

FEE FOR ALL: "FEES FOR FEES"
IN MARYLAND ESTATE LITIGATION

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INTRODUCTION

Satchel Paige, the fabled baseball player once allegedly remarked, "Never look behind you. You never know what might be gaining." In litigation concerning decedents' estates, what might be gaining—acceptance at least—is a claim for fees incurred by a personal representative defending an unsuccessful challenge to a fee petition, so-called "fees for fees."

The practice of awarding attorneys fees against adversaries in certain circumstances is causing important changes in the way litigation is financed in the United States.¹ The traditional "American Rule," of course, is generally thought to prevent a prevailing party from recovering attorneys' fees from a losing litigant.² But the rule has long been subject to both judicially fashioned and statutory exceptions.³ Court-awarded "fee-related fees" for "fee litigation" is now commonplace.⁴ There thus is a distinct tendency in many areas of the law towards a loser pays regime.

Though courts generally endorse the rule that an award of reasonable attorneys' fees includes fees for the time spent securing fees, the law of decedents' estate

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¹ Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing the Problem*, 1986 Duke L.J. 435, 437-438.

² *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796). See Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, Law & Contemp. Probs., Winter 1984, at 9, 15.

³ Under the "American Rule" as it is understood and applied today, attorneys' fees are generally not awarded absent a specific statutory provision or pursuant to a valid contract. See *Alyeska Pipeline Serv. v. Wilderness Soc.*, 421 U.S. 240 (1975). Still, it is a rule from which the judiciary continues to carve exceptions. See, e.g., *Prospect Development Company, Inc. v. Bershader*, 258 Va. 75, 515 S.E.2d 291, 301 (1999)("in a fraud suit," where "defendants engaged in callous, deliberate, deceitful acts," "a chancellor, in the exercise of his discretion, may award attorney's fees to a defrauded party").

⁴ See, e.g., *Trimper v. City of Norfolk*, 58 F.3d 68, 77 (4th Cir. 1995)("[T]ime spent defending entitlement to attorney's fees is properly compensable"); *Daly v. Hill*, 790 F.2d 1071, 1080 (4th Cir. 1986)(same); *American Fed'n of Gov't Employees v. Federal Labor Relations Auth.*, 994 F.2d 20, 21 (D.C. Cir. 1993)(noting that "the availability of 'fees for fees' is essential" and that "an award of 'fees for fees' is not merely a remote descendant of the underlying action from which it derives," but rather "is an integral aspect of the statutory scheme on which the underlying claim is based").

administration, where personal representatives are ordinarily compensated from funds of the probate estate, is not well settled in some jurisdictions, including Maryland, in that regard. Commissions and fees are set by a court pursuant to statutory authorization and paid out of an estate, and any amount awarded a personal representative necessarily reduces the corpus of the residuary estate. When interested parties challenge commission and fee claims of personal representatives,⁵ probate courts confront the dilemma of whether to provide reimbursement of attorneys' fees expended to establish and defend a petition for commissions, fees for extraordinary services and attorneys' fees incurred in connection with underlying estate administration.

Many probate courts continue to reason that allowing "fees for fees" would contravene the "American Rule," and in the context of estate administration, might also constrain an interested party from asserting valid objections to an attorneys' fee claim out of fear that objections will decrease estate assets. Other probate courts justify an award of "fees for fees" on the ground that to preclude the claim might impede an estate in retaining well-qualified and competent counsel concerned with adequate compensation. The better view, though one yet to be sanctioned judicially in Maryland's law of estate administration, may well be that a personal representative of a decedent's estate and its attorney should be relieved of having to risk personal financial loss by underwriting the legal proceeding's expenses, especially when a challenge to commissions and fees is not successful.⁶

I. *THE LANGUAGE OF THE GOVERNING ACT ESTABLISHES A THREE-PART TEST FOR RECOVERY OF FEES.*

In Maryland, "[t]he power of an orphans' court to allow [disbursements from an estate] is derived from statute."⁷ Md. Code Ann., *Est. & Trusts* §7-603 governs the recovery of expenses incurred and disbursements made by a personal representative in any estate-related legal proceeding.⁸ Maryland courts "apply the principles of statutory

⁵ Interested parties challenging personal representatives' petitions are generally labeled "exceptants" for pleading purposes.

⁶ A predictable response of many parties interested in a decedent's estate is to litigate the fee claim itself, adding further to the already considerable cost of administering an estate.

⁷ *Wolfe v. Turner*, 267 Md. 646, 299 A.2d 106, 109 (1973).

⁸ "When a personal representative or person nominated as personal representative defends or prosecutes a proceeding in good faith and with just

construction to enactments" like Md. Code Ann., *Est. & Trusts* §7-603, and the analysis "begins with the text."⁹ "If the legislature's intentions are evident from the text of the statute, [the court's] inquiry normally will end and the plain meaning of the enactment will govern."¹⁰ Regarding the question of whether to reimburse attorneys' fees expended to establish and defend a fee petition, "the statute is clear and unambiguous."¹¹

In order to recover under the clear and unambiguous terms of Md. Code Ann., *Est. & Trusts* §7-603: (1) the petitioner must be a personal representative; (2) the petitioner must have defended the proceeding "in good faith and with just cause;" and (3) the petitioner's expenses and disbursements must have been "necessary."¹² Typically, there is little room for debate about the identity of the personal representative of an estate granted letters of administration. When the personal representative prevails on an exceptant's challenge to its fee petition, there should likewise be no serious doubt that the personal representative "did defend in good faith and with just cause."¹³

As to the third required element, the personal representative's expenses and disbursements should be classified as "necessary," where fees are incurred to properly and effectively defend against exceptions to a statutorily-required petition. This is so because Maryland's Trusts and Estates Article provides the usual and customary, and generally only, method of recovering statutorily-mandated commissions and fees.

cause, he shall be entitled to receive his necessary expenses and disbursements from the estate regardless of the outcome of the proceeding." *Id.*

⁹ *Beyer v. Morgan State University*, 139 Md.App. 609, 779 A.2d 388, 401, *aff'd* 369 Md. 335, 800 A.2d 707 (2002)(citation and internal quotation marks omitted).

¹⁰ *Id.* (Citations omitted).

¹¹ *Office of People's Counsel v. Maryland Public Service Comm'n*, 355 Md. 1, 733 A.2d 996, 1007 (1999)(citations omitted).

¹² *Id.*

¹³ *National Wildlife Fed'n v. Foster*, 83 Md.App. 484, 575 A.2d 776, 781 (1990). *But see In re Estate of King*, 769 A.2d 771, 781-783 (D.C. 2001)(applying District of Columbia statute and observing: "It is not enough in this case for [co-personal representatives of an estate] to say that wearing their 'trustee hat' they won a lawsuit." "Through the prism of the...request for fees under D.C. Code § 20-752, the inquiry is whether [the co-personal representatives] have shown that their efforts in the...litigation were in good faith and for just cause." *Id.*, 769 A.2d at 781, 783).

Given that "the process of statutory construction is straight forward and requires resort only to the words of the statute,"¹⁴ mere satisfaction of this three-part statutory test should be sufficient to at least qualify for a discretionary award by an orphan's court.

II. *THERE IS NO STATUTORY REQUIREMENT THAT NECESSARY EXPENSES AND DISBURSEMENTS BENEFIT THE ESTATE.*

Nothing in the text of Maryland's statute suggests that an orphan's court has discretion to determine whether a personal representative's actions benefited the estate before awarding its "necessary expenses and disbursements" out of the corpus. Nonetheless, in a Maryland probate proceeding, the personal representative may well find itself confronting interested parties' assertions that a "benefit" to the estate is necessary to satisfy the requirements for expense disbursements under Section 7-603 of the Estates & Trusts Article. Indeed, some foreign courts, applying inapposite state statutes,¹⁵ dissimilar common law,¹⁶ incompatible public policy,¹⁷ or disabling facts,¹⁸

¹⁴ *Office of People's Counsel v. Maryland Public Service Comm'n*, 733 A.2d at 1007 (1999)(citations omitted).

¹⁵ See, e.g., *Estate of Inlow*, applying Indiana's probate statute: "An attorney performing services for the estate at the instance of the personal representative shall have such compensation therefore out of the estate as the court shall deem just and reasonable" (Emphasis added). *Id.*, 735 N.E.2d 240, 250-251 (Ind. 2000); *Depositors' Committee v. Financial Management Task Force, Inc.*, interpreting and applying Colorado's banking statutes. *Id.*, 809 P.2d 1095, 1095-1096 (Colo. 1991); *In re Sloan Estate*, applying Michigan's probate statute: "a fiduciary of an estate may employ counsel to perform necessary legal services *in behalf of the estate*," as well as "the 'benefit' test [that] is the prevailing rule of law in th[at] state." (Emphasis added). *Id.*, 212 Mich. App. 357, 538 N.W.2d 47, 49 and fn. 1 (1995).

¹⁶ See, e.g., *Estate of Riemcke*, applying Washington's common law to "executrix of a nonintervention will" who was "the sole beneficiary thereunder." *Id.*, 80 Wash.2d 722, 497 P.2d 1319, 1327 (1972); *Estate of Bush*, applying "general rule" of Minnesota's common law that "in order to recover it must be established that such services inure to the benefit of the estate." *Id.*, 304 Minn. 105, 230 N.W.2d 33, 44 (1975); *Estate of Halas*, applying Illinois' common law: "[m]any benefits [must be] derived by the estate as a result of petitioner's legal services." *Id.*, 159 Ill.App.3d 818, 512 N.E.2d 1276, 1284, 1285, 111 Ill.Dec. 639 (1987); *Estate of Breault*, applying Illinois' common law: "where the services are not in the interest of the estate but rather in the interest of the executor, counsel's fees will be rejected." *Id.*, 34 Ill.App. 3d 56, 339 N.E.2d 340, 343 (1975), (citations and internal quotation marks omitted), *modified*, 64 Ill.2d 344, 356 N.E.2d 86, 1 Ill.Dec. 86 (1976).

¹⁷ See, e.g., *Estate of Larson*, applying Washington's "public policy" against "penalizing victimized parties from legitimately challenging attorney fee requests in probate proceedings." *Id.*, 103 Wash.2d 517, 694 P.2d 1051, 1059 (1985)(en banc).

¹⁸ See, e.g., *Estate of Bacheller*, finding that "litigation" was "an attempt to defend the collection of exorbitant fees from the estate and to justify the payment of an *obviously invalid* pledge." (Emphasis added). *Id.*, 437 S.W.2d 132, 142-143 (Mo. 1969).

have held that services which do not directly benefit the estate in the sense of increasing, protecting, or preserving it, ought not be compensated or reimbursed.

Md. Code Ann., *Est. & Trusts* §7-603 is derived from the Uniform Probate Code §3-720 (amended 1993), 8 U.L.A. 184 (1998) ("UPC"). *Oliver v. City of Larimore*,¹⁹ a case from a jurisdiction that also has adopted the Uniform Probate Code provision in effect in Maryland, is representative of the idea that the uniform statute should be read to interpolate a "benefit the estate" requirement.²⁰ Maryland courts, however, refrain from modifying or extending an enactment by judicial construction.²¹ Judicial grafting onto Md. Code Ann., *Est. & Trusts* §7-603 is therefore unlikely. Consequently, there is every reason to believe that Maryland courts will adhere to a literal reading of the statute, imposing only the requirements in it. The very language of Maryland's statute tends to confound the idea that the pecuniary interests of the estate must be improved in the slightest before reimbursement may be allowed, as it expressly authorizes reimbursement from estate funds even if a personal representative is not successful in the litigation.²²

¹⁹ 540 N.W.2d 630 (N.D. 1995).

²⁰ *Estate of Painter*, 671 P.2d 1331 (Colo. 1983) ("*Painter II* (1983)"), is another exemplar. Colorado's Probate Code §15-12-720 also closely mirrors UPC §3-720 as well. In an earlier iteration of that opinion, however, the Colorado Court of Appeals awarded fees for an initial hearing on a fee dispute, but declined an award for a second hearing that resulted because the fiduciary introduced irrelevant evidence in the first hearing. *Estate of Painter*, 628 P.2d 124, 125-126 (Colo. 1981) ("*Painter I* (1981)"). In 1991, the Colorado Court of Appeals resolved another fee dispute, much as it had in *Painter I* (1981) a decade earlier, awarding fees-on-fees to a bank, but declining to "determin[e] whether United Bank's future fees are justified," citing its later *Painter II* (1983) decision, and saying, vaguely, that "the issue of all additional attorney fees will be resolved by the probate court." *Estate of Holmes*, 821 P.2d 300, 304-305 (Colo. 1991).

²¹ *Taylor v. NationsBank*, 365 Md. 166, 776 A.2d 645, 654 (2001) (Courts "neither add nor delete words to a clear and unambiguous statute to give it a meaning not reflected by the words the Legislature used or engage in forced or subtle interpretation in an attempt to extend or limit the statute's meaning").

²² *Id.* (permitting reimbursement "regardless of the outcome of the proceeding").

III. *THERE IS NO COMMON LAW REQUIREMENT THAT NECESSARY EXPENSES AND DISBURSEMENTS BENEFIT THE ESTATE.*

A. *A Plurality Of Foreign Interpretations Supports Recovery Of Necessary Expenses And Disbursements From The Corpus Of The Estate Regardless Of Any Benefit.*

Just as in other areas of substantive law, there is ample precedent for most any position in "fees for fees" estate litigation.²³ Nonetheless, decisional law drawn from across the country appears to preponderate in favor of a personal representative's reimbursement claim. As an Alaskan appellate court emphasized last year, "case law from other UPC jurisdictions with identical or nearly identical statutes overwhelmingly supports the notion that" there simply is no "benefit requirement" in enactments employing language like that contained in Md. Code Ann., Est. & Trusts §7-603.²⁴

In *Estate of Rosen*, for example, some but not all beneficiaries under a will contested the reasonableness of a personal representative's fee. During the course of the fee challenge,

[t]he bank presented testimony of the trust officer who described in considerable detail the problems encountered in administration of the Rosen estate. He also estimated the total time expended both by himself and by the staff. In addition, the bank presented an expert witness who testified that the fee was reasonable and consistent with what would be charged by other corporate fiduciaries in the community.²⁵

²³ Courts regularly confront "case law supporting both sides" of an issue. *Estate of Inlow*, 735 N.E.2d 240, 251 (Ind. 2000).

²⁴ *Enders v. Parker, Estate of Kottke*, 28 P.3d 280, 285 n. 26 (Alaska 2001) (citing *Estate of Frieze*, 126 N.M. 16, 966 P.2d 183, 187 (N.M.App. 1998); *Estate of Killen*, 188 Ariz. 569, 937 P.2d 1375, 1380-1381 (Ariz.App. 1996); *Estate of Evenson*, 505 N.W.2d 90, 92 (Minn.App. 1993); *Estate of Watkins*, 243 Neb. 583, 501 N.W.2d 292, 296 (1993); *Estate of Holmes*, 821 P.2d 300, 304 (Colo.App. 1991); *Estate of Rosen*, 520 A.2d 700, 701 (Me. 1987)).

²⁵ *Id.*, 520 A.2d at 701-702.

After approving the Bank's requested fee, the Probate Court, Penobscot County, Maine, assessed the Bank's attorneys' fees against "[t]hree of the fourteen beneficiaries under the will" who prosecuted exceptions to the Bank's fee petition.²⁶

On appeal, the Supreme Judicial Court of Maine, applying that State's UPC codification providing "for an award of reasonable attorney fees 'from the estate,'" reversed, holding that "[a]ny award of attorney fees ... must be out of the estate," and thus be borne by all fourteen beneficiaries rather than merely the three exceptants.²⁷

Exactly the same result obtained in *Estate of Evenson*,²⁸ where the Court of Appeals of Minnesota awarded the personal representative "costs and attorney fees on appeal" from the estate, because, like the probate law of Maryland, that State's UPC codification, "Minn.Stat. §524.3-720 allows reimbursement of expenses and disbursements in all estate litigation."²⁹

B. Maryland's Public Policy Tends To Support Recovery Of Necessary Expenses And Disbursements From The Corpus Of The Estate Regardless Of Any Benefit.

While there is no decisional authority in Maryland specifically addressing the question of whether costs incurred in defense of a fiduciary fee petition may be paid out of an estate,³⁰ there is in Maryland's analogous law of trusts.³¹ In that comparable,

²⁶ *Id.*, 520 A.2d at 701.

²⁷ *Id.*, 520 A.2d at 701.

²⁸ 505 N.W.2d 90 (Minn.App. 1993).

²⁹ *Id.*, 505 N.W.2d at 92.

³⁰ *Cf. Thomason v. Bucher*, 266 Md. 1, 291 A.2d 437 (1972)(noting in case where orphans' court sustained exceptions to an administrative account, that personal representative's contention on untimely appeal was a "*non sequitur*," had a "foundation neither in law nor policy" and lacked "merit." *Id.*, 291 A.2d at 439). *Thomason* is little more than a link in a line of Maryland cases restricting a personal representative's right to attack on appeal an unfavorable order of the trial court. *See, e.g., Webster v. Larmore*, 270 Md. 351, 311 A.2d 405, 406 (1973)("we conclude that our prior decisions restricting a personal representative's right to appeal remain unaltered"); *Alston v. Gray*, 303 Md. 163, 492 A.2d 900, 902 (1985)("To those formerly articulated reasons, we also recognize that an unlimited right to appeal, in the hand of the executor or representative, could seriously deplete a small estate and might delay indefinitely the distribution of estate assets to deserving heirs"). *Thomason* neither implicates Md. Code Ann., *Est. & Trusts* §7-603, nor passes on its meaning or applicability. Like others of its kind, *Thomason* involves a personal representative who failed in litigation. In no way does it appear to diminish Maryland's policy preference, fleshed out by the law of trusts, when fee disputes are defended successfully.

settled, context, "[t]he general rule is that a trustee is entitled to attorneys' fees paid from the trust if it successfully defends an action brought by the beneficiary."³² The public policy rationale for the rule is found in *Saulsbury v. Denton Nat'l Bank*.³³ As the Court of Special Appeals there explained, quoting Judge Learned Hand:

The argument is that these expenses were incurred in the defendant's individual interest, and may not be charged against the trust. *** When the trustee's administration of the assets is unjustifiedly assailed it is a part of his duty to defend himself, for in so doing he is realizing the settlor's purpose. To compel him to bear the expense of an unsuccessful attack would be to diminish the compensation to which he is entitled and which was a part of the inducement of the burden of his duties.³⁴

In *Sokol v. Nattans*,³⁵ testamentary trustees claimed entitlement to reimbursement for counsel fees in connection with a contest over claimed trustee commissions, where the trustees were successful as to income commissions but unsuccessful as to a statutory termination commission. In passing on the petition, the trial court aptly observed:

[I]f a trustee is required to pay his own legal expenses whenever his right to compensation is contested, there is a substantial risk that he will not be adequately compensated. The Rule which permits reimbursement when the trustee is successful and denies reimbursement where he is unsuccessful seems to be a

³¹ Cf. Md. Code Ann., *Est. & Trusts* §7-403 (equating personal representative's fiducial liability to that of "a trustee of an express trust").

³² *Jacob v. Davis*, 128 Md.App. 433, 738 A.2d 904, 921 (1999)(directing that the trial "court should allocate to the Trusts only that portion or percentage of the fees it considers, in its discretion, to be fairly attributable to the successful aspects of the defense"), *cert. denied*, 357 Md. 482 (2000)(citations omitted).

³³ 25 Md.App. 669, 335 A.2d 199 (1975), *cert. denied*, 275 Md. 755 (1975).

³⁴ *Id.*, 335 A.2d at 202, (citations and internal quotation marks omitted).

³⁵ 26 Md.App. 65, 337 A.2d 460, *cert. denied*, 275 Md. 755 (1975).

fair one and consistent with the general policy to be served.³⁶

In *Estate of Trynin*,³⁷ the Supreme Court of California held in a probate proceeding that although "fee litigation confers no immediate or direct benefit on the estate, it becomes a necessary incident to the attorney's work for the estate, and so compensable, when unjustified challenges are raised to a fee claim."³⁸ Like the policy Maryland has embraced in its law of trusts,³⁹ California has concluded in the context of decedents' estates that a "contrary rule would effectively deny full and fair compensation for attorneys and thereby discourage qualified and competent counsel from undertaking to perform extraordinary services."⁴⁰ California's well-reasoned desideratum should

³⁶ *Id.*, 337 A.2d at 474.

³⁷ 49 Cal.3d 868, 264 Cal.Rptr. 93, 782 P.2d 232 (1989). In *Trynin*, the Supreme Court of California found *In re Nucorp Energy*, 764 F.2d 655 (9th Cir. 1985), persuasive, even though it addressed a "fees for fees" claim in the context of a bankruptcy proceeding. The handling of attorneys' fees in a bankruptcy matter presents an analogous situation to allowing fees in a probate proceeding, because in both contexts, the fee is set by the court pursuant to statutory authorization and paid out of an estate. The *Nucorp* court concluded that the "preparation and presentation" of the petition for attorneys' fees "constituted 'actual, necessary services,' within the meaning of the governing statutory language, because preparation of a detailed fee application was statutorily required and because the detailed billing information provided was 'of importance to all parties, as well as to the court.'" *Trynin*, 782 P.2d at 238 (quoting *Nucorp*, 764 F.2d at 659). Moreover, the *Trynin* court emphasized: "[I]n statutory fee cases, federal courts...have uniformly held that time spent in establishing the entitlement to and amount of the fee is compensable." *Id.* (quoting *Nucorp*, 764 F.2d at 659-660). Applying the *Nucorp* holding to the *Trynin* record, the Supreme Court of California concluded that attorneys' fees related to a bankrupt estate are analogous "to attorney[s]' fees for probate services as in both cases the fee is set by the court pursuant to statutory authorization and paid out of an estate." *Id.* Indeed, "the legislative intent [is] to ensure that attorneys are fully compensated for handling cases. A rule denying compensation for necessary fee-related services would be inconsistent with this intent since it would result in a reduction of the rate paid for all the attorneys' services and thereby diminish the fees of...counsel to a level that fails to provide full compensation for their services." *Id.* (quoting *Nucorp*, 764 F.2d at 662)(other citations and internal quotation marks omitted).

³⁸ *Id.*, 782 P.2d at 238.

³⁹ Although Indiana and Michigan have rejected California's "public policy reason for the rule," in cases of beneficiaries who failed in their bid to reduce a personal representative's commission or fee request, (*Estate of Inlow*, 735 N.E.2d 240, 253 (Ind.Ct.App. 2000); *In re Sloan Estate*, 212 Mich.App. 357, 538 N.W.2d 47, 49 (1995)(Court of Appeals "accept[ed] that this [public policy] argument may have validity" but followed "converse" rationale)), the reasoning and holding of *Trynin* appears entirely consonant with the public policy of Maryland, where it is established that attorneys' fees and litigation costs incurred in a trustee's successful defense of an action brought by a trust beneficiary are recoverable.

⁴⁰ *Id.*, 782 P.2d at 238. *Cf. Prandini v. National Tea Co.*, 585 F.2d 47, 53 (3rd Cir. 1978)("If an attorney is required to expend time litigating his fee claim, yet may not be compensated for that time, the attorney's effective rate for all the hours expended on the case will be correspondingly

animate Maryland's estate law when fees are disputed, much as it already infuses Maryland's trust law.

Md. Code Ann., *Est. & Trusts* §7-603 does not expressly exclude reimbursement for work reasonably performed by a personal representative and its attorneys to establish and defend their commission and fee claims. An exercise of sound discretion in favor of "fees for fees" thus would derive not simply from the probate code itself, but also from persuasive judicial gloss, so long as the estate's representatives and attorneys, in performing services, were acting consistent with the fiduciary duties imposed upon them. Amounts awarded to the personal representative for both ordinary and extraordinary services should, in short, be adequate, given the value of the estate and nature of its assets, to fully compensate the personal representative and its attorneys for all their services, including successful fee-related services.⁴¹

CONCLUSION

Probating an estate can be adversarial, and may well involve a great deal of creative work. Arriving at an accurate and reasonable fee award requires much time and effort on the part of the litigants and the court. After the first litigation inevitably comes the second, with added costs and potential fee awards of its own. Although full-scale litigation over the fee award can be expensive, the statutory process prevailing in Maryland both contemplates and requires it. Decisional law and logic also support reimbursement by a decedent's estate for reasonable litigation costs and fees incurred in defending a fee petition.⁴²

decreased... . Such a result would not comport with the purpose behind most statutory fee authorizations").

⁴¹ The *Trynin* court also observed: "It has sometimes been argued, as a reason for denying fees for fee-related services, that permitting such awards will result in the 'Kafkaesque judicial nightmare' of an 'infinite regression of [fees] litigation,' in which each request for fee-related fees is contested and results in yet another request for fee-related fees Experience in statutory fee-shifting contexts suggests that this perceived problem is largely theoretical and seldom arises in practice. In any event, we are confident that trial courts, in the exercise of broad discretion granted them in ruling on fee applications, have the means to resolve this problem should it arise." *Id.*, 782 P.2d at 238 (citation omitted). Other courts tend to concur. See, e.g., *Ragan v. Commissioner*, 210 F.3d 514, 518 (5th Cir. 2000)(rejecting in tax-law context "a policy argument that 'fees-for-fees' should be requested at the time of the original fee request in order to prevent a cascading, 'ad infinitum' series of fee requests in which a party first requests fees, then later requests 'fees for fees,' and then later requests 'fees for 'fees for fees,'" and so on," noting that "the danger of infinite, but decreasing, fee requests is more illusory than real").

⁴² It would be fair as well. Having forced a personal representative to incur significant expenses and fees in defending against unfounded exceptions, exceptants should be in no position to complain if they, as parties interested in the estate, have to pay a portion of the bill. That is

Absent circumstances rendering the award unjust, fees recoverable under Md. Code Ann., *Est. & Trusts* § 7-603 should routinely include compensation for reasonable costs and fees necessary to establish and defend a fee claim. Otherwise, Maryland's public policy pertaining to fiduciaries will be frustrated, sometimes nullified, if commission and fee awards are diluted or dissipated by lengthy, uncompensated proceedings to fix or defend a rightful fee claim.⁴³

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necessarily and especially so, when the personal representative's participation in a protracted fee proceeding was at the exceptants' insistence.

⁴³ *Cf. Souza v. Southworth*, 564 F.2d 609, 614 (1st Cir. 1977)(noting that the failure to allow fees for fees "would permit a deep pocket losing party to dissipate the incentive provided by an award through recalcitrance and automatic appeals").