteed by the Federal and State Constitutions. She has not suffered any discrimination by virtue of having her case assigned to an elected district judge sitting as an approved special circuit judge in the Family Court project. Such a submission could have resulted regardless of whether the cases were assigned alphabetically or in any other manner. It must be remembered that the hearing judges who may have been elected as district judges are not serving in that capacity but rather as special circuit judges pursuant to a proper appointment by the Chief Justice. The district judges involved in this project hear divorce and custody cases in their capacity as special circuit judges only.

Although the question of alphabetical discrimination may be real in some circumstances, it is not prejudicial here and does not require any interference with the Family Court project. There is no palpable error or manifest injustice as required by CR 61.02. There is no basis for relief on such grounds.

The Court of Appeals did not commit reversible error in denying the petition for mandamus. The Court of Appeals properly determined that the Jefferson Family Court project is a temporary "joint research project" of the judiciary and General Assembly and is structured in a constitutionally permissible manner. The panel of the Court of Appeals held that Judge Fitzgerald was constitutionally vested in his capacity as a special circuit judge with appropriate subject matter jurisdiction to consider

the divorce proceedings. Accordingly the Court of Appeals was correct in denying the petition for a writ of mandamus.

It is not for us to say that the implementation of the project could have been accomplished in a better fashion. Perhaps the assignment of cases should be on a random basis; perhaps participation by the litigants should be voluntary; perhaps the establishment of a Family Court should have been as a division of the circuit court with a definite time limitation imposed by the legislature. Our only task is to determine the nature of what has been established and its constitutional status.

Our research indicates that approximately fifteen states have adopted the Family Court concept to some degree. A comprehensive review of the Family Court system in the United States may be found in an article by presiding Judge Robert W. Page of the Family Division of the Superior Court of New Jersey in 44 Juv. & Family Ct. J. 1 (1993). One of the most interesting observations made by Judge Page is that "the optimal situation would be the establishment of a Family Court as a division of the highest court of general jurisdiction." Id. at 40.

Our review of the establishment of Family Courts indicates that in Virginia, the pilot project was complete in no more than ten years. In New York, the Family Court was established pursuant to a constitutional amendment. See N.Y. Const. art. VI, § 13 (Amended 1961). The Supreme Court of Florida created a Family Court by adopting the Task Force Report in an opinion. In Re: Report of the Com'n on Family Cts., 588 So. 586 (Fla. 1991).

The Family Court concept indicates no single pattern adopted by all the states that have used the system. Simply calling something Family Court does not always make it such. Cf. Robert E. Shepherd, Jr. Juvenile Justice, 8 Crim. Just. 37 (1993)

It should be clear that the creation of any court is vested only in the legislature by virtue of Sections 112 and 113 of the Constitution, and new district or circuit courts can be established only upon a certification of necessity by the Supreme Court.

The final form, if any, of the Family Court will need to be detailed in legislation. That does not mean that one branch of government cannot assist another branch of government in analyzing the methods to make a system of government including the administration of judicial matters more effective. The funding of the pilot program by the General Assembly gives approval to the actions taken by the Chief Justice to implement the recommendations of the Task Force set up by the General Assembly itself. The concurrent resolution which created the pilot project requires funding periodically by the legislature. The duration of such funding and the duration of the project is clearly within the bounds of the legislature. Under the rules of comity, the judiciary has not invaded the province of the legislature. The Chief Justice cannot and has not created a court system. The General Assembly could require a termination of the project or, in effect, a report which could be used to determine the permanent status of a Family Court.

The Florida experience reported In Re Report of Commission on Family Courts, supra, required that each judicial circuit in

Florida was to develop a local rule establishing a Family division in its circuit. In formulating its local rule establishing a Family division, each judicial circuit in Florida was to develop its plan in accordance with available local resources and was also to develop an appropriate plan for its jurisdiction as if a Family division were properly funded by the state. The concept of a division of the circuit court is not entirely foreign to Kentucky jurisprudence. There is no valid reason why the General Assembly, with the assistance of the judiciary and a special committee of the judiciary should not be able to formulate a workable program which would combine the authority and jurisdiction of the district and circuit courts and include the feature of one judge/one case so popular in Family Court parlance.

There remains a vexing concern about how long the temporary appointments can be used to implement the Family Court project. It is not appropriate for this Court to advise the legislature as to when such a pilot project should be completed. Such a decision is within their sound legislative judgment. Future litigation as to the length of the project is not necessarily foreclosed by our decision here.

We must conclude that Judge Fitzgerald is presiding over the dissolution action in a proper and constitutional manner pursuant to his appointment as a special circuit judge in conformity with Section 110(5)(b) of the Constitution. The Family Court project does not create a new and unconstitutional court in violation of Sections 27, 28 or 109 of the Constitution. Consequently, Penny L. Kuprion has not been denied equal protection of the law

pursuant to either the United States or Kentucky Constitutions. The Court of Appeals correctly denied mandamus.

The decision of the Court of Appeals to deny the writ of mandamus is affirmed.

Lambert, Spain, Miller and Stumbo, JJ., concur. Reynolds, J., concurs in majorty opinion in result only. Special Justice, Robert S. Miller, also files a separate concurring opinion in which Spain and Stumbo, JJ., join. Special Justice, David Tachau, files a separate dissenting opinion. Stephens, C.J., and Leibson, J., did not sit.

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AND

ROBERT G. KUPRION — REAL PARTY IN INTEREST

CONCURRING OPINION[1] BY SPECIAL JUSTICE ROBERT S. MILLER

I agree entirely with the result and the reasoning of this court's principal opinion, but feel constrained by the reasoning of the dissenting opinion respectfully to propose an underlying analysis which I believe independently supports the court's principal opinion. Most of my differences with the dissenting opinion are covered by the principal opinion itself, or are self-evident. The notion, for example, that the Chief Justice

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[1]I am not unmindful (and I know that the author of the dissenting opinion also is not) of the language Kentucky Utilities v. South East Coal, Ky., 836 S.W.2d 407 (1992) 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 Leibson 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.

has created a new court is to me at best a legal conclusion adopted to characterize reasoning on a different subject, and at worst a play on words. The Chief Justice purported to grant the authority of a Circuit Judge to a District Judge; and if he did that properly, he did that and no more.

More fundamentally, though, I believe that the dissenting opinion has been misled by the fact that both Penny Kuprion and Robert Kuprion framed the arguments in their briefs by reference to Legislative Research Com'n v. Brown, Ky., 664 S.W.2d 907 (1984), a leading modern authority of this court (as the dissenting opinion correctly quotes) 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, 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. The dissenting opinion over and over harks back to this language of Brown, which I believe is so far afield from the issues before this court that we would be just as well served to consider Brown as a part of a different body of law. Brown did not focus directly on any issue between the legislative branch and the judicial branch, much less on an issue where the two branches have agreed, nor where there are express constitutional provisions that point in opposite directions on the

facts before the court. Thus, that opinion gives some, but severely limited guidance 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.[2]

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[2] 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. It is therefore doubly misleading that the dissenting opinion in several places quotes Brown's quotations from an opinion of the United States Supreme Court. In fact, the 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 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, 493 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 ex rel 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

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 1029 (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 long allowed legislative rule-making in this area of "inherent" judicial power, so long as the operation of the courts was not "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, 288 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. O'Bryan v. Commonwealth, Ky., 634 S.W.2d 153 (1982); Combs v. Huff, Ky., 858

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)

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 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 are not here even asked to resolve the continuing debate about the judiciary's proper role, this court certainly understated the judicial practice when it said in