
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.

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