DAVID A. ALEXANDER and MACLIN P. DAVIS, JR.,	)	
	)	
Plaintiffs/Appellees,	)	
	)	**Davidson Chancery**
	)	**No. 91-4018-II(III)**
VS.	)	
	)	**Appeal No.**
	)	**01A01-9605-CH-00215**
JULIA ANN WHITE INMAN,	)	
	)	
Defendant/Appellant.	)	

IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE DAVIDSON CHANCERY COURT
AT NASHVILLE, TENNESSEE

HONORABLE ROBERT S. BRANDT, CHANCELLOR

Anne C. Martin #15536
DODSON, PARKER & BEHM
Harlan Dodson, III #2368
306 Gay Street, Suite 400
P.O. Box 198806
Nashville, Tennessee 37219-8806
ATTORNEY FOR PLAINTIFF/APPELLANT

Ward DeWitt, Jr. #2626
TRABUE, STURDIVANT & DEWITT
511 Union Street
2500 Nashville City Center
Nashville, Tennessee 37219
ATTORNEY FOR DEFENDANT/APPELLEE

MODIFIED AND REMANDED

HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCURS:
SAMUEL L. LEWIS, JUDGE

DISSENTS IN SEPARATE OPINION:
WILLIAM C. KOCH, JR., JUDGE

DAVID A. ALEXANDER and MACLIN P. DAVIS, JR.,	)	**Davidson Chancery No. 91-4018-II(III)**
Plaintiffs/Appellees,	)	**Appeal No. 01A01-9605-CH-00215**
VS.	)	
JULIA ANN WHITE INMAN,	)	
Defendant/Appellant.	)	

O P I N I O N

The defendant, Julia Ann White Inman has appealed from the judgment of the Trial Court awarding the plaintiffs, Dave A. Alexander and Maclin P. Davis, $141,000 for balance due plaintiffs for legal services in her divorce case.

On December 13, 1991, plaintiffs filed this suit based upon a written employment contract dated September 22, 1988, containing the following pertinent provisions:

> Client has paid Attorneys a retainer fee of $10,000
>
> The amount of the final fee to be paid by Client for legal services of Attorneys and lawyers and clerks under their supervision shall be a reasonable amount taking into consideration the time and labor required to perform the services properly, the amount involved and results obtained, and other relevant factors. Said final fee shall not exceed 15% of the total sum (in money and property) awarded to Client after commencement of the trial of said action for divorce for alimony in solido, for five years of alimony in futuro, and distribution and division of property, or 10% of such total sum awarded to Client by settlement prior to the commencement of such trial, provided that said fee shall in no event be less than (a) $10,000; or (b) the total amount on a time basis for work of Attorneys and other attorneys and clerks under their supervision at their usual hourly charges for work.
>
> Said retainer fee shall be credited toward the total charges to client if the charges for work exceed $10,000 Attorneys shall bill client for said excess charges within a reasonable time. Client shall pay said charges at time they are billed to her.
>
> All expenses incurred by Attorneys in behalf of Client

shall be paid by Client at the time they are billed to client.

The complaint alleged the following:

1. On December 13, 1988, defendant was awarded in money and property amounting to $2,370,200.

2. On appeal to the Court of Appeal, defendant's award was increased to $3,413,430.

3. The Supreme Court affirmed the amount of the award of the Court of Appeals.

4. The total value of assets ultimately delivered to defendant was $4,357,809.75.

5. The reasonable fee for plaintiffs' services exceeded 15% of the total recovery, but plaintiffs' demands were limited to $501,514.50 in accordance with the 15% limitation of the contract.

6. After crediting payments of $159,000, plaintiffs' claimed a balance due of $342,514.50, plus interest.

Defendant answered and counter-claimed, admitting that the property received by her was valued at $3,357,809.75, but denying that this was its true value, and denying the performance of services to the extent of plaintiffs' demands and seeking refund of part of the fee already paid.

A trial resulted in a jury verdict and judgment for plaintiffs in the amount of $263,985. An appeal to this Court, produced an opinion published as *Alexander v. Inman*, Tenn. App. 1995, 686 S.W.2d 686, holding (1) the contingent fee contract was allowable, but was subject to the approval of the Trial Court; (2) plaintiffs' time records were admissible; (3) evidence of duplication of services was admissible, and (4) the instructions to the jury were inadequate. The cause was remanded for a retrial to a jury.

Upon remand, the parties agreed to submit the case to the Court without a jury upon the record of the previous jury trial with the addition of certain exhibits. In view of the long history

of this case, all parties have urged this Court not to remand for further consideration, but to resolve the issues of fact and law in this Court upon the record on appeal.

The Trial Judge filed a memorandum opinion holding:

1. The contract was enforceable

2. Plaintiffs' rendered services

3. Plaintiffs' violated their contract by failure to bill their client regularly as provided in the contract.

4. $300,000 was a reasonable fee for plaintiffs' services

Judgment was entered in favor of plaintiffs for $141,000.00.

Defendant appealed to this Court, presenting issues all of which relate to the correct amount of fee due plaintiffs.

While this appeal was pending, on September 3, 1996, the Supreme Court filed its opinion in the case of *White v. McBride*, No. 02501-9510, PB-00104, for publication. The opinion states:

> The rule fashioned by the Cummings court is, in our view, completely acceptable. We agree that attorneys should not be penalized for innocent snafus, such as an oversight in drafting that might render their fee contracts unenforceable. To do so would be unfair to the lawyer who had otherwise diligently pursued the client's interests, and it would result in a windfall to the client who had benefitted from those services. Thus, a recovery under a theory of quantum meruit is warranted in these situations.
>
> We are of the opinion, however, that an attorney who enters into a fee contract, or attempts to collect a fee, that is clearly excessive under DR2-106 should not be permitted the advantage of the Cummings rule. A violation of DR 2-106 is an ethical transgression of a most flagrant sort as it goes directly to the heart of the fiduciary relationship that exists between attorney and client. To permit an attorney to fall back on the theory of quantum meruit when he unsuccess-

> fully fails to collect a clearly excessive fee does absolutely nothing to promote ethical behavior. On the contrary, this interpretation would encourage attorneys to enter exorbitant fee contracts, secure that the safety net of quantum meruit is there in case of a subsequent fall.
>
> Having so concluded, we reverse that portion of the lower courts' judgment awarding fees on a quantum meruit basis. Any prior authority in conflict with this opinion is hereby expressly overruled.

The decision of this Court in the present case must conform to the opinion of the Supreme Court in *White v. McBride.*

The former opinion of this Court in the present case stated:

> Trial courts should require attorneys who wish to enter into a contingent fee arrangement in a divorce case to submit the agreement for approval prior to considering the merits of the divorce case. While the trial courts may determine the most efficient way to review the fee arrangement, they should approve the agreement only if the attorney demonstrates:
>
> 1. That the client is currently unable to pay a reasonable fixed fee or will be unable to pay a reasonable fixed fee from his or her anticipated share of the marital property or from an award of alimony or spousal support; or
>
> 2. That the opposing party cannot pay reasonable pendente lite attorneys' fees pursuant to Tenn. Code Ann. §§ 36-5-101(I), -103(c) (Supp.1994) or an award for attorneys' fees at the conclusion of the case.
>
> In addition, the attorney must demonstrate:
>
> 3. That the attorney has explained all relevant considerations to the client, including the availability of other fee or payment arrangements and the client's right to seek independent legal advice;
>
> 4. That the client fully understands his or her obligations under the agreement; (FN26)
>
> 5. That the attorney has agreed to credit any court-awarded fees against his or her final fee; and
>
> 6. That the arrangement is fair and reasonable and is in the client's best interest.

Measured by the above criteria, this Court finds that, despite its provision for a "reasonable fee," the contract is not an enforceable contract, particularly because plaintiffs did not prove that defendant was adequately informed as set out in the criteria.

Having so found, this Court must proceed to the second phase and determine whether the plaintiffs' have forfeited all rights to any fee on any theory by attempting to collect a fee that is "clearly excessive under DR2-106."

Supreme Court Rule 8, DR2-106(A) and (B) provide-:

> **DR 2-106. Fees for Legal Services**
> (A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.
>
> (B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:
>
> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
>
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
>
> (3) The fee customarily charged in the locality for similar legal services.
>
> (4) The amount involved and the results obtained.
>
> (5) The time limitations imposed by the client or by the circumstances.
>
> (6) The nature and length of the professional relationship with the client.
>
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
>
> (8) Whether the fee is fixed or contingent.

1. The time and labor are not satisfactorily documented by plaintiffs, and there is evidence of unnecessary duplication. The questions involved were not novel or difficult. Extraordinary skill was not required.

2. The likelihood of loss of business is not satisfactorily shown.

3. The evidence as to customary fees varies from $60,000 to $501,514.50.

4. The amount recovered was substantial but, for the most part consisted of physical assets.

5. There is some evidence of time constraints at the inception of the representation, but not thereafter.

6. There was no previous or continuing general representation of the client.

7. The experience, reputation and ability of the two plaintiffs is unquestioned except for the frail health of Mr. Alexander.

8. After the disqualification of the contract, the fee was neither fixed nor contingent.

According to the evidence presented by plaintiffs, their charges in this case were in keeping with their "customary charges in similar cases. For this reason, this Court finds that the fee demanded by plaintiffs was not "clearly unreasonable" so as to justify a forfeiture of any fee.

Because of this holding, it is in order for this Court upon de novo review to determine as

a fact the just amount of "quantum meruit" recovery due plaintiffs.

42 C.J.S. Implied Contracts, 524 cites a number of authorities for allowance of a quantum meruit recovery, but none state any criterion for the amount of recovery except "reasonable value."

In *Baker v. Brown's Estate*, Mo. 1956, 294 S.W.22, the appellate court affirmed allowance of a claim for nursing services and stated:

> It may be readily demonstrated that the finding of the jury is within the range of reasonableness as to reasonable value.

In 56 ALR 2d 13, is found a comprehensive analysis of the amount of fee due attorneys for services rendered in the absence of a contract or applicable statute. However, no criterium is found therein for ascertaining the value of benefit received, as distinguished from the reasonableness of the fee sought or allowed.

In *Marta v. Nepa*, Del. 1978, 385 A 2d 727, a real estate broker commission case, the Court said:

> Quantum meruit literally means "as much as he deserves," Mead v. Ringling, Wis.Supt., 266 Wis. 523, 64 N.W.2d 222 (1954); it is the reasonable worth or value of services rendered for the benefit of another. There was expert testimony in the original trial to establish that the standard commission for procuring a commercial lease. However, evidence of a standard commission is neither equivalent to nor commensurate with the evidence required for determining a recovery based on quantum meruit. A standard commission which is agreed upon before services are commenced, is an arbitrary figure which may or may not reflect quantum meruit, i.e., how much the service is worth or how much compensation is deserved therefor.
>
> The evidence offered at that proceeding should include opinion testimony by expert witnesses in response to hypothetical questions based upon the particular facts of this case, as to the worth of the specific services.

In 7 Am Jur 2d, Attorneys at Law § 277 p. 310, is found in the following text:

> **Factors considered in determining reasonable value of services.**
>
> In the absence of a controlling contract, an attorney is entitled to the reasonable value of services performed for his client. Such reasonable value is a question of fact to be determined in the light of the particular circumstances of each individual case.

There was testimony that the $501,514.50 fee demanded by plaintiffs was reasonable. There was also evidence that representation was available from other attorneys for as little as

$60,000.00. One explanation for the wide divergence between plaintiffs' charges and the lower quoted fee is that the defendant was "overstaffed." That is, the nature of the case did not require the services of so many or so experienced lawyers.

It is reasonable to infer that, armed with full and accurate advice as to her needs and the availability of less expensive representation, the defendant would not have contracted to pay the fee demanded by plaintiffs, but would obtained other, less expensive representation. Therefore, the measure of the value of benefit received by plaintiff from the services of plaintiff is the reasonable cost of employing competent counsel to perform the services which were necessary and were performed by plaintiffs.

Upon review of the evidence de novo, this Court finds that the value of the services rendered by plaintiffs to defendant (i.e., the benefit received by her) was $280,757.25. Since plaintiffs have already received $159,000, they are due the additional amount of $121,757.25. The judgment of the Trial Court is reduced to this amount. Interest at the statutory rate will accrue from February 13, 1996, the date of entry of the judgment of the Trial Court. Costs of this appeal are assessed equally. That is, appellant will pay one half of said costs; and appellees will pay one half of same. The cause is remanded to the Trial Court for any necessary further proceedings.

MODIFIED AND REMANDED

_____

HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCURS:

_____

SAMUEL L. LEWIS, JUDGE

DISSENTS IN SEPARATE OPINION:
WILLIAM C. KOCH, JR., JUDGE