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### CERTIFICATION

I, Kelly L. Stephens, Clerk of the Supreme Court of Kentucky, do hereby certify that the attached order, **ORDER REMANDING; FRANKLIN CIRCUIT COURT, Case No. 17-CI-1348** is a true and correct copy of the original order as it appears on file in my office.

Done this 24th day of May 2022, at Frankfort, Kentucky.

  
KELLY L. STEPHENS, CLERK

# Supreme Court of Kentucky

FROM THE 48TH JUDICIAL CIRCUIT  
FRANKLIN CIRCUIT COURT, DIVISION ONE  
CASE NO. 17-CI-1348

IN RE:

COMMONWEALTH OF KENTUCKY

INTERVENING PLAINTIFF

V.

KKR & CO., L.L.P., et al.

DEFENDANTS

## ORDER REMANDING

This matter is before the Chief Justice upon the certification of the Clerk of the Franklin Circuit Court of the affidavit of attorney Barbara Edelman, filed on behalf of defendants KKR & Co., Inc., Henry Kravis, and George Roberts (the “KKR & Co., Inc. defendants”), which seeks to disqualify the Honorable Phillip Shepherd, Circuit Judge for the 48th Judicial Circuit, Division One, from presiding in the above-styled action.

Under KRS 26A.020,<sup>1</sup> a party may file with the circuit clerk an affidavit “that the judge will not afford him a fair and impartial trial.” This affidavit prompts the Chief Justice “to review the facts and determine whether to designate a regular or retired justice or judge of the Court of Justice as special judge.” About the authority given to the Chief Justice when making such a

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<sup>1</sup> It should be noted that this Court has held KRS 26A.020 to be an unconstitutional “encroachment by the legislature on the power of the judiciary to make rules.” But because it is a “‘statutorily acceptable’ substitute for current judicially mandated procedure” and “out of deference and respect,” the Court has extended comity to the legislature. *Foster v. Overstreet*, 905 S.W.3d 504, 506–07 (Ky. 1995).

determination, KRS 26A.020 is vague, and a paucity of caselaw exists to guide the Chief Justice's decision.

It is important to note that the KKR & Co., Inc. defendants did not file a motion before Judge Shepherd asking him to recuse. This is not procedurally required by either rule or statute. But as the Supreme Court recently held in *Abbott, Inc. v. Guirguis*, "when a party moves for a judge's recusal, an affidavit setting forth factual allegations is required. If the judge grants the motion and recuses, a substitute judge is appointed to the case and the matter is at an end. Conversely, if the motion is denied, the judge may include in the record whatever countervailing facts or considerations he or she deems pertinent to permit appellate review."<sup>2</sup> Based on this language, and out of deference for the judge before whom a case is pending, parties should present the reasons that recusal is requested and give the judge an opportunity to grant or deny that request before filing a KRS 26A.020 affidavit.

In the present case, and in the companion case in which the KKR & Co., Inc. defendants have also sought disqualification,<sup>3</sup> the Chief Justice finds that Judge Shepherd should have been afforded an opportunity to grant or deny a motion for recusal before an affidavit was certified to the Chief Justice under KRS 26A.020.

Accordingly, the Chief Justice ORDERS that this matter is remanded to the Franklin Circuit Court with direction to Judge Shepherd to review the KKR

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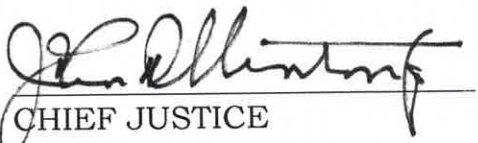
<sup>2</sup> 626 S.W.3d 475, 484 (Ky. 2021).

<sup>3</sup> *Tia Taylor, et al. v. KKR & Co., Inc., et al.*, 21-CI-00645 (Franklin Cir. Ct. filed Aug. 19, 2021).

& Co., Inc. defendants' affidavit as a motion to recuse and either grant or deny their request. If the motion is denied, a copy of Judge Shepherd's order shall be certified by the Franklin Circuit Court Clerk to the Chief Justice, who will then review the affidavit as a request for disqualification under KRS 26A.020.

The Clerk of the Franklin Circuit Court shall place a copy of this order in the record of this case and shall serve copies on the parties or their counsel.

Entered this 23rd day of May 2022.

  
CHIEF JUSTICE

Copies to: Honorable Hunter Daugherty, Chief Regional Circuit Judge  
Honorable Phillip Shepherd, Circuit Judge, 48th Judicial Circuit  
Amy Feldman, Franklin County Circuit Court Clerk