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TIE VOTES IN THE KENTUCKY SUPREME COURT

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Appellate courts have an odd number of judges or justices for a reason. One party is supposed to win, and an odd number of votes serves the goal of one of the parties getting more votes than the other. But what happens if a judge or justice cannot hear a case for whatever reason, leaving the court with an even number of participants and creating the possibility of a tie vote?

States around the country address the potential of a tie vote in an appellate court in a variety of ways. Most states[1] provide for a special judge or justice to be appointed so that an odd number of participating jurists is restored, although the states are not consistent on who makes the appointment. On the other hand, the United States Supreme Court does not have any provision for the appointment of special justices. In that Court, the lower court's opinion stands affirmed if the vote in the Supreme Court is 4-4.[2]

The Kentucky Supreme Court follows the same rule as the United States Supreme Court, with Kentucky Supreme Court Rule 1.020 stating that "in appealed cases if one member is disqualified or does not sit and the court is equally divided, the order or judgment appealed from shall stand affirmed." Interestingly, the rule is different if more than one justice is not able to participate in a particular case; Kentucky Constitution § 110(3) provides that if "as many as two Justices decline or are unable to sit" the Governor shall appoint "a sufficient number of Justices to constitute a full Court . . . ."

This article addresses the situation presented by only one justice being unable to participate in a case before the Kentucky Supreme Court, which creates the possibility of a tie vote in the Supreme Court. From 2020 through 2022, the tie vote rule set forth in Kentucky Supreme Court Rule 1.020 came into play five times, with the Supreme Court entering an order in each of those five cases stating that "[t]he vote of the six members of this Court participating in the determination of this appeal being equally divided, pursuant to SCR 1.020, the opinion of the Court of Appeals is affirmed."[3] No opinion was issued in any of the five cases.

The portion of Rule 1.020 calling for a case that equally divides the Supreme Court to stand affirmed has been in effect since 1978. But the Supreme Court has not always followed the intent of that Rule and previously took affirmative steps to avoid the possibility of one of its cases resulting in a tie vote. In doing so, the Court explained that it believed it had a duty to decide all cases before it, and allowing a case to stand affirmed because of a tie vote was a dereliction of its duty to decide the cases before it:

> This Court's responsibility is to decide all cases presented to it in an orderly and just fashion; a case affirmed by an equally divided court without opinion is not a quality decision by any stretch of the imagination and would limit this Court's responsibility.[4]

The Supreme Court in *Kentucky Utilities* followed a different procedure the Court had adopted to deal with cases in which a single justice did not participate. That procedure, set forth in an appendix to the *Kentucky Utilities* opinion, called for the Chief Justice to appoint a special justice for a particular case from a list of qualified attorneys submitted by each of the sitting Supreme Court justices.

A change in the make-up of the Supreme Court brought an entirely different approach to what to do when a single justice cannot participate in a case. In *Hodge v. Commonwealth*, 17 S.W.3d 824 (Ky. 1999), Chief Justice Lambert, writing for a unanimous court, pointed out that *Kentucky Utilities* "does not hold that the Constitution of Kentucky, or any statute or administrative regulation, requires such appointment be made or that such policy be continued." *Id.* at 824. The Court further indicated that the Court "as presently comprised has previously and unanimously determined that such policy should be discontinued." *Id.* In its place, the Supreme Court reverted to the procedure set forth in the previously adopted Rule 1.020, which both envisioned that cases would be decided by a Court sitting with six justices and set forth what would happen in the event of a tie vote. The Supreme Court reaffirmed its stance in 2006 in *Fletcher v. Graham*, 193 S.W.3d 350, 366 (Ky. 2006), and it remains the Supreme Court's practice to not appoint a special justice when only one justice is not sitting in a particular case, thereby creating the possibility of a tie vote.

It is not uncommon for the Supreme Court to sit with six participating justices.[5] The most common cause of the Supreme Court having six participating justices is the departure of a justice from the court. In 2018, for example, the retirement of Justice Cunningham resulted in many cases being decided on the merits by the Supreme Court with six justices sitting. A six justice court may also result from the disqualification of a justice for any of the reasons set forth in KRS 26A.015, such as when a justice was on the Court of Appeals panel that decided the case or the justice was the trial judge in the case before the case made its way to the Supreme Court. Whatever the reason, the Kentucky Supreme Court deciding a case with six justices sitting is not uncommon.

What is uncommon is for the Supreme Court's vote in those cases to be 3-3. Of the 55 cases decided with six participating justices from 2020 to 2022, only the five cases identified above resulted in a 3-3 vote.

Is a procedure affecting so few cases something to worry about? If you assume that half of the cases resulting in a tie vote would have been affirmed by the Supreme Court if seven justices participated, the number of cases in which the procedure affected the outcome of the case gets even smaller. And in fact, it is possible that every one of the five cases would have been affirmed if seven justices participated.

On the other hand, it is possible that every one of those five cases would have been reversed if seven justices participated. And regardless of whether the outcome would have been different, each of those cases was important enough to be worthy of the Supreme Court's consideration. Because the selected procedure may affect the outcome of cases that already have been deemed important, it makes sense to give the procedures to use in resolving those cases an appropriate amount of thought and analysis.

The options available in Kentucky to address how to proceed when a single justice is precluded from participating in a particular case are limited by a provision in Kentucky's

Constitution which provides that the Chief Justice "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." Kentucky Constitution § 110(5)(b) (emphasis added). Thus, Kentucky cannot have the Chief Justice appoint an active or retired judge or justice to serve as a special justice in a case pending before the Supreme Court.

But that provision does not expressly preclude the Court's prior practice of appointing a practicing attorney to sit as a special justice in a particular case. That prior procedure also has the benefit of being consistent with KRS 26A.015(3)(a), which states that any justice of the Court of Justice disqualified under KRS section 26A is to be replaced by the Chief Justice. And while the prior procedure arguably is inconsistent with SCR 1.020, a point made by Justice Wintersheimer in his concurring opinion in *Kentucky Utilities*, the counter to that argument is that, while SCR 1.020 provides what happens in the event of an equally divided court, it does not address what the Court may or may not do to avoid a case being decided by only six justices.

So which is the better practice – declaring the lower court result to be affirmed in the event of a 3-3 vote in the Supreme Court per SCR 1.020, or appointing a single special justice to make sure the Court is sitting with an odd number of justices so that a definitive result is reached? Clearly, the majority of the Supreme Court at the time *Kentucky Utilities* was decided did not believe that SCR 1.020 provided a satisfying way to resolve any case.[6] Just as clear, however, is that other compositions of the Supreme Court have been more comfortable with lower courts' opinions being affirmed when the vote in the Supreme Court is 3-3.

As has been pointed out, every case before the Supreme Court is an important case, and allowing important cases to be resolved without the Supreme Court deciding the important issue presented in the case definitely is less than satisfying. In addition, the current rule favors appellees over appellants; an appellant needs the votes of four justices to prevail in the Supreme Court regardless of whether six or seven justices are sitting, and allowing the appeal to move forward with six sitting justices reduces the number of justices an appellant can try to convince to vote for reversal. Finally, the parties in those cases have invested a lot of time and effort in the case only to, in effect, get no result at all from the Supreme Court.

Yet that potentially less than satisfying result is likely preferable to the other available options. With Kentucky's Constitution not allowing the Chief Justice to appoint a sitting or retired judge as a special justice to the Supreme Court, the most logical option to prevent tie votes from occurring is what Kentucky does when there is more than one special justice to be appointed and what the Court did in *Kentucky Utilities*: appoint a practicing lawyer as a special justice.

In most cases, that procedure would be fine. If otherwise there are at least four justices agreeing on how the case should be decided, the appointment of a special justice will result in a decision by a "full" court of seven justices but will not affect the outcome of the appeal.

The appointment of a single special justice produces an entirely different dynamic in a case that otherwise would result in a 3-3 vote among the six participating justices. In those cases, the vote of the single special justice will break the tie and decide the outcome of the case. Thus, important issues of Kentucky law would be decided by the vote of a currently practicing lawyer who likely has never received any training as a judge and may be considering an issue for the first time. Additionally, circumstances may give rise in some cases to a claim that a special justice's deciding vote might have been influenced by the special justice's own practice.

At the end of the day, it does not seem the Commonwealth is best served by binding precedent being created on an important legal question by a single vote from someone who is not a judge. If the issue presented is indeed an important one, it will make its way back to the Supreme Court which, hopefully, will be able to decide the issue with all seven justices participating. The perceived benefit of ensuring that the Supreme Court issues an opinion on the merits in every case that comes before it is not sufficient to justify allowing a single practicing attorney to create binding precedent on an important legal issue. Let's leave that up to the elected justices. **B&B**

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ENDNOTES

1 At last count, around thirty states have adopted a procedure designed to prevent the possibility of a tie vote in their appellate courts.

2 Apparently, Chief Justice William Rehnquist and Justice John Paul Stevens both expressed dissatisfaction with the United States Supreme Court's rule. *See* J. Pidot, *Tie Votes in the Supreme Court*, 101 Minn. L. R. 245, 249 (2016). A subsequent discussion between Justice Stevens and Senator Patrick Leahy led to Senator Leahy introducing a bill in Congress lifting a decades old prohibition against retired Supreme Court justices participating in a particular case by designation. The Leahy proposal was never brought to a vote.

3 *See Cleveland Construction v. Shackleford*, 2021-SC-0190 (Ky. April 28, 2022); *Bluegrass Oakwood, Inc. v. Stubbs*, 2020-SC-0593 (Ky. Feb. 24, 2022); *CSX Transportation, Inc. v. Boggs*, 2018-SC-0191 (Ky. Aug. 20, 2020); *Maguire v. Crook*, 2018-SC-0290 (Ky. Aug. 8, 2020); *Turner v. Perry County Sheriff's Dep't*, 2019-SC-0355 (Ky. May 28, 2020).

4 *Kentucky Utilities Co. v. South East Coal Co.*, 836 S.W.2d 407, 409-10 (Ky. 1992).

5 From 2020 to 2022, a total of 50 cases in addition to the five cases identified above were decided on the merits by the Supreme Court with six justices participating.

6 The majority opinion in *Kentucky Utilities* does not address how its adopted procedure meshed with SCR 1.020 envisioning that there would be tie votes in the Supreme Court.