The District of Columbia Bar

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# COMMENTS OF THE SECTION ON ESTATES, TRUSTS AND PROBATE LAW OF THE DISTRICT OF COLUMBIA BAR

**to the**
**Advisory Committee on Superior Court Rules of Probate and Fiduciary Procedure**

**REGARDING**

**A proposed revision of a number of the Probate Rules, including the addition to and the renumbering of proposed 200 series rules, the adoption of an amended 400 series of interim Probate Rules on a permanent basis, and amendments to the 300 series of intervention rules and to the rules of procedure for estates of decedents dying on or after January 1, 1981.**

**March 21, 1996**

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**STANDARD DISCLAIMER**

**"The views expressed herein represent only those of the Section on Estates, Trusts and Probate Law of the District of Columbia Bar and not those of the D.C. Bar or of its Board of Governors."**

# ESTATES, TRUSTS AND PROBATE LAW SECTION



The District of Columbia Bar



## SUMMARY

In Summary, the Estates, Trusts and Probate Law Section proposes that the interests of the Office of the Register of Wills in efficient administration and the interests of Petitioners could both be best served by having court costs in unsupervised probate proceedings paid at the time of the filing of the Certificate of Notice pursuance to D. C. Code Section 20-704(b-1). The Section further suggests that the payment should be accompanied by a letter or other statement, in no particular required form, signed by either the personal representative or counsel for the estate certifying (1) the total value of the personal property and (2) the number of parcels of real property owned by the estate.

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The Estates, Trusts and Probate Law Section of the District of Columbia Bar generally supports approval of the proposed revisions to the Probate Rules. Several of the proposed revisions, however, cause concern to the Section because they propose substantive changes to current practice and procedure in the Probate Division of the Court.

The 400 series of Interim Probate Rules have been applied since the effective date of The Probate Reform Act of 1994 to the administration of estates of decedents dying on or after July 1, 1995. Those Rules have generally worked well in the implementation of the Probate Reform Act, an Act which significantly changed the manner in which probate estates are administered in the District of Columbia.

Proposed SCR-Probate 425, 'Court Costs', if adopted, will substantially affect the manner in which court costs have historically been assessed and collected by the Register of Wills in the administration of decedents' estates. The Section does not support that provision of SCR-Probate 425(a)(5) which proposes:

> "(5) Time of Payment.
> . . . In an unsupervised administration, the costs to be collected by the Register of Wills shall be paid at the time of the filing of the petition for probate (emphasis added)."

This proposed rule varies significantly from the current Interim Rule for the time of payment of court costs and, to the knowledge of the authors of these comments, proposes for the first time, that court costs on decedents' estates, which are guaranteed by counsel for the estate, will be assessed and collected at the time the Petition for Probate is filed.

The Section feels that, as explained in these comments, the proposed change to SCR-Probate 425 will (a) cause financial hardship in many cases, and (b) will create a heavier administrative burden on the Office of the Register of Wills than the burden this proposed rule is designed to relieve.

Even though this rule is applicable only to unsupervised proceedings, the Section feels that any enhanced efficiency which may accrue to the Office of the Register of Wills as a result of the proposed rule change is greatly outweighed by the resulting hardship to the estate being administered and to the attorney and the petitioner who may or may not be appointed the Personal Representative of the estate and who may or may not inherit from the estate.

Proposed SCR-Probate 425(a)(5), as drafted, may impose considerable hardship on those persons who must tender court costs prior to the opening of the estate. While the Personal Representative is responsible for paying court costs, he or she is responsible, as the fiduciary of the estate, to pay those costs

from estate assets; the Personal Representative is not personally liable. The proposed rule change will require someone, whether it is the nominated Personal Representative, the attorney representing the Personal Representative, or some other individual to pay court costs in order to initiate the probate proceeding. At the time the Petition is filed, assets of the estate are not available to pay any estate liability, including the liability for Court Costs. The purposes of a probate proceeding are to obtain access to estate assets and to satisfy estate liabilities as well as to marshall estate assets and to make distributions in accordance with a valid will or with the statutory scheme of descent and distribution. The proposed requirement that the estate liability for court costs be satisfied before the Court has conferred legal authority on a personal representative to act on behalf of the probate estate contradicts a basic legal concept regarding probate administration and the duties and responsibilities of fiduciaries and/or heirs of a decedent's estate.

Under Interim Probate Rule 425, court costs to be collected by the Register of Wills in an unsupervised administration are paid at the time of the filing of the Certificate of Notice required by D.C. Code Section 20-704(b-1). The Section 20-704(b-1) notice is required to be filed within 90 days after the appointment of the personal representative. The 90 day period for filing the Certificate of Notice is essentially the same three month time period required for preparation and delivery of the inventory to persons interested in the decedent's estate. The Interim Rule therefore logically provides for payment of court costs in both supervised and unsupervised proceedings at that point in the administration process when the assets of the estate have been inventoried and appraised and the value of the probate assets on which the court costs are assessed has been determined with reasonable certainty.

To assess Court Costs on the estimated values of assets described on the Petition for Probate will inevitably result in a miscalculation of the amount of those costs and will create a need to follow up and collect the appropriate amount. It is virtually impossible to determine accurate values for a decedent's assets at the time the Petition for Probate is prepared. Not until the petitioner has been appointed as personal representative does he or she have access to information concerning bank accounts (and more importantly to information concerning account balances) owned by the decedent, to brokerage accounts held by the decedent, to the decedent's bank deposit box, and only, to a limited extent, does the Petitioner have the ability to obtain information relating to real estate owned by the decedent. Furthermore, at the time the Petition is filed, tangible personal property has not been appraised and the value of decedent's interests in a variety of other assets, such as stock in closely held corporations and certain partnership interests, are frequently unknown. By proceeding in this proposed manner, the Court will, in effect, be requiring assessment and payment of costs on at least two different occasions: the first occasion is at the time of the filing of the

Petition on the estimated value of the probate assets; and, the second occasion is after the actual value of those assets has been determined, usually at the time the inventory is prepared.

Rather than improve the efficiency of the collection of court costs, actual implementation of the proposed rule change would suggest a greater administrative burden in collecting court costs. The initial assessment will inevitably be an incorrect assessment and thus will necessitate corrective action at a subsequent date, mostly likely after the inventory has been prepared. Rather than impose this additional administrative burden on the Office of the Register of Wills, the reasonable and intelligent approach for assessment and collection of court costs is to assess and collect costs after the value of the probate assets has been determined with reasonable certainty, not at the time of filing the Petition for Probate when asset information is always estimated.

An informal survey of the members of the Estates, Trusts and Probate Law Section suggests that any difficulties which may have been encountered by the Office of the Register of Wills in collecting court costs to date in unsupervised proceedings at the time the Certificate of Notices required by D.C.Code Sec. 20-704(b-1) are filed may have resulted from general unfamiliarity with the new procedures. The Section believes that it is reasonable to assume that after practitioners have become more familiar with practice and procedures under the new law, strict compliance with the Rules will become routine. There should be no greater difficulty in collecting court costs at the time the Certificate of Notices are filed in unsupervised proceedings than there has been in collecting those Costs at the time Waivers of Accounts and Inventories were filed prior to the 1994 Act (and as they will be collected when Waivers of Accounts and Inventories are file in Supervised proceedings under the 1994 Act).

To assess and collect court costs at the time a Petition for Probate is filed in an unsupervised administration proceeding imposes an additional hardship on those interested persons desiring an unsupervised proceeding. Were administration supervised, court costs would not be collected until Waivers of Inventories and Accounts were filed or until the filing of the First Account, whichever should first occur. In any event, court costs will not be collected in a supervised proceeding until some time after the Petition for Probate has been filed and until sufficient time has elapsed to marshall, inventory and appraise assets. If proposed SCR-Probate 425(a)(5) is adopted, supervised administration could become the proceeding of choice in the preparation of wills and testators could choose to direct supervised administration pursuant to D. C. Code Sec. 20-402. On the other hand, an increasing number of Personal Representatives may seek to persuade the Court that pre-payment of court costs, especially in estates that are without liquid assets which would enable prompt reimbursement upon qualification of the Personal Representative, is sufficient "good cause" to order supervised administration pursuant to D. C. Code Sec. 20-402(a)(3)

In Summary, the Estates, Trusts and Probate Law Section proposes that the interests of the Office of the Register of Wills in efficient administration and the interests of Petitioners could both be best served by having court costs in unsupervised probate proceedings paid at the time of the filing of the Certificate of Notice pursuance to D. C. Code Section 20-704(b-1). The Section further suggests that the payment should be accompanied by a letter or other statement, in no particular required form, signed by either the personal representative or counsel for the estate certifying (1) the total value of the personal property and (2) the number of parcels of real property owned by the estate.

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Proposed SCR-Probate 305 provides that retained counsel shall file a Notice of Appearance as soon as practicable and his or her appearance shall become effective ten days after filing such notice, or at the next scheduled hearing.

Currently, SCR-Probate 305 addresses only the appearance of court appointed counsel and provides for the filing of a Notice of Appearance within three (3) days after appointment. A common experience seems to be that court appointed counsel have not been filing a Notice of Appearance and, in some instances, have either not entered an appearance or have not contacted counsel for the petitioner to advise whether or not court appointed counsel is going to serve. This plays havoc with the required notices. The Section suggests that the rule be amended to state that court appointed counsel's appointment will be vacated unless Form 1-D is filed within the three-day (or longer) limit and/or court appointed counsel advises counsel for the petitioner that the appointment is accepted. The Section also suggests that the form appointing counsel, when submitted to the Court with the Petition for General Proceeding, bear a written caveat that the appointment will be vacated unless proper Notice of Appearance is given within the stated time.

Other aspects of current SCR-Probate 305 which seem to have caused confusion among practitioners are the provisions of 305(a)(7) and (10). In some cases less experienced practitioners will often file unnecessary reports in lieu of responsive pleadings, petitioners and/or motions, even in uncontested cases. Such action only increases the fees charged against the ward's estate or the guardianship fund with no concurrent benefit. The Section suggests either an official comment following the Rule that sets forth the circumstances under which responsive pleadings are appropriate or an amendment to 305(a)(7) stating that responsive pleadings are appropriate for a contested matter (either contesting the appointment of any fiduciary or of the specifically suggested fiduciary).

Finally, the Section would like the Rules Committee to consider the matter of requiring training for prospective court

appointed counsel and fiduciaries before they are appointed to cases. The Section believes that such training will add to the efficiency of management of these cases by the Court and the Probate Division as well as to the quality and cost effectiveness of the services rendered to the subject. The Bar generally, and the Estates, Trusts and Probate Law Section in particular, is willing to assist the Court in developing and participating in such training programs in any manner the Court feels appropriate.