
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:

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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.