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Supreme Court of Kentucky

NO. 94-SC-000334

PENNY L. KUPRION	**APPELLANT**
vs.	
HON. RICHARD J. FITZGERALD, JUDGE JEFFERSON DISTRICT COURT, DIVISION 14	**APPELLEE**
and	
ROBERT G. KUPRION	**REAL PARTY IN INTEREST**

APPEAL FROM COMMONWEALTH OF KENTUCKY COURT OF APPEALS

✓REPLY BRIEF FOR APPELLANT

IT IS HEREBY CERTIFIED that a copy of the foregoing Reply Brief for Appellant was on this the 5 day of July, 1994, mailed to the Appellee, the Hon. Richard J. FitzGerald, Judge, Jefferson District Court, Division Fourteen, Jefferson Hall of Justice, 600 West Jefferson Street, Louisville, Kentucky 40202, and to Maureen Sullivan, Esq., Counsel for Real Party in Interest, Suite 600 North, First Trust Centre, 200 South Fifth Street, Louisville, Kentucky 40202.

Ted W. Spiegel

TED W. SPIEGEL
Counsel for Appellant

SUPREME COURT OF KENTUCKY

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PENNY L. KUPRION — APPELLANT

vs.

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INTRODUCTION

This brief is submitted in reply to the Appellee and Real Party in Interest brief filed with this Court on June 23, 1994. The purpose of this brief will be to distinguish those historical circumstances when the use of special judges is permissible and prove that the present use of special judges has no precedent.

STATEMENT OF POINT AND AUTHORITIES

I. The use of Special Judges on an indefinite basis which does not depend on a fixed period of time, or the life of a particular case, is contrary to established precedent.....1

KRS 26A.020.....1

Cartwright v. State, Ind. App. 621 N.E.2d 1165 (1993).....1
Hargadon v. Silk, 129 S.W.2d 1039, 279 Ky. 69 (1939).....2,3
In re Kenton County Bar Ass'n.,
236 S.W.2d 906, 314 Ky. 664 (1951).....1,2
Regency Pheasant Run Ltd. v. Karem,
Ky., 860 S.W.2d 755 (1993).....3

ARGUMENT

(1) THE USE OF SPECIAL JUDGES ON AN INDEFINITE BASIS WHICH DOES NOT DEPEND ON A FIXED PERIOD OF TIME, OR THE LIFE OF A PARTICULAR CASE, IS CONTRARY TO ESTABLISHED PRECEDENT.

The Appellant has consistently argued that a district judge lacks jurisdiction to enter a Decree of Dissolution of Marriage. The Appellant has further argued that short of certain isolated circumstances no person, or body of persons, other than the Kentucky General Assembly can grant the necessary subject matter jurisdiction to hear divorces on a regular basis to a district judge. This includes the Supreme Court of Kentucky and the Chief Justice of Kentucky.

Perhaps this question can best be amplified by a detailed study of the traditional uses of special judges and judges pro tempore. While the Kentucky Constitution only uses the designation "special judge" and KRS 26A.020 uses the same designation, what we are really talking about has traditionally been defined by two (2) separate designations. The first is judge pro tempore and the second is special judge.

Indiana has defined both of these classifications, as well as "judge" in **Cartwright v. State**, Ind. App. 621 N.E.2d 1165 (1993). A *judge* is either the duly elected or appointed judge of the court, or a duly appointed judge pro tempore or special judge. Before giving rise to additional arguments, it should be pointed out that circuit judges in Indiana are elected officials as are some superior court judges and county court judges. In large municipalities, such as the Chicago suburbs and Indianapolis, some superior court judges are not elected but are appointed by the Governor, hence the reference to appointment. **Cartwright, id.** further defines a *judge pro tempore* as appointed for a specified time period in the absence of the regular judge. A *special judge* is defined as appointed for the duration of a case.

One might argue that this is a treatise of Indiana law and has little bearing on the court system in Kentucky. No statement could be further from the truth. Kentucky has adopted very much the same definitions and distinctions. **In re Kenton County Bar**

Ass'n., 236 S.W.2d 906, 314 Ky. 664 (1951). This case dealt with a request to the Court of Appeals (now Supreme Court) to review a formal ethics opinion. The opinion was requested by lawyers who frequently sat as judges pro tempore in the local courts and were asking for an opinion as to whether or not such action disqualified them from actual law practice in those courts. The court stated:

> ". . . If there is a continuing appointment with more or less permanent tenure of office, although subject to the pleasure of the judge or city legislative body as is true in regard to judges pro tem of police courts in cities of the first, fifth and sixth classes and of county judges pro tem, it is improper for the appointee to practice any case in the court over which he may preside, and until a reasonable time after he has severed his official connection with that court. In other cases, where the services are in the nature of a special judge and the appointment is limited to a particular trial or short period of time, the appointee is not precluded from practice in that court until after the expiration of his appointment. However, if a lawyer accepts such temporary appointments frequently so that he may be identified in the minds of some people with the judicial position, he thereby disqualifies himself for further practice in that court until that impression has been removed." In re Kenton County Bar Ass'n., 236 S.W.2d 906, 314 Ky. 664 (1951) at p. 909.

In Hargadon v. Silk, 129 S.W.2d 1039, 279 Ky. 69 (1939), the court faced the distinction of special judges and judges pro tempore. In this case, the court held that a permanent judge pro tempore for the City of Louisville Police Court was unconstitutional in that the very nature of a judge pro tempore required appointment each time the regular judge was unavailable to hold court. The court further opined:

> "We have had in this commonwealth from time to time statutory provisions with reference to the appointment of special, or pro tem circuit judges in contingencies wherein the regular judge of such courts for some reason could not act. At the present time that authority is conferred upon the chief justice of the commonwealth. All of those statutes set forth the contingencies when a special or pro tem. circuit judge might be appointed by the particular authority upon which the right was conferred; and it has never been exercised except when and as occasions arise. We anticipate that no one would insist that under the present statutory provisions for the appointment of special or pro tem. circuit court judges, the chief justice could appoint one or more standing special judges to function in any circuit court of the commonwealth upon his direction." Hargadon v. Silk, 129 S.W.2d 1039, 279 Ky. 69 (1939) at p. 1042.

Special judges in Kentucky traditionally take on the role of either being a judge pro tempore which is to sit in the absence or the unavailability of the regular judge of the court, or to be a special judge which is to sit when a judge recuses him or herself from a particular case or cases. This is in line with the present court's finding in **Regency Pheasant Run Ltd. v. Karem**, Ky., 860 S.W.2d 755 (1993). In this case, the retired circuit judge was appointed special judge for one (1) day to dispose of nine (9) cases. Each of these cases had been heard prior to retirement and the judge had not yet delivered his rulings. His special judge commission allowed for this and for no more.

We contrast this authority to the present case before the court. The district judge is appointed as a special circuit court judge to hear a class of cases -- some of which have not even been filed. Justice Thomas in **Hargadon, id.** could not fathom such a situation. In retrospect, we can now say that the distinguished justice was myopic as a visionary, but at least he recognized the potential for abuse of the power to appoint special judges.

Somehow, the Appellee and the Real Party in Interest are asking this Court to adopt a new legal fiction -- that the circuit courts and the district courts can have a combined session, that we can cross swear the judges, and that everything is all right because it is just a project *(circuit court plus district court)* and not a court. Imagine that -- it is a court when it needs to be one, such as entering judgments, determining custody, enforcing child support or issuing emergency protective orders, but when it does not need to be one, such as withstanding constitutional scrutiny it is not a court at all, but it is a joint research project. This writer wonders whether someone who is serving jail time for contempt would find any consolation knowing that he or she was ordered to jail by a project.

The Appellee's argument is fatally flawed because it lacks precedental foundation. There is no authority for joint sessions of circuit and district court. Like it or not, district judges and circuit judges are not the same. They have different constitutional qualifications, they have different salaries, they have different terms of office, and most importantly they have different jurisdiction. The argument that the

Family Court is not a court has about as much credence as a scientific statement that the earth is flat.

Additionally, the Appellee and Real Party in Interest goes to great lengths to state that what is happening in Family Court is essentially no different than traffic court or probate court. There is an important distinction. Traffic court and probate court are district courts presided over by district judges who ran for office as district judges and who possess the necessary statutory and constitutional jurisdiction to perform their offices. Family Court uses district judges in roles which are statutorily reserved for circuit judges. The Appellee's own appendix recognizes this in the submission of the proposed biennial budget for 1994 to 1996. Describing the circuit court, the budget states that:

> "The circuit court is Kentucky's trial court of general jurisdiction. Composed of 56 judicial circuits and 93 judges, this court has within its jurisdiction all civil matters involving $4,000 or more, capital offenses and felonies, divorce, adoption, termination of parental rights, land title problems, contested probate, and appeals from district court and administrative agencies. Its' appellate jurisdiction is provided by law, and all appeals are on the record. Review of administrative actions of state agencies constitutes an original action and not an appeal. The court and its staff's responsibilities are: to conduct fair and impartial hearings on all cases within their jurisdiction in an expeditious manner; to provide a system of jury management; to provide for a permanent record of all court proceedings; to assure that counsel is provided to indigent criminal defendants, and to reduce the number of cases pending in circuit court." Brief of Appellee, Appendix, p. 8.

The legislature knows that there are 93 circuit judges, not 96. Pretending that district court judges are circuit court judges will not make it so. Putting all of the name dropping in the Appellee's brief aside, this case really boils down to one issue and one issue only. Can the Court swear in a district judge as a special circuit judge to sit in a court which is nowhere defined in the Constitution for an indeterminate period of time without reference to a particular case? The answer is no. Special judgeships are reserved for unavailability of the regular judge or recusal. A "*special judge*" (traditional special judge or judge pro tempore) must be seated in an existing court (district, circuit, or Court of Appeals) for a finite period of time or for a particular case or cases. Why

should it be any different? Two (2) of you who read this brief and decide this case are "*Special Justices*" and your commissions will end when this case is over. Your appointments are temporary. They would be temporary if they were for a period of time. They cannot be temporary if they extend beyond the elected term of those you sit for. The family court orders have already done that. They cannot be temporary when they are already older than the term of office for the district judges who sit under them. It might be acceptable to quote dictionary definitions for words, but you cannot ignore the day-to-day events. Family Court is a court. A district judge is a district judge. A district judge cannot be a special circuit judge forever, not even when he holds office by Order of the Chief Justice. The Jefferson Family Court is illegal and unconstitutional.

CONCLUSION

For the reasons so stated in this Reply Brief and in the Brief of the Appellant filed heretofore, it is respectfully urged that this Court reverse the Court of Appeals, direct that the Writ of Mandamus be issued, and find the Jefferson Family Court to be unconstitutional.

Respectfully submitted,

TED W. SPIEGEL
Counsel for Appellant
First Trust Centre, Suite 201 North
200 South Fifth Street
Louisville, Kentucky 40202
Phone: (502) 583-4290

THOMAS A. McADAM, III
Counsel for Appellant
235 South Fifth Street
Louisville, Kentucky 40202
Phone: (502) 584-7255