

SB468_ByronMacfarlane_FAV.pdf

Uploaded by: Byron Macfarlane

Position: FAV



BYRON E. MACFARLANE
REGISTER OF WILLS FOR HOWARD COUNTY

9250 JUDICIAL WAY, SUITE 1100
ELLICOTT CITY, MARYLAND 21043

February 15, 2022

Hon. William C. Smith, Jr., Chairman
Judicial Proceedings Committee
Miller Senate Office Building, 2 East
Annapolis, Maryland 21401

**Re: SB468 – Estates and Trusts – Personal Representatives – Payment of
Commissions and Attorney’s Fees Without Court Approval – FAVORABLE**

Dear Chairman Smith and Members of the Judicial Proceedings Committee,

I write to you and your committee in strong support of this bill. This legislation clarifies current law, which allows the personal representative of an estate to pay personal representative’s commissions and attorney’s fees without court approval when all interested persons consent to those fees, and the amount of those fees are at or below the statutory maximum provided in the Estates & Trusts Article.

I support this bill as a Register of Wills – working with grieving families every day, as an attorney – who understands how seriously members of our profession take our duty to charge fair fees to our clients, and as a citizen – who believes that our government should not stand in the way of members of a family – especially those in grief – who have managed to find consensus.

In truth, this legislation should not be necessary because the plain language of Estates & Trusts §7-604(a)(1) is clear and unambiguous. However, some judges misinterpret or ignore current law and its legislative history, ignore the express wishes of family members, and exceed their limited jurisdiction by reducing or denying agreed-upon commissions and fees. These extra-legal decisions create unnecessary hostilities, create confusion for attorneys and families, prolong the administration of estates, and delay closure for family members coping with the deaths of loved ones. This bill will reign in courts which refuse to respect the will of the legislature and invent authority where none exists, and it will ensure that the wishes of Maryland families are respected. After all, when families consent to pay a personal representative or an attorney for their services, they are agreeing to pay them a portion of their own inheritance, so no one is better positioned to decide whether those fees are reasonable. A court should not substitute its own – subjective – judgment for the express wishes of an estate’s interested persons.

Opponents of this legislation have stated the courts need the unfettered authority to cut or deny commissions or fees to attorneys who, in their view, are unfairly overcharging their clients, and to protect, in their words, “uninformed” citizens who don’t understand what they’ve agreed to. They argue the unambiguous current law is, rather, ambiguous – in order to invent authority where none exists. And they paint an unflattering picture of both our Estates & Trusts attorneys and the average citizen. That picture doesn’t reflect this reality: Personal representatives and attorneys regularly charge reasonable commissions and fees and in almost every estate the families either affirmatively consent or do not object to those payments. Moreover, in none of the cases in which an orphans’ court has interfered with payment of commissions or fees – which are permitted under §7-604(a)(1) – has it ever been shown that there was any undue influence over a family member consenting to those payments, nor of any impropriety by any attorney.

It is also important to note that there are numerous instances in probate when interested parties offer their consent and their competence isn’t questioned by the courts. These include consenting to the appointment of the personal representative, agreeing to waive the requirement of the personal representative to obtain a bond, and consenting to admit a copy of a will to probate. Also, parties sometimes consent to settlement agreements, which, as a matter of law, the courts cannot reject. If the aforementioned consents are never subject to such second-guessing, either by practice or by law, unanimously agreed-upon attorney’s fees should be no different.

In closing, when courts interfere with unanimous agreement among family members in an estate to pay reasonable personal representative’s commissions or attorney’s fees, it has real life consequences for attorneys and for Marylanders in grief. We should respect the unambiguous will of the legislature in the original enactment of Estates & Trusts §7-604(a)(1) and the judgment of our citizens, we should encourage harmony among family members, and we should prevent extra-legal interference by our courts. I strongly urge a favorable report on this bill.

Thank you for your time, attention, and service to our great state.

Sincerely,

A handwritten signature in blue ink, reading "Byron E. Macfarlane". The signature is fluid and cursive, with the first name "Byron" and last name "Macfarlane" clearly legible.

Byron E. Macfarlane

Senator West SB-468 Attorney Fees FAV.pdf

Uploaded by: Christopher West

Position: FAV

CHRIS WEST
Legislative District 42
Baltimore County

Judicial Proceedings Committee

Vice Chair, Baltimore County
Senate Delegation



THE SENATE OF MARYLAND
ANNAPOLIS, MARYLAND 21401

Annapolis Office
James Senate Office Building
11 Bladen Street, Room 303
Annapolis, Maryland 21401
410-841-3648 • 301-858-3648
800-492-7122 Ext. 3648
Chris.West@senate.state.md.us

District Office
1134 York Road, Suite 200
Lutherville -Timonium, MD 21093
410-823-7087

February 17, 2022
The Senate Judicial Proceedings Committee
2 East Miller Senate Building
Annapolis, MD, 21401
The Honorable William C. Smith Jr.

Re: SB 468 - Estates and Trusts - Personal Representatives - Payment of Commissions and Attorney's Fees Without Court Approval

Dear Chairman Smith and Members of the Committee,

Senate Bill 468 was brought to me by the Maryland State Bar Association's Estates and Trusts Section.

Currently, Maryland law provides that in the administration of estates, the payment of commissions to personal representatives and the payment of attorney's fees "may be made" without court approval so long as: (a) all creditors who have filed claims but haven't been paid yet consent in writing to the payment; (b) the combined sum of such commission payments and attorney's fees does not exceed the maximum amounts permitted to be paid under the Maryland Code (9% of the first \$20,000 of the estate plus 3.6% of the balance of the estate), unless the will provides for higher compensation; and (c) signed written consents are filed with the Register of Wills by all "Interested Persons" in the estate. Under the current law therefore, anyone who might have a possible objection to the payment of the commissions or attorney's fees can prevent such sums from being paid by merely refusing to execute the consent form.

The use of the verbal phrase "may be made" without court approval turns out to have caused difficulties because the words "may be made" leave open the possibility that the Orphans Court still "may" have a role to play.

Assuming that all unpaid creditors and Interested Parties have consented to the payment of the commissions and attorney's fees, there is no reason why the Orphans Court should get involved at all. There is no need for a Petition for approval of the commissions and fees to be filed with the Orphans Court, no need for a Court proceeding, and no need for the Orphans Court to enter an Order approving the commissions and fees. All of that is simply a waste of time and money. That's why SB 468 provides that if all of the conditional factors have occurred, the Personal Representative may pay the attorneys fees. It eliminates the role of the Orphans Court. To guard against any abuse, the bill explicitly provides that the payment may only be for legal work rendered prior to the date of the consent of the Interested Persons. So it would be impermissible for the attorneys to apply for legal fees to be paid prior to the time the legal services are rendered.

I appreciate the Committee's consideration of Senate Bill 468 and will be happy to answer any follow-up questions the committee may have.

SB468 MSBA Estate & Trust Law Section FAV.pdf

Uploaded by: Jonathan Lasley

Position: FAV

To: Members of the Senate Judicial Proceedings Committee

From: MSBA Estate & Trust Law Section

Date: February 17, 2022

Subject: Senate Bill 468: Estates and Trusts – Personal Representatives – Payment of Commissions and Attorney’s Fees Without Court Approval.

Position: Support

Background and Description of Current Law

In 1997, the General Assembly enacted House Bill 762 as Chapter 693. That legislation contained several provisions designed to simplify estate administration, including a revised Section 7-604 of the Estates and Trusts Article. That Section provides a mechanism permitting a personal representative to pay attorney fees and/or personal representative commissions without court approval under certain circumstances. Before the enactment of Chapter 693, estates had to file a petition with the Orphans’ Court in order to make any payment of fees or commissions. This requirement added costs, delays, and other inefficiencies to the administration of estates – even when the aggregate payments fell below the amount established as reasonable under Section 7-601 of the Estates and Trusts Article.¹

The Register of Wills Association, Orphans’ Court judges, and the Estate and Trust Law Section supported House Bill 762 (and its Senate counterpart, SB 508) in 1997. Their written testimony and other items of legislative history make it clear that the relevant part of the legislation was intended to eliminate Orphans’ Court discretion with respect to the payment of fees and commissions where:

- (a) All creditors and interested persons consent to the payment;
- (b) The amounts to be paid, when added to any amounts previously paid, do not exceed the statutory formula under Section 7-601 of the Estates and Trust Article; and
- (c) The Consent is filed with the Register of Wills.

¹ Section 7-601 sets reasonable Personal Representative’s commissions (which are combined for attorney fees covering administrative tasks) at 9% for the first \$20,000 in value of the estate accounted for, plus 3.6% of everything above \$20,000.

Problem Addressed by this Legislation

Despite the plain meaning of the statute and its legislative history, some Orphans' Courts – with increasing frequency in recent years – have denied the payment of attorney fees and/or commissions even when the requirements of Section 7-604 are met. Those decisions have created uncertainty in estate administration, restored the burdens that Chapter 693 was enacted to alleviate, provided an incentive for Marylanders to avoid probate, and chilled the willingness of some attorneys – particularly solo practitioners and small firms – to take on estate administration matters because of the financial risk.

How the Proposed Legislation Solves the Problem

The proposed legislation restores the General Assembly's original intent in enacting Section 7-604. It clarifies that the only discretion with respect to the payment of attorney fees and/or personal representative's commissions when the requirements of that Section are met belongs to the personal representative, who may proceed with the payment(s) without court approval.

In discussing this legislation, some Orphans' Court judges raised concerns about the practice of some attorneys and personal representatives to seek fees and commissions in anticipation of work to be performed, rather than for work already completed. While such payments technically are permitted under the current statute, Chapter 693 was intended to facilitate the payment of fees for work already performed. Accordingly, the proposed legislation adds the requirement that payments without court approval are limited to those covering completed work, except when the Consents are filed with a final account (where anticipatory fees often are unavoidable).

Maryland's probate system is among the most efficient in the country. That efficiency allows Marylanders to avoid costly and complex probate avoidance schemes. However, if the administration of estates is complicated by unnecessary roadblocks to the prompt payment of those responsible for completing the tasks, the entire system suffers. The General Assembly recognized that in 1997, and enacted the current version of Section 7-604 to remove some of those barriers. The proposed legislation reaffirms that goal, and reduces the risk of future misinterpretation of the statute. For these reasons, we urge a **favorable** report.

For further information, please contact:

Jonathan G. Lasley
(410) 263-4876
jlasley@frankebeckett.com

Michaela C. Muffoletto
(410) 332-8534
mcm@nqgrg.com

Christine W. Hubbard
(410) 798-4533
christine@chubbardlaw.com