RENDERED: SEPTEMBER 2, 2011; 10:00 A.M.
TO BE PUBLISHED

ORDERED NOT PUBLISHED BY SUPREME COURT: MAY 16, 2012
(FILE NO. 2011-SC-000598-D)

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002202-MR

JOAN KINCAID; JOAN KINCAID, MEMBER OF THE ADVISORY COMMITTEE OF THE TRUST AND ESTATE OF GARVICE D. KINCAID; JOAN KINCAID, EXECUTRIX OF THE ESTATE OF JANE KINCAID; MICHAEL FOLEY; MICHAEL FOLEY, MEMBER OF THE ADVISORY COMMITTEE OF THE TRUST AND ESTATE OF GARVICE D. KINCAID — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 85-CI-01714 AND 97-CI-04028

BRETT KINCAID; CIERRA KINCAID, A MINOR; KEVIN KINCAID; BROOK KINCAID, A MINOR; BRYCE KINCAID, A MINOR; CHANCE KINCAID, A MINOR; J. ROSS STINETORF, ESQ., AS GUARDIAN AD LITEM FOR THE MINOR, UNBORN BENEFICIARIES OF FUND C OF THE GARVICE KINCAID TRUST; KINCAID FOUNDATION; AND CENTRAL BANK & TRUST COMPANY, AS EXECUTOR AND TRUSTEE OF THE ESTATE OF GARVICE D. KINCAID — APPELLEES

AND NO. 2009-CA-002203-MR

CENTRAL BANK & TRUST COMPANY,
AS EXEC. OF THE ESTATE OF GARVICE
D. KINCAID APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE GARY D. PAYNE, JUDGE
ACTION NOS. 85-CI-01714 AND 97-CI-04028

BRETT KINCAID; KEVIN KINCAID;
CIERRA KINCAID, A MINOR;
BROOK KINCAID, A MINOR;
BRYCE KINCAID, A MINOR;
CHANCE KINCAID, A MINOR;
J. ROSS STINETORF, AS GUARDIAN AD
LITEM FOR MINOR AND UNBORN
BENEFICIARIES OF FUND C OF THE GARVICE
KINCAID TRUST; KINCAID FOUNDATION;
JOAN KINCAID; MICHAEL KINCAID;
MICHAEL KINCAID, MEMBER OF THE ADVISORY
COMMITTEE OF THE TRUST AND ESTATE OF GARVICE
KINCAID; JOAN KINCAID, EXECUTRIX OF THE
ESTATE OF JANE KINCAID; AND JOAN KINCAID,
MEMBER OF THE ADVISORY COMMITTEE OF THE
TRUST AND ESTATE OF GARVICE KINCAID APPELLEES

AND NO. 2009-CA-002263-MR

BRETT KINCAID; KEVIN KINCAID;
CIERRA KINCAID, A MINOR;

BROOK KINCAID, A MINOR;
BRYCE KINCAID, A MINOR; AND
CHANCE KINCAID, A MINOR — CROSS-APPELLANTS

v.

CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES E. KELLER, JUDGE
ACTION NO. 85-CI-01714 AND 97-CI-04028

JOAN KINCAID, EXECUTRIX OF THE
ESTATE OF JANE KINCAID; MICHAEL
FOLEY; MICHAEL FOLEY, MEMBER OF THE
ADVISORY COMMITTEE OF THE TRUST
AND ESTATE OF GARVICE D. KINCAID;
JOAN KINCAID; JOAN KINCAID MEMBER
OF THE ADVISORY COMMITTEE OF THE
TRUST AND ESTATE OF GARVICE D. KINCAID;
AND CENTRAL BANK & TRUST COMPANY,
EXECUTOR AND TRUSTEE OF THE ESTATE OF
GARVICE D. KINCAID — CROSS-APPELLEES

OPINION AND ORDER
UNSEALING RECORDS AND
OPINION
AFFIRMING IN PART
REVERSING AND REMANDING IN PART

** ** ** ** **

BEFORE: ACREE, LAMBERT AND THOMPSON, JUDGES.

THOMPSON, JUDGE: The controversy between the parties is whether Joan Kincaid and Jane Kincaid (the Kincaid daughters) and Michael D. Foley, an unrelated accountant, collectively referred to as (the advisory committee

members), are entitled to compensation for their service as advisors to the estate and trust of Garvice D. Kincaid.[1] However, before addressing the issues presented by the parties, this Court is compelled to discuss the sealing of the record. Although the parties sought and achieved the sealing of the entire record, we believe that the matter is one that is of significant public interest that has infrequently been the subject of judicial opinion. Therefore, we take this opportunity to provide guidance to the trial courts.

Mr. Kincaid's estate consisted of a myriad of investments and an estate valued at over $23 million. The largest estate asset included majority ownership in the voting shares of the once legally and financially troubled Kentucky Central Life Insurance Company and Central Bank. Alleging the need to protect the financial entities, during the proceedings to approve the final allocation and distribution of the estate and trust assets, the advisory committee moved the trial court for a confidentiality order. Of particular concern to the parties was that information regarding the financial status of Central Bank would be subject to public review. The court issued a broadly written protective order that applied "to all information and documents disclosed in this action…."

The litigation concerning the allocation and distribution of the estate assets continued during which the estate's beneficiaries, Brett Kincaid and Kevin

[1] After the appellate briefs were filed, Jane Kincaid died and Joan D. Kincaid, executrix of her estate, was substituted as a party.

Kincaid (Mr. Kincaid's grandsons and referred to as the grandsons),[2] were represented by Johnson True & Guarnieri, LLP. After the parties reached a settlement, litigation ensued concerning the amount and payment of attorney fees to the law firm. In 2008, an appeal was filed in this Court. Because the record was sealed in the trial court, an order was issued by our Court sealing the entire record.

When the current appeal was filed, Central Bank and the advisory committee members sought an order similar to that entered in the 2008 appeal. Because there was no objection and in reliance on the sealing of the records in the earlier appeal, an order was issued sealing the entire record in the current appeal. With the records sealed in both cases pending before this Court, the cases proceeded.

In February 2010, this Court rendered a "To be Published" opinion in the 2008 appeal. Again, an effort was made to privatize the judicial proceeding. Upon receipt of the opinion, the Kincaid daughters filed an emergency motion seeking to remove the opinion from this Court's website and to designate it as unpublished. In ruling on the motion, this Court stressed that lawsuits are public events and despite the prior order sealing the record, there was no basis for disregarding the presumption of the openness of judicial proceedings.[3]

---

[2] The appellees and cross-appellants include minor beneficiaries and unborn children as potential beneficiaries of the trust. For purposes of clarity, we refer to them collectively as the grandsons.

[3] We note that ultimately the case was ordered unpublished by our Supreme Court.

We have outlined the state of the record when this appellate panel began its review and discovered that the entire court records in both cases consisting of over 1,000 pages were sealed, including mere procedural matters. Thus, on its own motion, this Court ordered the parties to file supplemental briefs addressing the propriety of sealing the entire record. Central Bank and the advisory committee advised this Court that they had no objection to unsealing the records and the Kincaid brothers likewise had no objection. However, the lack of objections by the parties neither resolves our concern nor diminishes the need to offer guidance to our trial courts.

The sealing of court records offends the public's right to access court documents or material that derives from the common law and the First Amendment. *Roman Catholic Diocese of Lexington v. Noble*, 92 S.W.3d 724 (Ky. 2002).[4] It is a right so entrenched in our judicial system that there is a presumption that judicial records are available to the public. *Courier-Journal v. McDonald-Burkman*, 298 S.W.3d 846 (Ky. 2009). Yet, it is becoming an increasing practice for trial courts to seal records without a hearing or findings and only because the parties do not want their case open to the public. While it is understandable that

[4] Our discussion does not apply to cases that the legislature has designated as confidential. See KRS 625.045 provides that voluntary termination of parental rights cases shall be confidential; KRS 199.570(1)(a) provides that adoption proceedings shall be confidential; KRS 610.320(3) provides that juvenile records must be confidential; and KRS 413.249(3) provides that certain childhood sexual assault or abuse cases shall be kept confidential.

parties seek to avoid public embarrassment, scrutiny, or financial exposure, the courts must use caution when denying public access to court records.

Although a trial court retains the inherent supervisory power over its own records and files and has the discretionary authority to deny access to its records and files, it should be done only for compelling reasons. *Roman Catholic Diocese of Lexington*, 92 S.W.3d at 730. When exercising that discretion, the trial court is required to balance its inherent right to control and the public's presumptive right of access. *Cline v. Spectrum Care Academy, Inc.*, 316 S.W.3d 320, 325 (Ky.App. 2010). Our concern in this case is the procedure followed by the trial court when determining whether to seal court records. Unfortunately, there is no applicable Kentucky Rule of Civil Procedure. However, we believe that the case law does provide guidance to the trial court in deciding whether to seal a record and the procedure that must be followed.

In *Lexington Herald-Leader Co., Inc. v. Meigs*, 660 S.W.2d 658 (Ky. 1983), the Court addressed the issue in the context of an order closing a criminal proceeding to the public and the press. We summarize the procedure set forth:

> (1) There must be a hearing;
>
> (2) The trial court must consider less restrictive means;
>
> (3) The burden of proof is upon the party seeking closure and it must be established that:

> (a) the right or interest sought to be protected is sufficiently important to warrant the extraordinary protection of the closed court;
>
> (b) the asserted right or interest probably cannot be adequately protected by less restrictive alternatives to closure; and
>
> (c) the right or interest he seeks to protect will be protected by a closed proceeding.

Id. at 664. The Kentucky Supreme Court has held that the principles enunciated in *Meigs* are applicable to court records and civil proceedings. *Courier-Journal and Louisville Times Co. v. Peers*, 747 S.W.2d 125 (Ky. 1988). Thus, although guidance is absent from our civil rules, the procedure in *Meigs* must be followed.

We add an additional principle that emerges from the facts in the present case. There was no hearing conducted and no findings by the trial court and, as a result, there was no compelling reason to seal the court record. It was sealed solely because the parties requested confidentiality. We conclude that the parties' agreement to seal a court record without a hearing and appropriate findings cannot be the basis for denying public access. Otherwise, the fundamental premise of an open and transparent judicial system is undermined.

In conclusion, we note that the rule adopted in *Meigs* is similar to the comprehensive rule adopted in California. California Rules of Court, Rule 2.550 and 2.551. To provide clarity to our trial courts and to preserve the integrity of an open and transparent judiciary, we encourage the Kentucky Supreme Court to

follow those states that have promulgated civil rules providing procedural guidance for sealing records.

NOW, THEREFORE, this Court hereby ORDERS that all records in these appeals are hereby unsealed.

THE ISSUES PRESENTED BY THE PARTIES

The advisory committee members appeal from a summary judgment of the Fayette Circuit Court denying their claims to compensation directly from the remaining trust funds. Central Bank, as executor and trustee, appeals from a subsequent order denying the Bank's request to supplement its executor and trustee fee to compensate the advisory committee members for past service. However, the order permitted Central Bank to pay compensation to the advisory committee members from and after the date of the court's order. Although premised on different legal theories, the advisory committee members and Central Bank agree that the members are entitled to compensation, whether as fiduciaries to the estate or as advisors to Central Bank, as executor and trustee of the estate and trust.

The grandsons filed a cross-appeal from the court's summary judgment denying the advisory committee's request for compensation.[5] The grandsons oppose compensation to the advisory committee members for past or

[5] The grandsons filed a notice of appeal from the summary judgment but their argument pertains to the order permitting Central Bank to pay future compensation to the advisory committee members. Because we conclude that Central Bank is authorized to compensate the advisory committee for their past and future service, the grandsons procedural error is irrelevant.

future services arguing that: (1) the advisory committee members served as non-compensated volunteers; (2) the advisory committee members did not serve as fiduciaries and, therefore, were not entitled to compensation; and (3) the advisory committee members and Central Bank waived any entitlement to compensation.

We conclude that the appeals and cross-appeal are resolved on the basis of statutory law applicable to executors and trustees and, as a consequence, that the denial of Central Bank's request for a supplemental fee for past services rendered by the advisory committee members was erroneous as a matter of law and reverse. For the same reasons, we affirm the award of future compensation to the advisory committee members. Our holding renders it unnecessary to decide whether the advisory committee members are entitled to compensation as fiduciaries to the estate and trust.

FACTUAL BACKGROUND

Mr. Kincaid died on November 21, 1975, survived by his wife, Nelle W. Kincaid, the Kincaid daughters, and the grandsons. The testamentary documents include his Last Will and Testament, Codicil and a Trust Agreement. Pursuant to the documents, the majority of Mr. Kincaid's estate was distributed into a trust, divided into a marital share designated as Funds A and B, and a non-marital share, Fund C. In accordance with Mr. Kincaid's directive, Central Bank has served as executor and trustee throughout the estate's administration.

The testamentary documents also provide for the appointment of an advisory committee originally designated as three of Mr. Kincaid's business associates charged with the duties of providing instructions to Central Bank in its capacity as executor and trustee. Specifically, the will provides:

> It is my express desire to have as members of the Advisory Committee persons who are employed by, represent, have financial interests in, or receive compensation from, corporations in which my estate or trust estate have, or are likely to have, financial interests; therefore, any such employment, representation, or financial interests shall not disqualify a person from being, becoming or remaining a member of the Advisory Committee.

The trust agreement contains a similar provision.

The will also provides that Central Bank's role as executor and trustee is "directed by the Advisory Committee" and that the Bank consult with the advisory committee and act in accordance with the committee's instructions. The will and trust agreement empower the advisory committee to serve as co-executors and both testamentary documents permit the advisory committee to remove the trustee and appoint another or appoint themselves as trustees.

In addition to provisions for indemnification to the advisory committee against claims, liabilities, expenses and costs actually and necessarily incurred in connection with the estate, the will and trust agreement empower the executor to employ and pay consultants. Specifically, the will states that the executor has the

power "[t]o employ or consult with such agents, advisors and legal counsel, other than its own regular employees in connection with its duties hereunder and to pay such persons, firms or corporations the reasonable value of their services." The trust agreement contains an identical provision.

Prior to Nelle Kincaid's death in 1984, the then-existing advisory committee distributed various estate assets to Funds A, B, and C. Following her death, the Kincaid daughters qualified as co-executrixes of her estate and became the sole beneficiaries of Funds A and B.

Subsequently, it became apparent that the existing advisory committee had mismanaged Kentucky Central Life Insurance Company. As a result, the Kincaid daughters initiated litigation against the existing advisory committee and Central Bank, in its capacity as executor and trustee, challenging the distribution of Funds A, B, and C. Contemporaneous with the takeover of Kentucky Central Life Insurance Company by the Kentucky Department of Insurance, the litigation was settled. As a part of the settlement, the advisory committee members resigned and the Kincaid daughters and Foley were appointed.

Following their appointment, the new advisory committee encountered numerous financial and legal obstacles. In a publicized battle, Kentucky Central Life Insurance Company was on the verge of a regulatory take-over requiring regular meetings with the Department of Insurance and the advisory committee

members. The members also served on the board of directors to protect the estate's interest and worked to rectify the financial turmoil by seeking outside buyers to infuse capital into the failing company. Faced with the collapse of the estate's major asset, the advisory committee challenged the Commissioner of Insurance's attempt to force an asset sale. In addition, the committee litigated against the Commissioner concerning the status of the preferred stock of Mid-Central Investment Company, a Kentucky Central Life Insurance Company subsidiary.

In their attempt to preserve the estate's assets, the advisory committee members served on the board of directors of Central Bank from 1993 to the present: During that time, the Bank's assets increased from $350 million to $1.8 billion. Additionally, the members served on the board of directors of an estate asset, Mid-State Financial Corporation. The members were also involved in litigation concerning the estate's federal estate tax which was ultimately settled in 2002, resulting in a $10 million benefit to the estate.

During the current advisory committee's service, the estate's assets increased significantly. Valued at approximately $23 million at the time of Mr. Kincaid's death, when substantially all of the assets were distributed in 2007, the estate's value was in excess of $240 million.

After eleven years of service, in 2000, the advisory committee members requested annual fees pursuant to KRS 386.180. Effective in 2000 but repealed in 2008, the statute authorized payment to trustees of either annual fees of three percent of the fair market value of the trust assets or, alternatively, a one-time fee of six percent of the fair market value of the assets payable at the time of distribution.

The Fayette Circuit Court denied the request. Relying on *First Sec. Nat. Bank & Trust Co. of Lexington v. des Cognets*, 563 S.W.2d 476 (Ky.App. 1978), the court stated:

> [T]he "proposed fee/compensation to the Advisory Committee is not approved. The Advisory Committee, having operated for a period of nearly eight years without the payment of or request for an annual fee has waived the ability to collect or charge an annual fee."

Following the Fayette Circuit Court's order denying the annual fee request and years of protracted litigation, the advisory committee and the Kincaid daughters, acting individually, moved to set aside the distributions made to Funds A, B, and C, and reallocate the trust assets into the estate. Additionally, they sought to assign present values to the assets, calculate the fractional share of the marital and non-marital interests, and distribute the assets of Funds A, B, and C pursuant to a fractional share calculation. The grandsons objected to the reallocation plan and litigation ensued.

In 2007, a settlement was reached and approved by the court. As a result, the estate's assets were distributed to Funds A, B, and C. Germane to the present controversy, $2 million was set aside in Fund C for the payment of administrative fees related to the estate's closure.

Prior to the closure and with all assets transferred to Funds A, B and C, the advisory committee members requested that $1.65 million of the $2 million be set aside for administrative costs to be paid as compensation for their sixteen years of service to the estate. The grandsons objected to the request and moved for summary judgment.

In response to the grandsons' objection to the payment of compensation to the advisory committee members, Central Bank moved the court to allow a supplement to its executor and trustee fee for the express purpose of allowing the Bank to reimburse the advisory committee members for their fiduciary and advisory services as permitted by KRS 395.150 and KRS 395.195(18). Central Bank emphasized that it charged only approximately $2.2 million in fiduciary fees to the estate and trust, a $1.9 million discount the Bank could have charged under standard fiduciary fee schedules and in excess of a $10 million discount from the amount authorized by KRS 395.150 (five percent of the $240,000,000 value of the estate assets).

Luther Deaton, President and CEO of Central Bank, testified that the Bank charged the reduced fee because of the limitations placed on its duties by the will and its belief that the advisory committee, as principal fiduciary, would be paid a separate fee directly from the estate and trust. Had the bank known that the advisory committee members would be denied a fee directly from the estate and trust, it would have charged a larger fee as authorized by law and paid the advisory committee members. He further testified that considering the enormity and complexity of the tasks performed by the advisory committee members, the amount requested for their service was substantially less than could be sought by non-related fiduciaries.

Although the advisory committee members had not received compensation for the service to the estate and trusts, Mr. Foley, an advisory committee member and accountant, testified that from 1993 through 2009, each of the advisory committee members were compensated for their service as members of the board of directors of companies related to the estate and trust in amounts exceeding $1 million. However, the Kincaid daughters served on the same boards before becoming members of the advisory committee and received the same fees as any board member.

To support their assertion that the advisory committee members' request for compensation at the estate's closure was not prohibited, the members introduced

the report of Eric A. Manterfield, an attorney and former manager of personal trust services for JP Morgan Chase Bank.[6] In addition to concluding that the compensation requested by the members was reasonable, he opined that it was customary for personal representatives to request compensation at the closure of the estate and that compensation was awarded regardless of whether the will provided for compensation.

We now turn to the Fayette Circuit Court's summary judgment and subsequent order.

On September 18, 2009, the circuit court granted the grandsons' motion for summary judgment and denied the advisory committee members' request for compensation. The court stated that its judgment was based on Mr. Kincaid's failure to address payment to the advisory committee members in his will. However, Central Bank's motion to supplement its fee for the purpose of paying the advisory committee members remained pending.

On October 5, 2009, the circuit court held a combined hearing on the advisory committee members' motion to alter, amend or vacate the court's summary judgment and Central Bank's motion for a supplemental fee. In contrast to the basis for its summary judgment, the court orally found that the will and trust instruments did not prohibit nor expressly provide for the payment of fees to the

[6] No issue is presented regarding Mr. Manterfield's qualifications or whether his opinion was admissible. Because our decision is based on statutory law as opposed to findings of fact, his opinion is insignificant.

advisory committee members and premised its decision on the timing of the advisory committee members' request for payment at the estate's closure. Although the Court denied the compensation sought, it found that the amount requested was reasonable. In the same order, the court found that the advisory committee could be compensated by Central Bank for their future service from and after the entry of its order.

The advisory committee members filed an appeal from the court's summary judgment and the grandsons cross-appealed. Central Bank filed a notice of appeal from the October 28, 2009, order that denied its request for a supplemental fee to compensate the advisory committee members for their service prior to the entry of the court's October 2009 order.

LAW AND ANALYSIS

The standard of review applicable to a summary judgment is well-established:

> The standard of review on appeal when a trial court grants a motion for summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the

> party opposing summary judgment to present at least some affirmative evidence showing that there is a genuine issue of material fact for trial. The trial court must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists.

Lewis v. B & R Corp., 56 S.W.3d 432, 436 (Ky.App. 2001) (internal footnotes, quotes and citations omitted).

The circuit court granted summary judgment to the grandsons and against the advisory committee members on the basis that the will did not expressly provide for compensation to the advisory committee members. Thus, its summary judgment is subject to *de novo* review. *Id*. However, the grandsons and Central Bank contend that the standard of review for the court's subsequent order denying Central Bank's request to supplement its fee is an abuse of discretion. *See e.g. Clay v. Buchanan*, 487 S.W.2d 278 (Ky. 1972).

Regardless of the circuit court's designation, the denial of Central Bank's request to supplement its fees to include past compensation to the advisory committee members was based on its interpretation of the law, not on its findings of fact. The undisputed facts are as follows: (1) the testamentary documents empowered the advisory committee to direct the executor and trustee; (2) the advisory committee directed Central Bank as executor and trustee; (3) the advisory committee was active in the administration of the estate; (4) the advisory committee did not mismanage estate assets or act fraudulently; (5) the advisory

committee sought and was denied compensation during the administration of the estate; (6) the settlement of the estate reserved $2 million for the payment of administrative fees; (7) Central Bank did not charge the amount to which it was entitled pursuant to statute based on the expectation that the advisory committee would be compensated; and (8) the amount sought as compensation to the advisory committee was reasonable. Where, as here, there are no material facts in dispute and the issue presented is one of statutory interpretation, the abuse of discretion standard does not apply and we review the court's order *de novo*. *Workforce Development Cabinet v. Gaines*, 276 S.W.3d 789, 792 (Ky. 2008).

With the *de novo* standard of review as our guide, we turn to the issue of whether the advisory committee is entitled to compensation.

The grandsons contend that because Mr. Kincaid's will did not expressly provide for payment to the advisory committee members and because there is no specific statute addressing compensation to an estate or trust advisory committee, compensation is precluded as a matter of law. Consequently, the committee members served as non-compensated volunteers. In the alternative, they contend that the advisory committee waived any right to seek compensation for their service.

The grandsons are correct that advisory committees are not mentioned in our statutes authorizing compensation to personal representatives.

Nevertheless, it has been recognized that advisory committee members vested with broad powers in the administration of an estate are fiduciaries.

> The advisors are not, strictly speaking, trustees under the will, but their status and their duties partake of the nature of the status and duties of a trustee, or it might be proper to consider them as co-trustees with the principal one, but with limited authority. The settlor may appoint an advisor to his trustee whose consent to certain acts may be prerequisite to the valid execution of parts of the trust. Trusts and Trustees, by Bogert, Vol. 1, § 122; *Marshall's Trustee v. Marshall*, 225 Ky. 168, 7 S.W.2d 1062, 61 A.L.R. 1365. We think they may be said to be advisory trustees with strictly limited capacities and duties, that is, an assistant to the trustee limited in his capacity by the terms of the trust, having no right or authority further than the capacity of advising as provided in the instrument.

Gathright's Trustee v. Gaut, 276 Ky. 562, 124 S.W.2d 782, 783-784 (Ky.App. 1939).[7]

The advisory committee members point out that if Mr. Kincaid had intended that the members not be compensated, he would have expressly provided that the committee was to serve voluntarily. Moreover, the will expressly permits the executor to employ advisors.

We do not comment on the merits of the arguments pertaining to the advisory committee members' right to seek compensation directly from the estate because the grandsons' arguments became moot when Central Bank asserted its

[7] The advisory committee first sought compensation pursuant to KRS 386.180, applicable to trustees. However, when it later sought compensation after the repeal of KRS 386.180, it did so pursuant to KRS 395.150, applicable to executors, administrators, and curators.

statutory right to seek a supplemental fee to compensate the advisory committee. We conclude that the sole issue to be decided is whether Central Bank is entitled to supplement its fee for the purpose of compensating the advisory committee members for their services. We hold that, as a matter of law, Central Bank, as executor of the estate, is entitled to pay reasonable compensation to the advisory committee for its advice and administration of the estate pursuant to KRS 395.150 and KRS 39.195(18).

KRS 395.150 provides:

> (1) The compensation of an executor, administrator or curator, for services as such, shall not exceed five percent (5%) of the value of the personal estate of the decedent, plus five percent (5%) of the income collected by the executor, administrator or curator for the estate.
>
> (2) Upon proof submitted showing that an executor, administrator or curator has performed additional services in the administration of the decedent's estate, the court may allow to the executor, administrator or curator such additional compensation as would be fair and reasonable for the additional services rendered, if the additional services were:
>
> (a) Unusual or extraordinary and not normally incident to the administration of a decedent's estate; or
>
> (b) Performed in connection with real estate or with estate and inheritance taxes claimed against property that is not a part of the decedent's estate but is included in the decedent's estate for the purpose of asserting such taxes.

Additionally, KRS 395.195(18) provides that a personal representative may:

> [e]mploy persons, including attorneys, auditors, investment advisors, or agents, to advise or assist the personal representative in the performance of his administrative duties; act without independent investigation upon their recommendations; and instead of acting personally, employ one (1) or more agents to perform any act of administration, whether or not discretionary[;]

Consistent with the statutory provisions, the will expressly permits the executor to employ advisors.

Under KRS 395.150(1), Central Bank, as executor, was entitled to a principal fee of approximately $12 million (five percent of the estate) but it discounted its fiduciary fee based on its expectation that the advisory committee would be compensated for its services. The supplemental fee sought is $1.65 million, less than one percent of the value of the estate and an amount the circuit court found reasonable. Despite Central Bank's statutory entitlement to the fees requested, the circuit court erroneously concluded that such fees could not be awarded at the closure of the estate. There is simply no legal authority for its conclusion.

As a practical matter, fees are customarily sought at the closure of an estate when all expenses are known as expressed in 34 C.J.S. Executors and Administrators §1001:

> While compensation ordinarily should not be allowed a representative until final settlement of his or her accounts, particularly where the settlement of the estate may be

> completed within a relatively short period of time, it is within the power of the court, in the exercise of its discretion, to make, during the course of and prior to the close of the administration, an allowance for such part of the compensation, or such commissions, as may then fairly be regarded as earned, although full compensation for the entire administration will not generally be awarded until final settlement. (internal footnotes omitted).

Moreover, contrary to the court's suggestion that the advisory committee did not previously seek a fee during the administration of the estate, in 2000 it sought annual fees pursuant to KRS 386.180, which authorized annual fees or a one-time fee payable at the time of distribution. The request was denied based on *First Sec. Nat. Bank & Trust Co. of Lexington,* where the Court held that the trust had waived its statutory option of requesting an annual fee by not requesting a fee for thirty-three years. However, the court recognized that the trustee would still be entitled to a fee upon distribution of the trust assets. *Id*. at 477. Thus, there is no indication that the advisory committee members intended to serve voluntarily or that Central Bank intended to waive its right to seek a fee to compensate the advisory committee. To the contrary, the Fayette Circuit Court previously held that the advisory committee could not seek a fee until the closure of the estate. Thus, Central Bank justifiably believed that the advisory committee would be paid and the record is absolutely devoid of any indication that Central Bank voluntarily and intentionally surrendered or relinquished its right to charge a reasonable fee, including payment to advisors as permitted pursuant to KRS 395.150 and KRS

395.195(18). *Barker v. Stearns Coal & Lumber Co*., 291 Ky. 184, 163 S.W.2d 466, 470 (1942).

In summary, we hold that Central Bank is entitled to supplement its executor fee to which it is entitled pursuant to KRS 395.150 and KRS 395.195(18) for the purpose of compensating the advisory committee members for their sixteen years of service as advisors to the Bank, as executor and trustee. During their service, the advisors were entangled in complex litigation and burdened with increasing estate assets on the verge of financial collapse to a value of $240 million. Because the circuit court found that the compensation requested is reasonable, it is required to permit Central Bank to supplement its fee in the amount of $1.65 million.

Based on the foregoing, to the extent that the October 28, 2009, order permits Central Bank to compensate the advisory committee members for future services, it is affirmed. However, to the extent that it denied past compensation to the advisory committee members, it is reversed and the case remanded for entry of an order approving the requested supplemental fee to allow Central Bank, as executor and trustee, to compensate the advisory committee members for their service. The advisory committee members' appeal from the summary judgment denying their request for compensation is moot.

ALL CONCUR.

ENTERED: September 2, 2011 /s/ Kelly Thompson_____
JUDGE, COURT OF APPEALS

BRIEFS FOR APPELLANTS/ CROSS-APPELLEES: JOAN KINCAID, MEMBER OF THE ADVISORY COMMITTEE OF THE TRUST AND ESTATE OF GARVICE D. KINCAID; MICHAEL FOLEY; MICHAEL FOLEY, MEMBER OF THE ADVISORY COMMITTEE OF THE TRUST AND ESTATE OF GARVICE D. KINCAID; JOAN KINCAID; AND JOAN KINCAID, EXECUTRIX OF THE ESTATE OF JANE KINCAID:

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

ORAL ARGUMENT FOR APPELLANTS/CROSS-APPELLEES JOAN KINCAID, MEMBER OF THE ADVISORY COMMITTEE OF THE TRUST & ESTATE OF GARVICE D. KINCAID; MICHAEL FOLEY; MICHAEL FOLEY, MEMBER OF THE ADVISORY COMMITTEE OF THE TRUST AND ESTATE OF GARVICE D. KINCAID; JOAN KINCAID; AND JOAN KINCAID, EXECUTRIX OF THE ESTATE OF JANE KINCAID:

Barry D. Hunter
Lexington, Kentucky

BRIEFS FOR APPELLANT/ CROSS-APPELLEE CENTRAL BANK & TRUST COMPANY, AS EXECUTOR OF THE ESTATE OF GARVICE D. KINCAID:

Elizabeth S. Hughes
C. Timothy Cone
Lexington, Kentucky

BRIEFS FOR APPELLEES/CROSS-APPELLANTS: BRETT KINCAID AND KEVIN KINCAID

John S. Talbott
Patterson A. DeCamp
Lexington, Kentucky

ORAL ARGUMENT FOR APPELLEES:

John S. Talbott
Lexington, Kentucky