

SB467 - Written Testimony.pdf

Uploaded by: Macfarlane, Byron

Position: FAV



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February 8, 2021

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

Re: SB467 – Estates and Trusts – Administration of Estates – Payment of Commissions and Attorney’s Fees

Dear Chairman Smith,

I write to you and your committee in support of this bill. It will require fees be paid to an attorney for an estate 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.

This legislation is a simple, straightforward proposal that would respect the decisions made by parties in estates and prevent judicial intrusion into otherwise harmonious proceedings. When parties agree to pay an attorney for legal 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. Under current law, however, courts have the authority to reduce or deny these fees despite the unanimous agreement of the parties. This creates conflict where none exists, creates confusion for the attorney and the family, prolongs the administration of the estate, and delays closure for family members coping with the death of a loved one.

Opponents of this legislation have stated the courts need to retain the ability to cut or deny 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 paint an unflattering picture of both our Estates & Trusts attorneys and our fellow citizens. That picture doesn’t reflect this reality: Attorneys regularly charge reasonable fees and in almost every estate the parties either affirmatively consent or do not object to those fees.

It is 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 orphans’ 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 attorney’s fees, it has real life consequences for attorneys and for Marylanders in grief. We should respect the judgment of our citizens, encourage harmony among family members, and reward them by reducing harmful interference by the state. I, therefore, urge a favorable report on Senate Bill 467.

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

Sincerely,

A handwritten signature in black ink that reads "Byron E. Macfarlane". The signature is written in a cursive, flowing style with a long horizontal line extending from the end of the name.

Byron E. Macfarlane

Written Testimony - SB467 Payment of Commissions

Uploaded by: Muff, Michaela

Position: FAV

To: Members of Senate Judicial Proceedings Committee
From: MSBA Estate & Trust Law Section
Date: February 8, 2021
Subject: **SB467** – Estates & Trusts – Administration of Estates – Payment of Commissions and Attorney’s Fees
Position: **Support**

The Estate and Trust Law Section of the Maryland State Bar Association (MSBA) **supports** Senate Bill 467 – Estates and Trusts – Administration of Estates – Payment of Commissions and Attorney’s Fees.

Attorney’s fees and personal representative’s commissions in estates are governed by § 7-601 et seq. of the Estates and Trust Article. Section 7-604(a) provides as follows:

“Payment of commissions to personal representatives under § 7-601 of this subtitle, and attorney’s fees under § 7-602 of this subtitle **may be made without court approval** (emphasis added) if”:

- (i) Each creditor, who has filed a claim that is still open, and all interested persons [collectively “**Interested Persons**”] consent in writing to the payment;
- (ii) The combined sum of the payments of commissions and attorney’s fees [collectively “**Fees**”] does not exceed the amounts provided in § 7-601 of this subtitle [9% of the first \$20,000 and 3.6% of the balance, unless the Will provides for a larger measure of compensation] [the “**Statutory Cap**”]; and
- (iii) The signed written consent form states the amounts of the payments and is filed with the register of wills.

The proposed bill (SB467) does not address the situation where Fees exceed the Statutory Cap. In those circumstances, it is clear that such Fees may only be paid upon petition filed with the Orphans’ Court, and the granting of an Order allowing for payment. This is true even if all

Interested Persons consent. Simply stated -- if Fees exceed the Statutory Cap, they must be approved by the Orphans' Court before they can be paid.

SB467 addresses only those cases where the Fees are equal to or below the Statutory Cap. In these circumstances, the legislature has clearly provided that Fees may be paid **“without court approval”** if (and only if) all Interested Persons affirmatively consent to the Fees. The statute does not require approval of anyone other than the Interested Persons under such circumstances, and very specifically says that such Fees may be paid **“without court approval.”** In other words, the legislature has already clearly spoken on this issue and has granted the Interested Persons with the power to monitor the amount and timing of the payment of Fees. Attached is a copy of House Bill 762 which enacted ET § 7-604 effective as of January 1, 1998, which provides the initial language as initially passed in 1997 (see PDF page 15 -- labelled as page number 10).

Notwithstanding the clear statutory language of ET § 7-604, MAJOC has taken the position that all Fees in all estates are subject to review by the Orphans' Court. The Section Council does not believe this to be the law in Maryland, as evidenced by the legislative history, and the plain language of the statute. If the Orphans' Court have the power to deny or reduce all Fees in all estates, even those under the Statutory Cap with consent from the Interested Persons, then, in fact, no Fees may be paid without court approval – making ET § 7-604 superfluous in its entirety.

The Section Council has learned from several of its members that some Orphans' Court judges in Maryland disallow or reduce Fees (some routinely) even when all Interested Persons have consented and the Fees are at or below the Statutory Cap. The position taken by MAJOC directly contradicts the long-standing statutory language. In order to address this issue once and for all, the Section Council is suggesting a change from the word “may” to “shall” in ET § 7-604. If changed, ET § 7-604 would read:

“Payment of commissions to personal representatives under § 7-601 of this subtitle, and attorney's fees under § 7-602 of this subtitle ~~may~~ **[shall]** be made without court approval if”

This change would not strip the Orphans' Court of powers it currently possesses. The change would simply clarify existing law and what has been the understanding of most practitioners since ET § 7-604 was enacted in 1997 -- namely that Fees can be paid **“without Court approval”** when they are at or below the Statutory Cap and all Interested Persons have consented.

As amended, the rule would remain that if even one Interested Person fails to affirmatively consent to the Fees, even if the Fees are at or below the Statutory Cap, then no Fees can be paid without prior approval from the Orphans' Court, upon filing of a petition for Fees. The change being proposed is for the very narrow situation where all Interested Persons consent in writing and the Fees are at or below the Statutory Cap.



Attorneys and personal representatives must have some reasonable assurance of getting paid if they are going to effectively assist in the administration of estates. Without such reasonable assurances, attorneys may be reluctant or unwilling to take on estates, and this will limit smaller or unsophisticated estates from having access-to-justice.

The payment of Fees when the amount is at or below the Statutory Cap and each and every Interested Person has consented to the Fees is an efficient method of policing the payment of Fees in estates. There is no reason for judicial resources to be expended to address Fees under the Statutory Cap that have already been reviewed and consented to by all Interested Persons.

For the reasons stated above, the MSBA **supports SB467 and urges a favorable committee report.**

For Further Information, Please Contact:

<p>Anne W. Coventry (301) 656-8850 acoventry@pasternakfidis.com</p>	<p>Michaela C. Muffoletto (410) 332-8534 mcm@nqgrg.com</p>	<p>Christine W. Hubbard (410) 798-4533 christine@chubbardlaw.com</p>	<p>Jay M. Eisenberg (301) 230-5223 JEisenberg@shulmanrogers.com</p>
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1 [(c)] (D) The personal representative may employ a qualified and disinterested
2 appraiser to assist him THE PERSONAL REPRESENTATIVE in ascertaining the fair
3 market value, as of the date of the death of the decedent, of an asset the value of which
4 may be fairly debatable. Different persons may be employed to appraise different kinds of
5 assets included in the estate. The name and address of each appraiser shall be indicated
6 on the inventory with the item or items he THE APPRAISER appraised.

7 [(d)] (E) Reasonable appraisal fees shall be allowed as an administration expense.

8 7-604.

9 (A) PAYMENT OF COMMISSIONS TO PERSONAL REPRESENTATIVES UNDER §
10 7-601 OF THIS SUBTITLE, AND ATTORNEY'S FEES UNDER § 7-602 OF THIS SUBTITLE
11 MAY BE MADE WITHOUT COURT APPROVAL IF:

12 (1) EACH CREDITOR, WHO HAS FILED A CLAIM THAT IS STILL OPEN,
13 AND ALL INTERESTED PERSONS CONSENT IN WRITING TO THE PAYMENT;

14 (2) THE COMBINED SUM OF THE PAYMENTS OF COMMISSIONS AND
15 ATTORNEY'S FEES DOES NOT EXCEED THE AMOUNTS PROVIDED IN § 7-601 OF THIS
16 SUBTITLE; AND

17 (3) THE SIGNED WRITTEN CONSENT FORM STATES THE AMOUNTS OF
18 THE PAYMENTS AND IS FILED WITH THE REGISTER OF WILLS

19 (B) WHEN RENDERING ACCOUNTS, THE PERSONAL REPRESENTATIVE SHALL
20 DESIGNATE ANY PAYMENT MADE UNDER THIS SECTION AS AN EXPENSE.

21 8-106.

22 (a) Subject to the priorities contained in § 8-105 OF THIS SUBTITLE, the personal
23 representative shall pay the funeral expenses of the decedent within six months of the
24 first appointment of a personal representative.

25 (b) Funeral expenses shall be allowed in the discretion of the court according to
26 the condition and circumstances of the decedent. In no event may the allowance exceed
27 [\$3,500] \$5,000 unless the estate of the decedent is solvent and a special order of court
28 has been obtained. If the estate is solvent and the will expressly empowers the personal
29 representative to pay the expenses without an order of court, an allowance by the court is
30 not required.

31 (c) If the funeral expenses are not paid within six months, the creditor may
32 petition the court to require the personal representative to show cause why he should not
33 be compelled to make the payment. If the court finds that the claim is valid, it shall fix the
34 amount due and shall order the personal representative to make payment within ten days
35 after the order is served upon him. If the personal representative does not have sufficient
36 funds, the claimant may at a later date resubmit his petition when the personal
37 representative has sufficient funds.

Senator West - SB 467 – Estates and Trusts – Admin

Uploaded by: West, Christopher

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

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February 10, 2021

Senate Judicial Proceedings Committee
The Honorable William C. Smith, Jr.
2 East Miller Senate Building
Annapolis, Maryland 21401-1991

RE: SB 467 – Estates and Trusts – Administration of Estates – Payment of Commissions and Attorney’s Fees

Dear Chairman Smith and Members of the Committee:

I am pleased to introduce Senate Bill 467 which changes a single word in the Maryland Code. This bill 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.

Under current law, if all unpaid creditors and all “Interested Parties” have executed the consent form, the payment of such commissions and fees “may be made” without court approval. The problem with the verbal phrase “may be made”, however, is it suggests 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 is why this bill changes the operative verbal phrase from "may be made" to "shall be made".

For these reasons I request a favorable report on Senate Bill 467.

I have with me Michaela Muffoletto, the Chair Elect of the Estates and Trusts Section of the Maryland State Bar Association, who will be able to expound more on the issues at hand in this bill and the salutary effects this legislation would have.

MD Judiciary - Testimony SB 467.pdf

Uploaded by: Elalamy, Sara

Position: UNF

MARYLAND JUDICIAL CONFERENCE
GOVERNMENT RELATIONS AND PUBLIC AFFAIRS

Hon. Mary Ellen Barbera
Chief Judge

187 Harry S. Truman Parkway
Annapolis, MD 21401

MEMORANDUM

TO: Senate Judicial Proceedings Committee
FROM: Legislative Committee
Suzanne D. Pelz, Esq.
410-260-1523
RE: Senate Bill 467
Estates and Trusts – Administration of Estates – Payments of
Commissions and Attorney’s Fees
DATE: January 27, 2021
(2/10)
POSITION: Oppose

The Maryland Judiciary opposes Senate Bill 467. This bill would require, rather than authorize, with certain conditions, the payment of attorney fees and commissions to personal representatives without court approval in the administration of estates.

The Judiciary traditionally opposes legislation that includes mandatory provisions. The Judiciary believes it is important for judges to weigh the facts and circumstances for each individual case when making a decision. Provisions that place restrictions on the judge prevent the judge from considering factors unique to the case.

cc. Hon. Chris West
Judicial Council
Legislative Committee
Kelley O’Connor

SB 467 2021 Opposition.pdf

Uploaded by: Malloy Groves, Athena

Position: UNF

MAJOC



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Hon. Kimberly J. Cascia
Queen Anne's County
Member-at-Large

MARYLAND ASSOCIATION OF THE JUDGES OF THE ORPHANS' COURTS

Bill No.: Senate Bill 467
Title: Estates and Trusts - Administration of Estates - Payment of Commissions and Attorney's Fees
Committee: Judicial Proceedings
Hearing Date: February 10, 2021
Position: Recommend Unfavorable Committee Report

COMMENTS:

The Orphans' Court, as Maryland's probate court, oversees the administration of decedents' estates. "[It has the jurisdiction to] conduct judicial probate, direct the conduct of a personal representative, and pass orders which may be required in the course of the administration of an estate of a decedent." MD Est & Trusts Code § 2-102(a). Probate is the legal process of transferring property from the estate to the heirs and legatees.

During the ordinary course of the administration of a regular estate (an estate having a value over \$50,000.00), the Orphans' Court reviews estate accounts, petitions for personal representative's commissions, and petitions for attorney's fees. If all requirements have been met, then the Court signs Orders approving the accounts and granting commissions and fees. If the Court notices discrepancies or has questions, then the Court may call for a hearing.

In awarding personal representative's commissions and/or attorney's fees, the court makes its determination based on various factors, including, but not limited to, the ease or complexity of the estate, how long the estate has been opened, and whether there was litigation.

Pursuant to Estates & Trusts Article § 7-601:

ESTATES AND TRUSTS ARTICLE § 7-601 COMPENSATION OF PERSONAL REPRESENTATIVE AND SPECIAL ADMINISTRATOR

- (a) Right to compensation. -- A personal representative or special administrator is entitled to reasonable compensation for services. If a will provides a stated compensation for the personal representative, additional compensation shall be allowed if the provision is insufficient in the judgment of the court. The personal representative or special administrator may renounce at any time all or a part of the right to compensation.
- (b) Computation of compensation. -- Unless the will provides a larger measure of compensation, **upon petition filed in reasonable detail** by the personal representative or special administrator **the court may allow** the commissions it considers appropriate. The commissions may not exceed those computed in accordance with the table in this subsection. (Emphasis added).

If the property subject to administration is:

The commission may not exceed:

Not over \$ 20,000..... 9%

Over \$ 20,000..... \$ 1,800 plus 3.6% of the excess over \$ 20,000

If the personal representative has retained the services of an attorney, then the attorney is also entitled to be paid from the estate.

Estates & Trusts Article § 7-602 provides:

ESTATES AND TRUSTS ARTICLE § 7-602 COMPENSATION FOR SERVICES OF AN ATTORNEY

- (a) In general. -- An attorney is entitled to reasonable compensation for legal services rendered by him to the estate and/or the personal representative.
- (b) Petition. -- **Upon the filing of a petition in reasonable detail** by the personal representative or the attorney, **the court may allow** a counsel fee to an attorney employed by the personal representative for legal services. The compensation shall be fair and reasonable in the light of all the circumstances to be considered in fixing the fee of an attorney. (Emphasis added).

Senate Bill 467 Opposition
Page 3

- (c) Considered with commissions. -- **If the court shall allow a counsel fee to one or more attorneys, it shall take into consideration in making its determination, what would be a fair and reasonable total charge for the cost of administering the estate under this article**, and it shall not allow aggregate compensation in excess of that figure. (Emphasis added).

Maryland Rule 6-416(a)(1) states that petitions for fees and/or commissions must include “the amount of all fees or commissions previously allowed, the amount of fees or commissions that the petitioner reasonably estimates will be requested in the future, the amount of fees or commissions currently requested, the basis for the current request in reasonable detail, and that the notice [to interested parties] required by subsection (a)(3) of this Rule has been given.”

The Notice required announces that “[u]pon the filing of a petition, the court, by order, shall allow attorney's fees or personal representative's commissions **as it considers appropriate**, subject to any exceptions [filed by an interested party].” (Emphasis added).

As the language of Estates & Trusts Article § 7-604 currently reads, even if there is written consent to commissions and fees from all interested persons, the Court still may review.

The Consent form itself provides that the Court maintains the ability to review:

I understand that the law, Estates and Trusts Article, § 7-601, provides a formula to establish the maximum total commissions to be paid for personal representative's commissions. If the total compensation for personal representative's commissions and attorney's fees **being requested** falls within the maximum allowable commissions, and the request is consented to by all unpaid creditors who have filed claims and all interested persons, this payment **need not be** subject to review or approval by the Court. (Emphasis added).

In other words, personal representatives and attorneys are still asking the Court for fees and commissions, which will be noted on estate accounts as an expense of the estate, since the Court maintains the authority to approve accounts. However, the details of how the commissions and fees were arrived do not need to be reviewed by the Court via petitions otherwise required because of the Consent. The Consent does not state that the payment will not be subject to Court review, just need not be. The use of a Consent simply negates the necessity of meticulous petitions.

Senate Bill 467 Opposition
Page 4

Upon review of the terms of the Consent, note that it is only valid if the request for commissions and fees falls within the statutory limit. Sometimes the attorney's calculation is wrong, either based on an incorrect estate valuation or mathematical error. The proposed change would not allow the Court to correct the mistake.

Assuming a calculation is correct, there may be times that the estate is extremely simple and the personal representative waives commissions. Even if the estate is large, comprised of a home with no mortgage and a substantial bank account, the work on it can be simple. Simple administration would not warrant the large commissions that would be the maximum calculated on the value of the assets. The nature of the statutory maximum would simply become a fee.

An automatic requirement that the Court be stripped of its ability to review requests to take money from an estate is contrary to well-settled statutory and case law. The appellate courts have repeatedly held that the determination of the amounts of fees and commissions is at the sound discretion and judgment of the Orphans' Court. See *Goldsborough v. DeWitt*, 169 Md. 463, 473–74, 182 A. 324 (1936); *Gradman v. Brown*, 183 Md. 634, 39 A.2d 808 (1944); *American Jewish Joint Distribution Committee v. Eisenberg*, 194 Md. 193, 199-200 (1949); *Kenny v. McAllister*, 198 Md. 521, 84 A.2d 897 (1951); *Dessel v. Goldman*, 231 Md. 428, 190 A.2d 633 (1963); *Lusby v. Nethken*, 262 Md. 584, 585 (1971); *Riddleberger v. Goeller*, 263 Md. 44, 282 A.2d 101 (1971); *Wright v. Nuttle*, 267 Md. 698 (1973); *Wolfe v. Turner*, 267 Md. 646, 299 A.2d 106 (1973); *Att'y Griev. Comm'n v. Owrutsky*, 322 Md. 334, 587 A.2d 511 (1991); *Beyer v. Morgan State Univ.*, 369 Md. 335, 353 (2002); *Peterson v. Orphans' Court for Queen Anne's County*, 160 Md. App. 137, 862 A.2d 1050 (2004); and, *Piper Rudnick LLP v. Hartz*, 386 Md. 201, 216 (2005).

We assert that allowing the payment of commissions and fees without the ability of court review, even through consent, impedes on the express discretion of the court. That oversight exists to protect the interests of not only the elderly, but also minor children and overall those who are grieving.

Therefore,

We recommend an Unfavorable Committee Report for Senate Bill 467