RENDERED: FEBRUARY 5, 2010; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000653-MR
AND
NO. 2008-CA-000668-MR

JANE KINCAID JOHNSON AND JOAN D. KINCAID, INDIVIDUALLY; AND AS MEMBERS OF THE ADVISORY COMMITTEE FOR THE ESTATE AND TRUST OF GARVICE D. KINCAID; MICHAEL D. FOLEY, AS A MEMBER OF THE ADVISORY COMMITTEE FOR THE ESTATE AND TRUST OF GARVICE D. KINCAID; CENTRAL BANK & TRUST COMPANY, AS EXECUTOR AND TRUSTEE; BRETT KINCAID; KEVIN KINCAID; CIERRA KINCAID, A MINOR; BROOKE KINCAID, A MINOR; BRYCE KINCAID, A MINOR; CHANCE KINCAID, A MINOR; AND J. ROSS STINETORF, ESQ., AS *GUARDIAN AD LITEM* FOR THE MINOR AND UNBORN BENEFICIARIES OF FUND C OF THE GARVICE KINCAID TRUST — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 85-CI-01714

JOHNSON, TRUE & GUARNIERI, LLP — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: LAMBERT AND TAYLOR, JUDGES; HARRIS, [1] SENIOR JUDGE.

LAMBERT, JUDGE: Appellants appeal a single judgment entered simultaneously in two Fayette Circuit Court cases on March 6, 2008, which awarded substantial attorney fees to Appellee, Johnson, True, and Guarnieri, LLP (hereinafter "JTG Law Firm"). Appellant, Central Bank and Trust Company, is the executor and trustee of three primary trusts established by Garvice D. Kincaid, deceased (hereinafter "the Kincaid Trusts"). The remaining Appellants are either beneficiaries of the trusts or advisory committee members that manage these trusts.[2] JTG Law Firm represented Appellants, Brett Kincaid and Kevin Kincaid, in litigation against Appellants, Jane K. Johnson and Joan D. Kincaid, individually and as members of the advisory committee. This litigation was ultimately settled, which led the JTG Law Firm to file a motion for award of fees and expenses. After considering the record, counsels' briefs and counsels' oral arguments, we hereby vacate the trial court's March 6, 2008, order granting the JTG Law Firm's motion for fees and expenses and remand this matter for further proceedings.

I. Factual Background

[1] Senior Judge William R. Harris, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

[2] Jane K. Johnson and Joan D. Kincaid are both beneficiaries and advisory committee members.

Garvice D. Kincaid passed away in 1975, leaving a large estate comprised mainly of various business interests in and around the Lexington, Kentucky area. At the time of his death, the estate's largest asset was majority ownership of Kentucky Central Life Insurance Company (hereinafter "KCL"). The estate also contained controlling interests in Central Bank and Trust Company. The bulk of Kincaid's estate was transferred into three primary trusts: Fund A, Fund B, and Fund C. Oversight of these trusts was vested in an advisory committee comprised of three of Kincaid's business associates. The advisory committee was to instruct the trustee, Central Bank and Trust Company, as to the management and distribution of the trust funds. Various allocations and adjustments were made to the trust funds by the advisory committee in 1977, 1985, and 1988.

Kincaid was survived by his wife, Nelle Kincaid, his daughters, Joan D. Kincaid and Jane K. Johnson, and his grandsons, Brett Kincaid and Kevin Kincaid. Upon the wife's death in 1984, Kincaid's daughters became the sole beneficiaries of Funds A and B. In 1985, the daughters initiated litigation against the advisory committee. In 1993, the daughters' lawsuit was settled contemporaneously with the takeover of KCL by the Kentucky Department of Insurance. Pursuant to this settlement, the advisory committee's original members resigned and the daughters, along with Michael Foley, became members of the committee.

On December 22, 2005, the advisory committee and the daughters, individually, filed a motion for court approval of a proposed final allocation and distribution of estate assets among Funds A, B, and C. Due largely to the collapse and liquidation of KCL, this proposed final allocation sought to transfer a large portion of the assets contained in Fund C to Funds A and B. As beneficiaries of Fund C, the Kincaid brothers retained the JTG Law Firm to oppose the proposed re-allocation plan.

The Kincaid brothers had retained the JTG Law Firm in previous litigation related to the Kincaid Trusts. In these previous representations, the Kincaid brothers were billed for each hour of service provided by the law firm and based on these hours, the law firm was paid an hourly rate either from the Kincaid brothers directly or from Fund C.

As the Kincaid brothers' litigation progressed, the JTG law firm continued to bill the Kincaid brothers for each hour of service provided throughout 2006 and from January through June of 2007. Billings ceased after June of 2007. As of the date of its fee motion, JTG law firm had billed the Kincaid brothers a total of $170,762.50 in fees. Of that amount, $50,000 had been paid to JTG Law Firm from Fund C and approximately $69,000[3] had been paid to JTG Law Firm directly by the Kincaid brothers.

In December 2007, the parties reached a settlement. They agreed that the value of Fund C would be reduced from approximately $195 million dollars to

[3] Of this amount, $5,000 was paid as a retainer.

$82 million dollars. Of this approximate $82 million dollars, up to $2 million dollars was designated to pay the final administrative expenses of the Garvice D. Kincaid Estate. This reduction was a significant improvement from the advisory committee's and daughters' initial proposal of reducing the value of Fund C to approximately $52 million dollars.

The settlement also provided the Kincaid brothers with significant cash distributions of at least $8 million dollars each over the next four years. The settlement agreement set forth the following language regarding attorney fees:

> 15. The attorneys representing Brett Kincaid and Kevin Kincaid will file a motion seeking an award of attorneys' fees, costs and expenses. Any attorneys' fees, costs and expenses awarded or otherwise paid out of the assets of the Estate or Trust of Garvice D. Kincaid shall be funded solely by Fund C out of the assets distributed to Fund C pursuant to the terms of this settlement.

On December 26, 2007, the JTG Law Firm filed its motion for fees and expenses with the trial court. In this motion, the JTG Law Firm argued that its efforts on behalf of Brett Kincaid and Kevin Kincaid resulted in savings to Fund C of approximately $28 million dollars.[4] Contending that this $28 million dollar savings constituted a "common fund," the JTG Law Firm sought as its fee a contingency award of ten percent (10%), or approximately $2.8 million dollars. The motion was served on December 21, 2007; however, Kevin Kincaid did not receive it until December 26, 2007. The JTG Law Firm set a January 3, 2008, hearing date for this motion.

[4] $82 million dollars less proposed amount of $52 million dollars less $2 million dollars reserved for final administrative expenses equals $28 million dollars.

On January 3, 2008, the Kincaid Brothers appeared *pro se*. They stated that they were unable to adequately prepare for the hearing or obtain new counsel due to the holidays and the short notice. However, they nevertheless proceeded to set forth arguments in opposition of JTG's motion during the hearing. One of these arguments was that they never entered into a contingency fee agreement with the JTG Law Firm, but rather an hourly fee agreement was always in place between the parties. They further argued that the JTG Law Firm's motion for a contingency fee was a breach of the parties' hourly fee agreement.

In support of its motion, the JTG Law Firm submitted an affidavit conceding that it did not have a contingency fee agreement with its clients. However, attorney J. Guthrie True stated that "it has always been my plan to seek a fee from any common fund created by my efforts pursuant to KRS 412.070 . . . ." The JTG Law Firm further stated that as of December 2007, it had invested approximately 1,000 hours on the case.

The other Appellants also objected to the JTG Law Firm's motion for a contingency fee. They argued that in light of the JTG Law Firm's history of hourly billings and the total lack of a contingency fee agreement, written or otherwise, between the JTG Law Firm and its clients, it was unreasonable under the circumstances of this case to allow the JTG Law Firm a fee that was at least ten (10) times greater than any hourly fee that could be justified.[5]

[5] 1,000 hours times the JTG Law Firm's highest billed rate of $275 per hour is $275,000. However, the JTG Law Firm sought attorney fees totaling ten times this amount ($2.8 million dollars).

On March 6, 2008, the trial court entered an order granting the JTG Law Firm's motion for approximately $2.8 million dollars in attorney fees. In addressing the Kincaid brothers' argument that the JTG Law Firm had already agreed to an hourly, rather than contingency, fee agreement for services rendered in this matter, the trial court ruled that it was not bound by any previous agreements between the parties. It further explained that since "[f]ee awards in common fund cases typically range from 20 to 50 percent of the common fund created," a ten percent (10%) fee award in this case was not excessive. *New England Health Care Employees Pension Fund v Fruit of the Loom, Inc.*, 234 F.R.D. 627, 633 (W.D. Ky. 2006) (internal citation and quotation omitted).

On March 14, 2008, the Kincaid brothers' new counsel filed a motion to reconsider. In that motion, the Kincaid brothers argued that the March 6, 2008, order should be set aside and a new hearing set because the Kincaid brothers were given inadequate notice of and time to prepare for the January 3, 2008, hearing. On March 26, 2008, the trial court conducted a hearing and entered an order denying the Kincaid brothers' motion to reconsider. In denying this motion, the trial court ruled that all arguments set out in the motion to reconsider were already made by the Kincaid brothers during the January 3, 2008, hearing. An appeal to this Court now follows.

II. Analysis

This controversy began with the JTG Law Firm's motion for a ten percent (10%) contingency fee on the approximately $28 million dollars of Fund C

funds which the JTG Law Firm contends were "preserved" by its efforts on behalf of the Kincaid brothers. The JTG Law Firm claims that such a fee is "modest" and "reasonable" in light of the unique circumstances of this case. Appellants counter that it is exactly the unique circumstances of this case that demonstrate that the fee is excessive and not reasonable. The Kincaid brothers further argue that it was unethical and a breach of contract for the JTG Law Firm to seek a contingency fee against their portions of the recovery obtained through the settlement since there was never a written contingency fee agreement between the parties.

A. Standard of Review

All parties agree as to this Court's standard of review. An award of attorney fees shall not be set aside unless there is an abuse of discretion. *Ford v. Beasley*, 148 S.W.3d 808, 813 (Ky. App. 2004) (*citing King v. Grecco*, 111 S.W.3d 877, 883 (Ky. App. 2002)). Upon careful review, we agree with Appellants that the trial court abused its discretion in granting the JTG Law Firm's fee motion.

B. Evaluation of fee assessed against recoveries of the law firm's clients

We will first address the Kincaid brothers' argument that the trial court abused its discretion in awarding the JTG Law Firm a contingency fee against their portions of the recovery obtained through the settlement where the law firm concedes that no such fee was ever set forth in writing and agreed to by their clients. It is axiomatic that an attorney is not permitted to charge or seek a contingency fee against their client's recovery unless said fee is set forth in a written fee agreement. Kentucky Supreme Court Rules (SCR) 3.130(1.5)(c);

Kentucky Bar Ass'n v. Womack, 269 S.W.3d 409, 413 (Ky. 2008) (attorney suspended for thirty days and ordered to pay restitution where he charged and collected a contingency fee in the absence of a written fee agreement, despite fact that attorney claimed that clients verbally agreed to said fee).

Acknowledging that they never had a written contingency fee agreement with their clients, the JTG Law Firm nevertheless argues that such a written fee agreement was not necessary in this case because an exception to SCR 3.130(1.5)(c) exists in KRS 412.070. This statute provides, in pertinent part, as follows:

> (1) In actions for the settlement of estates, . . . if one (1) or more of the legatees, devisees, distributees or parties in interest has prosecuted for the benefit of others interested with him, and has been to trouble and expense in that connection, the court shall allow him his necessary expenses, and his attorney reasonable compensation for his services, in addition to the costs. This allowance shall be paid out of the funds recovered before distribution.

As explained in *Webster County Soil Conservation Dist. v. Shelton*, 437 S.W.2d 934 (Ky. 1969), this statute requires that those benefitting from the creation of a "common fund" through no trouble or expense of their own must share, in equity, the costs and expense of obtaining that fund. *Id.* at 940. The reasoning for this rule is as follows:

> It would be unfair to permit one member of a class interested in the outcome of a lawsuit brought for his benefit to stand by and permit another member to bear all the costs and expense of the litigation. When a fund is recovered for the benefit of several parties in interest

> each should bear his share of the burden incident to recovery in proportion to the benefits derived therefrom.

Id. (quoting *Howell v. Highland Cemetery Co.*, 297 Ky. 659, 181 S.W.2d 44, 45 (1944) (internal citations omitted)).

In *Shelton v. Simpson*, 441 S.W.2d 421(Ky. 1969), the Kentucky Supreme Court held that the determination of the amount of attorney fees that may be assessed against unrepresented parties benefiting from a "common fund" pursuant to KRS 412.070 was a discretionary act of the trial court. *Id.* at 423. "The amount involved; the time required in preparation and prosecution of the case; and the knowledge and training and experience possessed by the attorney, together with his recognized ability and reputation, including other probable factors such as the prospective benefits he may be able to obtain for his client and the loss of other fees by reason of his employment, are some of the elements to be considered in fixing a fair and reasonable fee." *Howell*, 181 S.W.2d at 45.

The JTG Law Firm cites to federal authority to support its argument that a noncontracted contingency award against the entirety of the "common fund" recovery, including their clients' portion of that recovery, was permissible in this case under KRS 412.070. Review of this authority reveals that "common fund" awards in federal courts resulting from class-action lawsuits may be calculated based upon a percentage of the total recovery (contingency fee) or based upon a lodestar or multiplier approach (hourly rate). *See Fruit of the Loom, Inc.*, 234 F.R.D. at 633. The recent trend within the Sixth Circuit "has been towards

application of a percentage-of-the-fund method" because the "lodestar method is too cumbersome and time-consuming of the resources of the Court . . . ." *Id.* (internal citation and quotation omitted).

Yet, this case is not factually similar to the federal cases cited by the JTG Law Firm. Those cases involved large class action lawsuits where recoveries were being paid to literally hundreds of different class members. *See* Fed. R. Civ. Pro. 23 (prerequisite of designating an action as a "class action" is that "the class is so numerous that joinder of all members is impracticable"). In such circumstances, prosecuting attorneys often take substantial risk that hundreds of hours of time and thousands of dollars of expenses will go entirely uncompensated if they are unable to procure a successful result for their clients. In contrast, this is an estate case where the JTG Law Firm was not required to advance any money to pursue this litigation on behalf of the Kincaid brothers. Additionally, the Kincaid brothers personally paid the firm $69,000 prior to the firm's final motion for attorney fees. Thus, we fail to discern any substantial similarity between the risk undertaken by attorneys in typical class action cases and the risk undertaken by the JTG Law Firm in this case.

Of additional significance is the fact that the number of beneficiaries in this case is much smaller than the number of claimants in a typical class action case. Thus, the burden of having to calculate fees accruing from large numbers of recoveries is simply not present here. The sole beneficiaries of the fund at issue

were the following family members of the decedent: the daughters, the grandsons, and any and all children, both born and unborn, of the grandsons.

The advisory committee, the trustee, and the daughters (Joan and Jane Kincaid) were represented by their own counsel. Initially, the JTG Law Firm represented both the grandsons (the Kincaid brothers) and the grandsons' living children. However, when the settlement agreement was entered into by the parties, the JTG Law Firm ceased to represent the interests of the living children. The agreement reflects the following:

> WHEREAS, the only living beneficiaries of the Trust of Garvice D. Kincaid who are not parties to this Agreement are the minor children of Kevin Kincaid;
>
> WHEREAS, this Settlement Agreement requires the appointment of a *guardian ad litem* to protect the interests of the minor and unborn beneficiaries of the Trust of Garvice D. Kincaid, and it requires Court approval to ensure the fairness and propriety of its provisions . . . [.]

Pursuant to this settlement, the JTG Law Firm procured large cash distributions for their clients, the Kincaid brothers, to the exclusion of the other beneficiaries. The settlement agreement further provided that the JTG Law Firm would file a motion seeking attorney fees and that any fees granted by the trial court would be paid from Fund C.

According to the JTG Law Firm, the Kincaid brothers' execution of this settlement agreement created a significant recovery not only for themselves, but also for their living and unborn children. It was the creation of this "common

fund" through the efforts of their clients' litigation, the law firm argues, that authorized the trial court to enter an order obligating both the living and unborn children to share in the cost of this asset preservation pursuant to KRS 412.070. The firm further contends that the parties agreed to this "common fund" concept by specifically including language in the settlement agreement acknowledging that the JTG Law Firm would seek an award of fees from the estate.

The Kincaid brothers concede that they were aware of the JTG Law Firm's intent to seek part of its attorney fees directly from Fund C. In fact, in June 2006, the brothers and their minor children moved for and were granted an advancement of $50,000 from Fund C to pay for anticipated attorney fees and expenses.[6] However, they claim they were shocked and blindsided by their attorneys' attempt to seek a ten percent (10%) contingency award from the "common fund" rather than a fee based on hourly billings as the parties had agreed.

We agree that the absence of a contingency fee arrangement, written or otherwise, between the JTG Law Firm and their clients is controlling in this matter. In fact, the very case cited by the trial court to support its award of a contingency fee to the JTG Law Firm involved attorneys who entered into a contingency fee arrangement with their clients. *See Fruit of the Loom, Inc.*, 234 F.R.D. at 634. One of six factors in evaluating the reasonableness of a requested fee from a "common fund" in this jurisdiction's federal courts is "whether the services were undertaken on a contingent fee basis." *Id.* (*citing Bowling v. Pfizer,*

[6] The motion requested $75,000, but the trial court allowed only $50,000.

Inc., 102 F.3d 777, 780 (6th Cir. 1996)). The JTG Law firm concedes that their services were not undertaken on a contingent fee basis.

The JTG Law firm argues, however, that the consideration of any type of fee agreement entered into with their clients is irrelevant since the law firm is not seeking fees directly from their clients, but rather they are seeking fees from Fund C as a whole. In other words, the JTG Law firm contends that the increase in the amount of funds allocated to Fund C permitted them to bypass their clients' contractual right to control the fees assessed against their portion of the recovery obtained through the settlement in favor of seeking a larger fee from the fund as a whole. As will be set forth herein, this position is simply not supported in either law or fact.

As to the facts, it is apparent that the JTG Law Firm does not have a right to seek any kind of fee from Fund C as a whole because the law firm did not represent the broad interests of Fund C in its prosecution of this matter. Rather, it was the advisory committee and its attorneys who were representing the broad interests of Fund C. *See Erdman's Adm'r v. Erdman's Adm'r*, 231 Ky. 219, 21 S.W.2d 258, 259 (1929) (administrator of estate is the fiduciary who broadly represents all who may have an interest in the estate); *Skinner v. Morrow,* 318 S.W.2d 419, 425 (Ky. 1958) (pursuant to administrator's duty to ensure that estate is properly administered and distributed, administrator is obligated to participate on behalf of estate in any lawsuits concerning the estate). Because the interests of Fund C were already represented by attorneys for the estate, the JTG Law Firm

was foreclosed from claiming a fee in equity against the fund. *See Cambron v. Pottinger*, 310 Ky. 70, 219 S.W.2d 401, 402-403 (1949) ("The rule is firmly established in this jurisdiction that the court will not allow attorney fees to one party to be charged against the general fund where other parties are represented by attorneys in the same litigation.").

Moreover, the plain language of the settlement agreement demonstrates that any benefit derived to Fund C as a whole by the JTG Law Firm's efforts were simply incidental to the JTG Law Firm's representation of the Kincaid brothers. Not only does the JTG Law Firm purport to represent only the Kincaid brothers in that agreement, but the agreement reflects that the law firm procured substantial cash distributions for their clients to the exclusion of all other Fund C beneficiaries. The law firm's representation of the Kincaid brothers' interests to the exclusion of other interests is further demonstrated by a provision in the settlement agreement which bars two of the Fund C beneficiaries, Joan Kincaid and Jane K. Johnson, from ever receiving distributions from this fund. Thus, we reject the JTG Law Firm's contention that their incidental procurement of a benefit to some unrepresented Fund C beneficiaries can somehow supersede their contractual and ethical obligations under SCR 3.130(1.5)(c) to not assess a contingency fee against the recoveries, both vested and contingent, of their clients in the absence of a written agreement.

Our Rules of Professional Conduct further dictate that the interests of the JTG Law Firm must yield to the competing interests of their clients. *See* SCR

3.130(1.7) (Conflict of interest: general rule); SCR 3.130(1.8) (Conflict of interest: prohibited transactions). The JTG Law Firm's fee motion was surely in conflict with their clients' interests as any fees assessed against Fund C as a whole necessarily intruded upon the vested and contingent recoveries of the JTG Law Firm's own clients, the Kincaid brothers. Of the $28 million dollars that was allegedly "preserved" in Fund C as a result of the law firm's efforts on behalf of the brothers, $8 million dollars was specifically allocated for distribution to the Kincaid brothers. Thus, $800,000 of the fee awarded by the trial court was a direct assessment against the recoveries of the JTG Law Firm's clients.

As for the remaining $20 million dollars, the Kincaid brothers have a proportionate future interest in these funds as direct beneficiaries of Fund C. Contrary to the JTG Law Firm's contention, Fund C does not exist for its own benefit, but rather it exists for the benefit of the beneficiaries thereto. Thus, we reject the law firm's contention that their assessment of fees against Fund C did not interfere with or impede their clients' recoveries in this litigation.

The JTG Law Firm nevertheless cites to *Crutcher v. Elliston's Ex'rs*, 299 Ky. 613, 186 S.W.2d 644 (1945), for the position that the existence of any kind of fee contract between the parties is "irrelevant" to the determination of a "common fund" fee award. Our review of the pertinent authority reveals such a contention is without merit.

In *Crutcher*, the Kentucky Supreme Court addressed the reasonableness of attorney fees charged against the estate of O.P. Elliston. *Id.* at

647. In sorting out the respective rights and privileges of the estate's life beneficiaries versus its remaindermen beneficiaries, attorneys for the remaindermen beneficiaries sought a combined fee of $2,750, or approximately 5% of the estate. *Id*. This fee was set pursuant to a "current schedule of fees" that had been agreed upon and promulgated by the local bar. *Id.* The trial court refused to grant the recommended fee despite favorable testimony from several local attorneys, ruling that the circumstances only justified a fee of $500. *Id.*

Attorneys for the remaindermen beneficiaries appealed the trial court's refusal to grant them the fee set by the local bar. In ruling that the trial court did not abuse its discretion in reducing the fee charged to the estate, the *Crutcher* Court cited to *Erdman's Adm'r v. Erdman's Adm'r*, *supra,* for the proposition that courts are "not bound by any schedule of fees or even by a contract made by a personal representative with an attorney" when determining the reasonableness of any fee sought to be charged against an estate. *Id.*

The issue determined in *Erdman's Adm'r* was whether the trial court could "reduce . . . an attorney's fee fixed in a contract of employment by the personal representative [of an estate]." 21 S.W.2d at 258. In that case, the personal representative procured an attorney to prosecute a lawsuit involving the estate. *Id.* The personal representative agreed to pay the attorney fifty percent (50%) of any recovery obtained. *Id.* A recovery to the estate was obtained by the attorney; however, a creditor of the estate objected to such a large attorney fee. *Id.* The trial court determined that a fifty percent (50%) attorney's fee was

unreasonable under the circumstances and, thus, substantially reduced the fee charged to the estate. *Id.*

In addressing the attorney's appeal of the trial court's reduction of his agreed upon fee, the Court in *Erdman's Adm'r* held that the authority of a personal representative to make fee contracts with attorneys "is subject to the limitation that the fee stipulated shall be reasonable, and that is a question for the court to decide, under its general powers over the management and settlement of trust estates." *Id.* at 259. The Court further held as follows:

> One contracting with a personal representative does so subject to the legal limitations on his authority to act in such capacity, and this, of course, includes the power of revision by the courts. This rule is sound in law and in principle, for he is not only the representative of the decedent, or of his heirs or devisees, but also to a very great extent is the representative of the creditors. He occupies a position of trust with respect to those who are interested in the estate, and in a broad sense is a trustee of the property in his hands.

Id.

In this case, the trial court did not reduce but rather enhanced, by at least a factor of ten (10), the fee the Kincaid brothers claimed they agreed to pay the JTG Law Firm for their services. These circumstances are the exact opposite of the circumstances set forth in *Erdman's Adm'r* and *Crutcher*. Moreover, the holdings in those cases do not stand for the principle advanced by the JTG Law Firm that trial courts may ignore or refuse to consider fee agreements entered into by attorneys and their clients in "common fund" cases. Rather, the holdings in

Erdman's Adm'r and *Crutcher* merely reinforce the longstanding rule that trial courts may, when necessary, reduce attorney fees claimed against "common funds" in cases where such fees are simply not reasonable under the circumstances.

The controlling authority in this case actually lies in *Webster County Soil Conservation Dist. v. Shelton*, 437 S.W.2d 934 (Ky. 1969). In *Webster County*, Kentucky's highest court addressed facts nearly identical to those presented in this case. The reasonableness of an attorney fee assessed against a "common fund" obtained by approximately 400 class members, on behalf of a class of about 536 members was challenged by the attorney representing the 400 class members. *Id.* at 935. The 400 class members prosecuting the lawsuit entered into a written contingency fee agreement with this attorney to pay fifty percent (50%) of any recovery obtained. *Id.* 936. When a recovery was obtained, the attorney sought to have his fifty percent (50%) contingency fee contract enforced against the recoveries of each class member who signed the contract. *Id.* As for the approximately 136 class members who did not enter into a contract with him, the attorney asked the trial court to require each of these class members to pay a reasonable fee for his services. *Id.* The trial court denied the attorney's motion and ordered the assessment of a twenty-five percent (25%) contingency fee against the common fund as a whole. *Id.*

On appeal, the appellate court in *Webster County* agreed with the class members' attorney that the trial court abused its discretion in failing to enforce the

fifty percent (50%) contingency agreement against the attorney's clients. In so holding, the Court stated as follows:

> We conclude Mr. Nall had a right to have his contract enforced against his own clients strictly in accordance with the terms thereof.
>
> As to the parties who did not contract with Mr. Nall but who realized a benefit from his efforts, their responsibility is fixed by a 1954 act of the legislature, now KRS 412.070 . . . .

Id. at 940.

It would be absurd for us to now hold that clients do not have a corresponding right to enforce the fee contracts entered with their attorneys in "common fund" cases. As held in *Webster County*, the fee agreement between an attorney and his client remains both relevant and controlling to the determination of the fees assessed against a "common fund," unless the fee set forth in the fee agreement is otherwise determined to be unreasonable. *See Erdman's Adm'r*, 21 S.W.2d at 259; *Crutcher*, 186 S.W.2d at 647. Accord for this holding is also found in *Skinner v. Morrow*, 318 S.W.2d 419 (Ky. 1958), where Kentucky's highest court held that an attorney could not collect fees pursuant to KRS 412.070 from his clients' share of an estate recovery that was in excess of the fee agreed to between the attorney and his clients. *Id.* at 427-428. ("We so interpret the contracts, and in any event [the attorney] would not be entitled to recover from his clients a fee greater than they agreed to pay him.").

Thus, contrary to the JTG Law Firm's assertions, the controlling authority in this Commonwealth demonstrates that a trial court's discretion to set attorney fees "from whole cloth" pursuant to KRS 412.070 lies only against those parties who have benefitted from a "common fund" recovery but have not contributed to the cost of obtaining that recovery through the independent employment of legal counsel. *See* KRS 412.070; *Shelton v. Simpson*, 441 S.W.2d at 423 ("It is our conclusion that the amount of a reasonable attorney's fee for which the *noncontracting* members of the class are liable must be determined by the exercise of discretion by the trial court.") (emphasis added); *see also Cambron v. Pottinger*, 310 Ky. 70, 219 S.W.2d 401, 403 (1949) (only unrepresented parties benefitting from the work of others may be compelled to pay attorney fees pursuant to KRS 412.070). The JTG Law Firm's contention that KRS 412.070 creates an "exception" to the requirements of SCR 3.130(1.5)(c) regarding the collection of contingency fees against the recoveries of the law firm's own clients is without merit.

The JTG Law Firm alternatively argues that a contingency fee arrangement can be inferred from the circumstances of this case. The Kincaid brothers argue strenuously that they never agreed to a contingency fee arrangement, but rather it was always the brothers' understanding that attorney fees would be paid to the JTG Law firm based on an hourly rate. They cite to a ten (10) year history of hourly billings in all past representations by the JTG Law Firm and to the fact that the JTG Law Firm sought and received hourly payments for the first

year and a half of this litigation. It was only in the last six months of the litigation that the JTG Law Firm stopped sending the brothers hourly billing statements. According to the brothers, considering the size of this estate, they knew that an hourly rate was in their best interests and that they would have never employed the JTG Law Firm if they knew the firm was going to seek a percentage of the monies "preserved" in Fund C pursuant to this litigation.

The JTG Law Firm concedes it had no written contingency fee agreement with their clients as required by SCR 3.130(1.5)(c). They deny the existence of an hourly fee contract, arguing that this case was too complex to have determined a fee arrangement in the early stages of the litigation.[7] As early as February 2007, the JTG Law Firm claims it alerted its clients by letter to an intention to file a fee petition with the trial court seeking a fee "well above any hourly rate." Because the Kincaid brothers did not terminate the law firm's employment upon being alerted to this intention, the JTG Law Firm contends that the brothers implicitly agreed to a contingency fee arrangement at this time. In the alternative, the law firm contends that since there is no direct evidence establishing any kind of fee contract in this case, they should be permitted to collect a contingency fee in the absence of such an express contract. We find no support for either of these arguments.

Simply alerting one's client to one's intention to seek a fee from the trial court that is "well above any hourly rate" is not sufficient to satisfy the

[7] The trial court never addressed this issue.

requirements of SCR 3.130 (1.5)(c). *See Rasner v. Kentucky Bar Ass'n*, 57 S.W.3d 826, 829 (Ky. 2001) (attorney publicly reprimanded for pursuing a contingency fee without a written contingency fee agreement, despite fact attorney communicated to client that he would represent client only for said fee). Our Rules of Professional Conduct are unambiguous in their mandate that attorneys in Kentucky shall not seek contingency fees against their clients' recoveries unless said fees are set forth in writing and expressly agreed to by the client. SCR 3.130 (1.5)(c) ("A contingent fee agreement shall be in writing . . . .") The JTG Law Firm concedes that no written contingent fee agreement exists in this case. Thus, SCR 3.130-(1.5)(c) prohibited the JTG Law Firm from requesting or accepting a contingency fee award against any portion of their clients' recovery. *See Womack*, 269 S.W.3d at 413; *Kentucky Bar Ass'n v. Basinger*, 53 S.W.3d 92, 94 (Ky. 2001) (attorney suspended for violating SCR 3.130-1.5(c) and 3.130-8.3 by attempting to charge a contingency fee without a written contingent fee agreement). The JTG Law Firm's arguments to the contrary are without merit.

The JTG Law Firm's alternative argument that the absence of any fee agreement whatsoever permitted a contingency fee against their clients' recoveries in this case also fails. In the absence of a fee contract, an attorney's remedy lies solely in *quantum meruit*, which also presumes the collection of a noncontingency-based fee. *See Baker v. Shapiro*, 203 S.W.3d 697, 699 (Ky. 2006) (attorneys not entitled to contingency fee, even if expressly contracted for, if attorney is terminated prior to completion of the employment contract).

Finding no applicable case law, rules, or statutes to justify the JTG Law Firm's arguments, we hold that neither the plain language of nor the case law interpreting KRS 412.070 creates an exception to the requirements of SCR 3.130(1.5)(c) for attorneys seeking contingency fees from the recoveries realized by their clients. Plainly stated, SCR 3.130(1.5)(c) prohibits attorneys from seeking a contingency fee against the recoveries of their clients, regardless of whether these recoveries constitute a portion of a "common fund" under KRS 412.070, unless said fee is set forth in writing and expressly agreed to by the clients. As it was contrary to the Kentucky Rules of Professional Conduct for the JTG Law Firm to request or accept such a contingency fee award that was both not in compliance with SCR 3.130(1.5)(c) and well above any reasonable hourly rate that could be justified, we hold that it was an abuse of discretion for the trial court to grant such an award in violation of the authority set forth herein.

C. Evaluation of fee assessed against recoveries of unrepresented beneficiaries of Fund C

In addition to contesting the contingency fee assessed against them by the trial court, the Kincaid brothers also argue that the trial court erred in utilizing KRS 412.070 to assess attorney fees against the recoveries of the remaining unrepresented beneficiaries of Fund C. They claim there was no actual "recovery" from which an award could be made (since the value of Fund C was actually reduced, not maintained or enhanced, as a result of the lawsuit) and that an award against the recoveries of the unrepresented beneficiaries of Fund C was not

permitted in this case because all beneficiaries with vested interests were represented by counsel.

The JTG Law Firm contends that these arguments were not presented before the trial court and, thus, were not preserved for review. In the alternative, they argue that the Kincaid brothers waived any objection to a recovery of attorney fees from the estate by: (1) moving for and receiving $50,000 in KRS 412.070 funds in June 2006; and (2) entering into the December 2007 settlement agreement specifically acknowledging the JTG Law Firm's intent to seek attorney fees from the estate. The brothers counter that if any arguments are indeed unpreserved, it was because they were given inadequate notice and time to prepare for the January 3, 2008, hearing which addressed the JTG Law Firm's motion for attorney fees. Our review of these issues reveals that we need not address the substance of the JTG Law Firm's arguments or the brothers' lack of notice argument since we find the brothers' substantive claims to be without merit in any case.

Our case law has long established that an estate may be subject to the direct assessment and collection of attorney fees pursuant to KRS 412.070 where litigation involving the estate results in the recovery of a "common fund" for more than one beneficiary. *See Clark v. Pepper's Adm'r*, 132 Ky. 192, 116 S.W. 353, 355 (1909); *Skinner v. Morrow*, 318 S.W.2d 419, 427 (Ky. 1958). In this case, the Kincaid brothers readily acknowledge that they are not the only beneficiaries of Fund C. However, they claim that since the value of Fund C was ultimately

reduced in this case, there is no "recovery" from which an award can be made under KRS 412.070. We disagree.

In *Cummings v. Covey*, 229 S.W.3d 59 (Ky. App. 2007), this Court held that the plain language of KRS 412.070 permitted an award of attorney fees only "out of the funds recovered." *Id.* at 62. In other words, attorney fees under KRS 412.070 are capped at the amount actually recovered by parties to the subject litigation. *See id.* ("This allowance shall be paid out of the funds recovered before distribution."). In *Howell v. Highland Cemetery Co.*, this meant that an attorney, seeking fees from a recovery paid over time, was entitled to collect his fees only at the intervals when the recovery was actually distributed to the beneficiaries. 181 S.W.2d at 45.

The dispute in this case arose when the Appellants responsible for managing the funds in the Kincaid Estate proposed to reallocate monies to Fund C. This proposed reallocation would have reduced the value of Fund C from approximately $195 million dollars to approximately $52 million dollars. The Kincaid brothers' litigation resulted not only in the increase of this reallocation amount to approximately $82 million dollars, but also it provided for substantial cash payments to each brother. Clearly, these cash payments constitute a "recovery" to the brothers. The increase in the amount of monies to be allocated to Fund C also constituted a "recovery" under KRS 412.070 since these additional monies would not have been available for distribution to the fund's beneficiaries had the brothers not initiated and been successful in this litigation. Accordingly,

we reject the Kincaid brothers' first argument that no recovery existed from which an award of attorney fees could be made under KRS 412.070. While the case law set forth above limits the actual collection of fees by the JTG Law Firm until the time the funds are actually distributed to the beneficiaries, it does not affect the award of said fees based on the enhancement of funds available for distribution to these beneficiaries. *See Howell*, 181 S.W.2d at 45 ("The attorney is entitled to his proportionate share of the fee assessed against the [recovery paid] to date and the balance of the share assessed against the principal when the [remainder of the recovery is] paid to the [beneficiaries], and under KRS 30.200 he is entitled to a lien for the amount of his fee.").

The brothers also claim that the holding set forth in *Cambron v. Pottinger*, 219 S.W.2d at 402-403, prevented an award of fees from the estate since the minor beneficiaries were represented by counsel for most of the litigation (the representation ceased at the time the settlement agreement was executed) and the unborn beneficiaries had no vested interests at the time of the litigation. We also find this argument to be without merit.

The *Cambron* case held that attorney fees may not be awarded against a "common fund" pursuant to KRS 412.070 where the other parties benefiting from that fund "are represented by attorneys in the same litigation." *Id.* The reasoning for this holding was that "one jointly interested cannot be compelled to pay counsel employed by others when he is represented by his own counsel." *Id.* at 403 (internal citations and quotation omitted).

In this case, the fact that neither the minor nor the unborn beneficiaries were represented by counsel during the negotiation and execution of the settlement agreement which procured the substantial enhancement of funds allocated to Fund C is controlling. While the settlement agreement provided for the appointment of a *guardian ad litem* to review the agreement on behalf of these beneficiaries for "fairness and propriety," we do not believe that the limited role served by the guardian barred an award of attorney fees from the "common fund" pursuant to the principles set forth in *Cambron*.

Likewise, the brothers cite no authority for their claim that the unborn beneficiaries' lack of vested rights at the time of the settlement agreement prohibited a ruling from the trial court that these beneficiaries should, in equity, nevertheless share in the costs of a common recovery under KRS 412.070 if and when a recovery is actually distributed to them. Accordingly, this assignment of error is similarly rejected as being without merit.

We next turn to the errors asserted by all Appellants. They claim the fee awarded to the JTG Law Firm was unreasonable and excessive in that it was at least ten (10) times greater than any fee that could have been justified based on the time that was actually devoted to the case. They further argue that the trial court failed to sufficiently satisfy the mandate set forth in *Angel v. McKeehan*, 63 S.W.3d 185 (Ky. 2001), that the total character of the attorney's services must be considered by the trial court when determining the reasonableness of any fee assessed against an estate. *Id.* at 192.

In light of our holding that it was an abuse of discretion to award a contingency fee against any portion of the recovery attributed to the JTG Law Firm's clients in this case, we hold that any determination of the reasonableness of the fee assessed against the recoveries of the remaining beneficiaries must be reevaluated by the trial court.

As set forth above, a host of factors must be considered in determining the reasonableness of any fee assessed against unrepresented parties benefitting from a "common fund" pursuant to KRS 412.070. One of these factors expressly includes the actual time employed by the attorney in the preparation and prosecution of the case. *Howell*, 181 S.W.2d at 45. The total character of the services provided by the attorney, including the fee arrangements with the Kincaid brothers for these services, must also be considered in any determination of an unrepresented party's proportionate fee responsibility under KRS 412.070. *See* SCR 3.130 (1.5) (a) (8) ("whether a fee is fixed or contingent" is one factor to be considered in determining the reasonableness of an attorney fee); *Taylor v. Taylor*, 223 Ky. 799, 4 S.W.2d 752, 756 (1928) (attorney fees are not to be measured solely by amount of recovery, but should be determined based on the "extent and character of the work" performed by the attorney); *Fruit of the Loom, Inc.*, 234 F.R.D. at 634 (one of six factors in evaluating the reasonableness of a requested "common fund" fee is "whether the services were undertaken on a contingent fee basis"). This is certain since the award of attorney fees pursuant to KRS 412.070 is grounded in equity, and equity most surely requires that the proportionate fee

burden assessed against an unrepresented party receiving a beneficial interest from the client's litigation should bear some resemblance to the fees actually paid by that client. *See Howell,* 181 S.W.2d at 45 ("When a fund is recovered for the benefit of several parties in interest each should bear his share of the burden incident to recovery in proportion to the benefits derived therefrom.").

D. Conclusion

For the reasons set forth herein, we hereby vacate the trial court's March 6, 2008, order awarding attorney fees to Appellee and remand this case for a determination of the Kincaid brothers' proportionate share of the recovery realized in this case. Once their share of the recovery is calculated, the trial court is directed to make a determination as to whether an hourly fee agreement existed between the Kincaid brothers and the JTG Law Firm. If so, the trial court shall enforce that agreement. If not, the trial court may entertain any motions promulgated by the JTG Law Firm for a *quantum meruit* recovery for services provided to their clients in this litigation. As for the assessment of proportionate fees against the recoveries of the remaining beneficiaries of Fund C pursuant to KRS 412.070, the trial court is directed to determine a reasonable fee based on the total character of the services rendered in this case, including the fee arrangement between the Kincaid brothers and the JTG Law firm established for these services and the actual time employed by the JTG Law Firm in the preparation and prosecution of this case.

HARRIS, SENIOR JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

TAYLOR, JUDGE, DISSENTING: Respectfully, I dissent. Contrary to the conclusion of the majority, this is not a contingent fee case, in my opinion. Rather, I believe this is a classic common-fund case which the circuit court carefully analyzed and properly resolved, pursuant to KRS 412.070(1).

The circuit court correctly noted that this is a unique case. It is also a very complex case where the attorneys representing the Kincaid brothers and their heirs (Fund C beneficiaries) obtained an outstanding result, notwithstanding the complexity of the issues involved and the significant opposition from Jane Johnson and Joan Kincaid (the sole beneficiaries of Fund A and B) and the Advisory Committee (controlled by Jane and Joan) charged with overseeing administration of the Estate of Garvice D. Kincaid.

Garvice Kincaid died testate in 1975. He was a very successful businessman and attorney. At the time of his death in 1975, he was Chairman of the Board of Kentucky Central Life Insurance Company, held controlling interest in twenty banks in central and eastern Kentucky, and headed the Lexington Law Firm of Kincaid, Wilson, Schaeffer & Hembree. Mr. Kincaid had amassed a substantial estate at the time of his death which has been in administration for over thirty years. The Estate provided for three trust funds which have assets today valued in excess of 200 million dollars and which are the subject matter of the dispute between Jane and Joan and the Kincaid brothers.

Jane and Joan obtained control of the Advisory Committee contemporaneously with the collapse of Kentucky Central Life in 1993. The value of assets in Funds A and B dropped dramatically at this time while the Central Bank stock in Fund C substantially increased in value. In 2005, the Advisory Committee, controlled by Jane and Joan, sought court approval to reallocate funds from Fund C to Funds A and B to the detriment of the Kincaid brothers, which facilitated the hiring of the JTG Law Firm. In 2005, the value of Fund C assets had grown to approximately 195 million dollars. Jane and Joan sought to reallocate approximately 143 million dollars from Fund C to Funds A and B (to their direct benefit as sole beneficiaries), leaving approximately 52 million dollars in Fund C. In 2007, prior to the scheduled trial, a settlement was reached that allowed an additional 30 million dollars to remain in Fund C, to the benefit of the Kincaid brothers, above that amount provided for in the proposed reallocation by Jane and Joan.

There are no fee agreements of record in this case. The Kincaid brothers argue that their intent was always to pay hourly attorney fees based on their historical relationship with JTG. As early as May 2006, JTG gave notice to the court, the Kincaid brothers, and the Advisory Committee, that it intended to seek an award of fees and expenses under the common-fund doctrine pursuant to KRS 412.070(1).[8] I believe this notice sufficiently complied with Kentucky Rules of Professional Conduct 1.5(b). Notwithstanding, JTG continued to represent the

[8] *See* Motion to Advance Fees and Expenses from Fund C, filed May, 2006.

interest of the Kincaid brothers and their heirs without protest. In February 2007, Attorney True sent a letter to the Kincaid brothers regarding the fee situation, which set forth a second written notice to the Kincaid brothers that the law firm anticipated filing a fee application with the court that would seek fees well above any hourly fee amount. Again, the Kincaid brothers took no action to terminate the services of JTG and, in fact, continued in their preparations for a trial to oppose the reallocation proposal by Joan, Jane and the Advisory Committee. These preparations continued until the settlement – immediately prior to the scheduled trial, in December 2007.

Had this been a contingent fee case, the actual fees, arguably, could have been substantially higher; however, as noted by the parties, the Kincaid brothers had no authority to enter into a contingent fee agreement on behalf of Fund C and, of course, Jane and Joan and the Advisory Committee would have opposed a contingent fee agreement since they controlled Fund C and initiated the action to reduce the assets of Fund C to their benefit. But for the actions of Jane and Joan in their attempt to reallocate the assets of Fund C, there would have been no necessity for any litigation, including attorney's fees and costs being incurred by the Kincaid brothers.

I disagree with the majority that JTG did not represent the "broad interests" of Fund C as a whole in their representation of the Kincaid brothers. As a result of JTG's representation, all beneficiaries of Fund C directly benefited. I agree that there could have been better communications in defining the attorney-

client relationship, given the facts and circumstances of this complex case. However, I do not find any impropriety in JTG seeking a common-fund recovery in this case. Quite frankly, I am more concerned with the actions of Jane, Joan, and the Advisory Committee in their attempt to reallocate millions of dollars to their personal benefit while acting in a fiduciary capacity for Fund C.

This leads me to question whether the Advisory Committee, Jane and Joan have standing to object to the JTG fee request after they arguably attempted to divert almost 75 percent of the assets in Fund C to Funds A and B for their direct personal benefit – which was to the detriment of the Kincaid brothers. If anything, upon payment of attorney's fees from Fund C, Fund C arguably could pursue an action against Jane, Joan, and the Advisory Committee for a possible breach of their fiduciary duties in attempting to reallocate these funds for their personal benefit and to the detriment of the remaining beneficiaries of Fund C.[9]

As noted, the Kincaid brothers could have terminated the services of JTG at any time after they were put on notice that JTG would be seeking a substantial recovery based upon the common-fund doctrine. Any attorney in this state that has engaged in complex civil litigation will acknowledge that hindsight is always 20/20, especially as pertains to the position that may be taken by the client

[9] Appellees argued in their motion for reallocation that Mr. Kincaid's Will and the Kincaid Trust Agreement permitted this "final" reallocation of the "marital" and "nonmarital" interests in the respective Funds. In their arguments before the circuit court, the Kincaid brothers asserted that Jane, Joan, and the Advisory Committee breached their fiduciary duties to all beneficiaries of Fund C. Since the parties settled the Kincaid brothers' challenge, the circuit court did not determine whether Jane, Joan, and the Advisory Committee had acted improperly in seeking to reallocate the funds to the personal benefit of Jane and Joan.

after the dust settles. If the Kincaid brothers had hired another law firm, perhaps a much bigger law firm, they could still be facing a substantially higher fee request and could also be facing a significantly worse result. Even if the Kincaid brothers had been willing to enter into a contingent fee arrangement for their specific recovery, no competent law firm would have retained a case of this magnitude on a contingent basis without receiving at least one-third of the total recovery. In this case, the Kincaid brothers received (or will receive) 8 million dollars in tax-free distributions from Fund C as a result of the settlement which can be attributed specifically to the services provided by JTG. Based on a one-third recovery, this alone would have resulted in 2.6 million dollars in fees, plus additional fees on the 500 thousand dollars per year that each of the Kincaid brothers will receive from Fund C for the rest of their lives. Thus, if we compare the fees awarded under the common-fund approach versus what could have been received on a true contingent basis, the contingent fees would have been substantially greater and the common-fund award appears most reasonable.

Therefore, based on the record in this case, the findings of fact set forth by the circuit court are not clearly erroneous nor was the award of fees based upon the common-fund doctrine an abuse of discretion, in my opinion.

Finally, since the majority is returning this case to the circuit court to address the fee award based upon the *quantum meruit* doctrine, I believe some additional observations are in order. *Quantum meruit* is an equitable doctrine which allows one to recover the reasonable value of the services rendered in a

quasi-contractual relationship. *Cherry v. Augustus*, 245 S.W.3d 766 (Ky. App. 2006). To recover upon a claim based upon *quantum meruit*, one must show:

1. that valuable services were rendered, or materials furnished;
2. to the person from whom recovery is sought;
3. which services were accepted by that person, or at least were received by that person, or were rendered with the knowledge and consent of that person; and
4. under such circumstances as reasonably notified the person that the plaintiff expected to be paid by that person.

Id.(citing 66 Am. Jur. 2d *Restitution and Implied Contracts* § 38 (2001)).

When examining the award of fees to JTG based upon *quantum meruit*, I believe it would be both fair and equitable for the circuit court to require Jane, Joan, the Advisory Committee, and the executor of the Estate to disclose all legal billings incurred by each that have been paid by the Funds or the Estate since the initiation of the action by Jane and Joan to reallocate the funds from Fund C to Funds A and B in December 2005. This inquiry should also include all fees generated in opposition to JTG's fee request, including the Kincaid brothers. From this information, I believe the court can determine the reasonableness of fees to be awarded to JTG. Contrary to the suggestion of the majority, the outstanding result achieved in this highly complex and complicated case is worthy of a substantial *quantum meruit* award, which could easily be more than was awarded by the circuit court under the common-fund doctrine, in my opinion.

One other observation is in order. As part of the settlement, whereupon 30 million dollars of additional benefit was recovered for Fund C after almost two years of extensive efforts by JTG, 2 million dollars of that amount was agreed to by the Kincaid brothers, Jane, Joan, and the Advisory Committee to be paid toward final administrative expenses in closing out Mr. Kincaid's Estate. I find most peculiar that neither the Kincaid brothers, Jane, Joan, nor the Advisory Committee believe this amount to be excessive given that the bulk of the 2 million dollars will, in all likelihood, go to attorneys, accountants, and other professionals who are providing services on behalf of the Estate and the trust Funds. This amount on its face appears grossly excessive, in my opinion, given that the Estate has been in administration for over thirty years and the Dean Report relied upon by the Advisory Committee, reflects that at least 13.7 million dollars has been paid on Estate debts and expenses as of 2005. The Kincaid brothers have not opposed this excessive allocation for administration expenses from Fund C to finish up the affairs of the Estate but yet are opposing a 2.7 million dollar fee award to the attorneys who created substantial value in Fund C from which the Kincaid brothers have greatly benefited. This is yet another troubling and puzzling aspect of this case. I believe on remand that the circuit court, in conjunction with its *quantum meruit* consideration regarding the fees for the JTG Law Firm, should closely scrutinize the 2 million dollar fund that has been quietly allocated for "wrapping up" the Kincaid Estate.

For the foregoing reasons, I would affirm the Fayette Circuit Court's award of attorney's fees to the JTG Law Firm in this action.

BRIEF FOR JANE KINCAID, JOAN KINCAID AND MICHAEL FOLEY, INDIVIDUALLY AND AS MEMBERS OF THE ADVISORY COMMITTEE FOR ESTATE AND TRUST OF GARVICE D. KINCAID AND CENTRAL BANK & TRUST COMPANY:

James Park, Jr.
Paul E. Sullivan
Barry D. Hunter
Lexington, Kentucky

Carl Timothy Cone
Elizabeth S. Hughes
Lexington, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE JOHNSON, TRUE & GUARNIERI, LLP:

J. Guthrie True
Lexington, Kentucky

ORAL ARGUMENT FOR JANE KINCAID, JOAN KINCAID AND MICHAEL FOLEY, INDIVIDUALLY AND AS MEMBERS OF THE ADVISORY COMMITTEE FOR ESTATE AND TRUST OF GARVICE D. KINCAID AND CENTRAL BANK & TRUST COMPANY:

Barry D. Hunter
Lexington, Kentucky

BRIEF FOR BRETT KINCAID AND
KEVIN KINCAID:

Patterson Decamp
John S. Talbott, III

ORAL ARGUMENT FOR BRETT
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