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The People of the State of California, On the Relation of CHARLES WAGNER,

Plaintiffs,

v.

JACK HALPIN,

Defendant

Case No.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF QUO WARRANTO

Trial Date: None

I. INTRODUCTION

Relator CHARLES WAGNER (hereafter "Relator"), by and through his attorney, BARBARA A. KAUFFMAN, ESQ., respectfully submits the following Memorandum of Points and Authorities in support of his request that the Attorney General commence a *quo warranto* suit against JACK HALPIN (hereafter "Halpin") or, in the alternative, grant his application for leave to sue *in quo warranto* against Halpin. Halpin wrongly purports to hold office as a Judge of the Superior Court, Shasta County, California, and to preside over a suit in which Relator is a party.

II. STATEMENT OF FACTS

The facts are stated in detail in Relator's Verified Statement of Facts (hereafter "SOF") and Declaration of Barbara Kauffman in Support of Quo Warranto Complaint (hereafter "DBK".)

Briefly, Relator's Shasta County Superior Court dissolution case (hereafter "Divorce Case") was assigned to Halpin in January of 2010 (SOF ¶ 3). Halpin was appointed in 1962 to serve as a judge of the Superior Court of Shasta County, and retired in 1964. In January of 1994, Halpin was "temporarily" assigned to the Shasta Superior Court by the Chief Justice. The initial assignment was followed by an ongoing succession of **207** additional "temporary" assignment orders, effectively keeping Halpin in the position of Superior

Court Judge continuously from 1994 until April 30, 2012, without ever standing for election or being subject to oversight by the Commission on Judicial Performance (SOF ¶ 3,4,7.) So entrenched was Halpin and so certain was the Shasta Court of his ongoing "temporary" assignment, that Halpin was designated the Supervising Judge of the Family Law Division from 2008 to the end of April 2012 (SOF ¶8.) Most or multiple of Halpin's assignment orders, including Halpin's last six family court assignment orders (November 2011-April 2012) stated that Halpin was assigned for a specified period of time and dates (often 30 days*) "and until completion and disposition of all causes and matters heard pursuant to this assignment.*" (SOF ¶6.) A trial on reserved issues commenced in Relator's case on December 16, 2011. At that time, Halpin was serving on assignment pursuant to Order No. 1020705-11, which provides as follows:

> *"The Honorable Jack H. Halpin, Retired Judge of the Shasta County Superior Court, is hereby assigned to sit as a Judge of the Superior Court of California, County of Shasta, on the following date(s):*
>
> *December 1, 2011 to December 30, 2011*
>
> *and until completion and disposition of all causes and matters heard pursuant to this assignment."*

(SOF ¶ 9.) Relator's December 16, 2011 trial was cut short and continued when disputes about issues, evidence, disclosures and necessary amendments to the Petition for Dissolution arose. Relator then suffered health issues that prevented his participation in further trial proceedings for months thereafter. (SOF ¶ 10). Meanwhile, in March, 2012, Administrative Office of the Courts (hereafter "AOC") Assigned Judges Program (hereafter "AJP") personnel stated an understanding that *"Judge Halpin will not be in his current assignment beyond the end of April as internal reassignments are occurring in the Shasta Superior Court"*. (SOF ¶ 11). On May 3, 2012, the Redding press announced Halpin's retirement as of April 30, 2012 from his position as an assigned Shasta Superior Court Judge, noting that "*Although he's been a retired Shasta County Superior Court judge since 1994, Jack Halpin has been working full time on the bench for nearly 20 years*" and that Halpin "*does not believe he will return to the bench as a part-time judge.*" (SOF ¶ 13). On July 16, 2012, AOC AJP personnel confirmed that "*Judge Halpin is not assigned to the family bench in Shasta*". (SOF ¶ 14). Upon Halpin's April 30, 2012 retirement, Judge Gaul took over the family law calendar, and he is listed as the "current" judge in Relator's case on the court docket.

(SOF ¶ 16). According to AOC AJP records and/or representations, Halpin's December 2011 assignment order "ended" on December 30, 2012, and his last family law assignment order "ended" on April 30, 2012. Although Halpin had miscellaneous civil (not family) overflow assignments for a total of six days in July and August, 2012, they have also "ended". (SOF ¶ 6, 15, Ex. D).

Nonetheless, *at the request of opposing counsel in the Divorce Case*, and over the ongoing written and verbal objections of Relator and his counsel, the Shasta Court and Halpin continue to specially set hearing and trial dates before Halpin, indicating that Halpin has ongoing and indefinite authority and jurisdiction over the Divorce Case based upon the afore-mentioned December, 2011 assignment order. (SOF ¶ 16, 17, 19, 20, 21, 22, Exs. L, O).

Relator seeks *quo warranto* relief because Halpin is unlawfully usurping the Office of Superior Court Judge and violating his Constitutional right to have a judge who stands for election every six years, and who is subject to oversight by the Commission on Judicial Performance. (SOF ¶ 26).

III. DISCUSSION

A. A *Quo Warranto* Suit is Appropriate to Remedy Halpin's Ongoing Usurpation of the Office of Superior Court Judge.

The relevant procedural rule governing this application for suit or leave to sue is Code Civ. Pro. § 803, which provides in relevant part:

> "An action may be brought by the attorney-general in the name of the people of this state, upon his own information, or upon a complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office…within this state. *And the attorney-general must bring the action, whenever he has reason to believe that any such office. . . has been usurped, intruded into, or unlawfully held or exercised by any person,* or when he is directed to do so by the governor." [Emphasis added.]

Halpin is properly a defendant in such a suit, since the office he purports to hold, that of Judge of the Superior Court, Shasta County, is a public office of this State. *See People ex rel. Chapman v. Rapsey* (1940) 16 Cal. 2d 636, 639.

The Attorney General may authorize a private relator to prosecute the action in her stead; however the Attorney General maintains the right to control the proceedings throughout their course. (*Nicolopulos v. City of Lawndale (2001)*, 91 Cal. App. 4th 1221, 1228-1229.)

In deciding whether to grant leave to sue in the name of the People of the State of California in a *quo warranto* action, the Attorney General considers initially whether there exists a substantial question of

law or fact that requires judicial resolution, and, if so, whether the proposed action would serve the overall public interest." 81 Ops. Cal. Atty. Gen. 240, 241 (1998); Ops. Cal. Atty. Gen. 03-305 (2003).

In this case, Halpin has purported and continues to purport to hold office as a Judge of the Superior Court of Shasta County from 1994 through the present (almost 19 years), pursuant to **208** assignment orders signed by the Chief Justice, and without being elected during that 19-year period to a single six-year term of office, let alone three of them, as required by Article 6, section 16 (b) and (c) of the California Constitution. He claims to hold such office notwithstanding the fact that he "retired" from service as an assigned judge as of April 30, 2012, and notwithstanding the fact that AOC records indicate that all assignment orders pertaining to Halpin state that his assignments have "ended".

The basic legal question presented in this case is one of monumental importance, to wit: ***May Article 6 section 6(e) of the California Constitution be interpreted and implemented in such a fashion that it thwarts the public's right to elect superior court judges for a fixed term as set forth in Article 6, section 16 (b) and (c) of the California Constitution?***

The overall public interest involved is also one of monumental importance, namely, ***the right of suffrage***, protected by article II of the California Constitution. The California Supreme Court stated as follows in *Stanton v. Panish* (1980) 28 Cal.3d 107, 115:

> The right of suffrage, protected by article II of the California Constitution, is a fundamental right "preservative of other basic civil and political rights." (Reynolds v. Sims (1964) 377 U.S. 533, 562, 84 S.Ct. 1362, 1381, 12 L.Ed.2d 506; see also, Castro v. State of California (1970) 2 Cal.3d 223, 234, 85 Cal.Rptr. 20, 466 P.2d 244.) "Every reasonable presumption and interpretation is to be indulged in favor of the right of the people to exercise the elective process." (Hedlund v. Davis (1956) 47 Cal.2d 75, 81, 301 P.2d 843, 847.)

B. The Chief Justice's Power of Assignment Is Limited.

Article 6 section 6 (e) of the California Constitution provides as follows:

> (e) The Chief Justice shall seek to expedite judicial business and to equalize the work of judges. The Chief Justice may provide for the assignment of any judge to another court but only with the judge's consent if the court is of lower jurisdiction. A retired judge who consents may be assigned to any court.

Article 6, sections 16(b) and (c) of the California Constitution provide in relevant part as follows:

> (b) Judges of superior courts shall be elected in their counties at general elections except as otherwise necessary to meet the requirements of federal law. . .

> (c) Terms of judges of superior courts are six years beginning the Monday after January 1 following their election. A vacancy shall be filled by election to a full term at the next general election after the second January 1 following the vacancy, but the Governor shall appoint a person to fill the vacancy temporarily until the elected judge's term begins.

The tension between the extraordinary power of the Chief Justice to unilaterally assign retired judges to the superior court bench, and the Constitutional right of the public to elect superior court judges, was considered by the California Supreme Court in *Pickens v. Johnson* (1954) 42 Cal. 2d 399, at 406.

Once a judge retires, wrote the *Pickens* majority,

> [h]is term of office as a judge has…been terminated prior [to the end of his term of office] by his voluntary act, and the office is vacant…. [H]e has no power as a judicial officer until the happening of a contingency, namely, his assignment and voluntary acceptance thereof as a judge of the superior court in and for a designated county by the chairman of the Judicial Council. *That appointment does not prolong his term of office. It merely has the effect of vesting in him the powers of a judge of the superior court during the period specified in the assignment…. **It must be taken for granted that under the proper exercise of the power of assignment a retired judge will not be continued in service indefinitely***."
> [emphasis added].

In Pickens, the Court was careful to stress the limitations of the assignment power, which power at that time (1954) was embodied in Section 6 of the Judge's Retirement Act: "[T]he state…may invoke the assistance of the retired personnel of the judicial department in *emergencies* found to exist by the chairman of the Judicial Council. *Nothing foreign to that purpose could have been in contemplation by the Legislature*." 42 Cal. 2d at 405 [emphasis added]. And again: "It may not be assumed that the power of assignment conferred by section 6 of the statute will be improvidently exercised." 42 Cal. 2d at 409.

The concept that assignments of retired judges are temporary, will not continue indefinitely, and should be limited to exigent circumstances is supported in the AOC's Assigned Judges Program Handbooks in effect from at least 2010 forward. The Handbooks all include the following as acceptable reasons for assignment: vacancies resulting from death, elevation, retirement, or resignation; limited vacation coverage; illness or injury that results in a judge being unavailable for an extended period; disqualification of a judge; danger of dismissal in a criminal case as a result of calendar congestion; extraordinary circumstances leading to unusually congested or heavy workload; coverage for judges attending judicial training programs or Judicial Council functions. (DBK, Ex. C, pages 23-40, 45-81). The AOC AJP fact sheet specifically states that assignments are generally granted for "up to 60 days" (SOF,

Ex.B). And the legislature enacted Government Code section 68543.8, which specifically recognizes that there may be a shortage of judicial officers available to provide temporary assistance in rural counties, and requires the Judicial Council to contract with up to 10 retired judges who shall be available to be assigned up to 110 court days each year, at a daily pay rate that is 50% the daily salary of a superior court judge.

Nowhere is there contemplated the ongoing assignment of a retired judge for a period of time exceeding even one, let alone three, superior court elected terms of office, with no end in sight. Interpreting and implementing the Chief Justice's assignment power to allow such a thing is not legally permissible under *Picken*s, and the authority set forth below.

C. Constitutional Provisions, Like Statutes, Must be Harmonized to Avoid Conflict, and Construed to Avoid Absurd and Unfair Consequences

The power to assign retired judges is now set forth in Article 6, section 6(e) of the California Constitution. The Chief Justice, the Shasta Court and Halpin have interpreted this provision as permitting, in Halpin's case, the issuance of **208** consecutive "temporary" orders allowing Halpin to sit for almost 19 consecutive years as a Shasta County Superior Court Judge without ever standing for election, as required by Article 6, section 16 (b) and (c). Such interpretation and implementation of Article 6, section 6(e) is legally impermissible .

As set forth above, the Supreme Court in *Pickens v. Johnson* approved the Constitutionality of a legislative provision allowing the use of assigned retired judges, but did so with qualifications: namely, an assumption that that an assignment would not be continued "indefinitely", that use would be limited to "emergency" situations, and that the power of assignment would not be "improvidently exercised". The dissenting justice in *Pickens* observed that the assignment power could easily be manipulated to evade the Constitutional mandate requiring judges to submit to elections every six years, stating:

> "A] justice or judge eligible for retirement under the Judges' Retirement Act may be defeated at an election to succeed himself and then retire under the act before his term expires. Under the majority holding here such justice or judge may be assigned by the chairman of the Judicial Council to sit as a justice or judge in any court in which he may be eligible to sit under the act and thus he may continue to function as a justice or judge indefinitely and thereby thwart the will of the electors. I can envision a situation such as this arising…where the defeated retired judge may be so unpopular that he has lost the confidence and respect of a large segment of the population who constitute his constituents. Yet the chairman of the Judicial Council with the consent of such retired judge could foist him onto the people of that county as a judge of the superior court for an indefinite period by

the power of assignment which the majority now hold the chairman of the Judicial Council possesses." *Pickens v. Johnson, supra*, 42 Cal. 2d at 419 (Carter, J., concurring and dissenting).

This is almost exactly what has occurred in this case, except that Halpin did not wait to be defeated in an election bid in the 1960s. **Public protests, formal complaints, press reports, blogs, and scathing public comments submitted about Halpin's conduct during his "temporary" assignments since 1994, attest to large-scale public dissatisfaction with him among the residents of Shasta County. (SOF ¶ 18, and see esp. Ex. K, and comments to Ex. A.)** Yet the Shasta public's power to voice their opinion about Halpin at the election booth has been stolen from them via abuse of the Assigned Judges Program.

The courts of this state have made it clear that the right of voters to elect judges is not to be trifled with. The California Supreme Court held as follows in *Pollack v. Hamm* (1970) 3 Cal.3d 264, 273:

> "Were we to adopt petitioner's construction of article VI, section 16, subdivision (c), and hold that a new vacancy occurs each time an appointee vacates the office, it would be possible, through the device of appropriately timed resignations, to preclude any election to an office. *This would be contrary to the intent of the constitutional provision that a superior court term be six years, a provision which contemplates that an opportunity to pass on the qualifications of superior court judges will be available to the electorate no less often than every six years.* Since the language of article VI, section 16, subdivision (c), does not compel the result suggested by petitioner, *we are governed by the well established rules that constitutional and statutory provisions be construed consistently with the intent of the adopting body and in such manner as not to produce unreasonable results.* (West Pico Furniture Co. v. Pacific Finance Loans (1970) 2 Cal.3d 594, 607, 86 Cal.Rptr. 793, 469 P.2d 665; Barber v. Blue, supra, 65 Cal.2d 185, 188, 52 Cal.Rptr. 865, 417 P.2d 401; Select Base Materials v. Board of Equal. (1959) 51 Cal.2d 640, 645, 335 P.2d 672; Aggeler v. Dominguez (1933) 217 Cal. 429, 19 P.2d 241.)" [Emphasis added].

Ten years later, the California Supreme Court in *Stanton v. Panish* (1980) 28 Cal.3d 107, 115 held as follows with respect to Article 6, sections 16 (b) and (c) of the California Constitution:

> "Constitutional provisions, like statutes, must be harmonized to avoid conflict. (Serrano v. Priest (1971) 5 Cal.3d 584, 596, 96 Cal.Rptr. 601, 487 P.2d 1241) and construed to avoid absurd and unfair consequences (Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal.3d 208, 245, 149 Cal.Rptr. 239, 583 P.2d 1281; Fields v. Eu, supra, 18 Cal.3d 322, 328, 134 Cal.Rptr. 367, 556 P.2d 729). Our interpretation of section 16(c) at once gives the greatest possible effect to section 16, subdivision (b), and avoids the absurd and unfair result which would follow if the section were interpreted to compel cancellation of scheduled elections. Were respondents' interpretation adopted, a retiring incumbent dissatisfied with the candidates for, or the outcome of, a contest for the office could cause an election to be cancelled by an appropriately timed resignation."

The Court of Appeal in *Lungren v. Davis* (1991) 234 Cal.App.3d 806, 819-20 observed as follows:

> "Throughout the years one aspect of our system for selecting superior court judges has remained constant. That is the reservation by the people of the right to elect their judges. As the court said in *Bearden v. Collins, supra,* 220 Cal. at page 762, 32 P.2d 604: *"[I]t was clearly the intent of the framers that the people should reserve to themselves the right to elect such judges and their successors at regular intervals and that any other mode of filling said offices should be by use of an emergency method to fill vacancies until a general election should be held.*" This policy has endured to this day. (*Stanton v. Panish, supra,* 28 Cal.3d at p. 115, 167 Cal.Rptr. 584, 615 P.2d 1372.) [Emphasis added].
>
> And at page 825:
>
> "Moreover, in construing the meaning of the constitutional provisions at issue, we must consider their purposes. The purpose for avoiding the denomination of an appointee's tenure as a "term" is apparent—*our Constitution has consistently reserved to the people the right to elect their judges in all courts of superior court level or above. While there may be a legitimate debate over the wisdom of the elective-judge system, from a constitutional perspective that debate has been resolved in favor of elected judges. Since the first Constitution in 1849, the Governor has never been given the power to appoint a superior court judge to a term of office.* Vacancies are to be filled by election, and the Governor may only appoint a person temporarily to fill a vacancy in the superior court until the election. On the only occasion where an ambiguity was perceived, the Constitution was modified to specify more clearly the limited nature of the Governor's participation. (*Pollack v. Hamm, supra,* 3 Cal.3d at p. 272, 90 Cal.Rptr. 181, 475 P.2d 213.) Similarly, with the exception of the very first district judges for a short term only, *the Legislature has never been given the power to appoint judges. The linguistic insistence in the Constitution that judges be elected rather than appointed not only serves to reserve the right of suffrage to the people, it serves to maintain the independence of the judicial branch from undue influence by the executive and legislative branches.*" [Emphasis added].

Of course, the logic applied above also prohibits members of the *judicial branch* from interpreting or implementing the Chief Justice's Constitutional assignment power in a manner which would deny the public their Constitutional right to elect their superior court judges for a defined term of office. But that is exactly what has happened with Halpin, and indeed, the Shasta Court and Halpin have gone even further, and interpreted the Chief Justice's assignment powers and past assignment orders in such a manner that would effectively *permanently* attach cases to Halpin as an individual, rather than the Superior Court, and allow Halpin to continue acting as a Shasta Superior Court judge *indefinitely*, even after his public announcement of his retirement as an assigned judge of the Shasta Superior Court. Again, such interpretation and implementation of Article 6, section 6(e) is legally impermissible.

D. Halpin's Authority Under Prior Family Law Assignment Orders Was Terminated at the latest on April 30, 2012, When He Retired From His Position as an Assigned Judge.

Halpin announced his retirement from his two-decade employment as an "assigned judge" effective April 30, 2012. That was concurrent with the stated "end" date of his last family law assignment order.

Halpin's comments (that he didn't believe he would return to the bench part-time); the information from the AOC (that Halpin was no longer assigned to the Shasta family law bench, and his assignment orders had "ended") and the actions of the Shasta Court (moving Judge Gaul to the family law department, and transferring Halpin's cases to him) gave no indication of any expectation that ongoing family law cases were "attached" to Halpin, or that he was claiming the right to remain a Shasta Superior Court Judge indefinitely. Those claims appear to be an afterthought on the part of the Shasta Court and Halpin which the law does not support.

First, cases do not "attach" to individuals, or individual judges. This is obvious when one reviews the case law dealing with the powers of successor judges in a single matter. "[T]he judges of the superior court hold but one and the same court, and the jurisdiction they exercise in any cause is that of the court and not the individual…" *People v. Barbera*, 78 Cal. App. 277, 279, 248 P. 304, 305 (App. 1 Dist., Div. 2, 1926), *citing Graziani v. Denny*, 174 Cal. 176, 179, 162 P. 397, 399 (1917) *and Nickel v. State*, 179 Cal. 126, 129, 175 P. 641. The import of this line of cases is clear: a controversy follows a court, not an individual judge. No individual judge can claim authority over a particular matter simply by virtue of having once temporarily presided over it. The court's authority is enduring; that of the individual judge who temporarily hears a case cannot be. Second, upon the expiration of the term of office of a judge, his judicial power ceases, and it is not competent for him thereafter to do any act necessary to complete the trial of any cause which remains unfinished (*Reimer v. Firpo* (1949) 94 Cal.App.2d 798, 800-01.) It follows ineluctably that, for any judge, sitting in whatever capacity, the consequence of retirement is the forfeiture of any and all judicial powers held by that judge at the time of his retirement. In the instant case, although Halpin, in his 22 years on the bench, never was elected to a term of office, any powers he had as an assigned judge necessarily expired when he retired as an assigned judge.

As set forth above, it is legally impermissible to interpret and implement Article 6, section 6(e) of the California Constitution in such a manner that the judicial branch can do what the Governor and Legislature are strictly prohibited from doing: that is, thwart the public's fundamental suffrage rights to elect superior court judges for a fixed term; or do what the Shasta Court and Halpin are doing -- insisting that assignment orders may, by their terms, attach a cause to an individual, rather than a court; and allow

retired judges to retire from their assignment to the superior court, but retain indefinitely the ongoing powers of a superior court judge.

Accordingly, Halpin is usurping the office of Superior Court judge, and must be ousted. Unfortunately, this situation is not unique to Shasta County. (DBK ¶ 15, 16.) According to information from the AOC, one third of assigned judges are longterm (DBK ¶ 5 , Ex.B p.9), with Butte County being one of the other biggest offenders by having assigned retired judges sit for 13 and 16 years (DBK ¶ 15, 16, Exs. F and G).

CONCLUSION

Judicial review of an ongoing usurpation of judicial office, and unlawful claims to judicial powers that effectively deprive the public of fundamental, constitutionally protected suffrage rights, is not only proper, it is absolutely essential.

Given the fundamental legal and public policy issues at stake in this case, the Attorney General should prosecute this suit. The Attorney General has far more available financial and legal resources than does Relator. In the alternative, leave should be granted to prosecute this suit in quo warranto.

Dated: December 6, 2012

Respectfully Submitted,

BARBARA A. KAUFFMAN, ESQ.
Limited Scope Attorney for Relator