

EXPLANATORY MEMORANDUM TO
THE NON-CONTENTIOUS PROBATE (FEES) ORDER 2018

2018 No. 0000 (L.)

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument introduces a new regime of fees for applications for a grant of probate, with a banded structure based on the value of the estate. The fee structure is set out in detail below. It increases the estate threshold below which no fee for an application for a grant of probate is payable from £5,000 to £50,000.
- 2.2 The instrument also removes applications for a grant of probate from the generally applicable remissions scheme for courts and tribunal fees ('Help with Fees'), previously contained in Schedule 1A to the Non-Contentious Probate Fees Order 2004 (S.I. 2004/3120) (which is to be revoked by Article 11 of, and Schedule 2 to, this Order), but retains the Lord Chancellor's power to remit or reduce a fee in exceptional circumstances (Article 10 of this Order).
- 2.3 Articles 7 to 9 of this Order makes provision for refunds and remissions in specified circumstances.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This instrument is made under the Lord Chancellor's power in section 180 of the Anti-social Behaviour, Crime and Policing Act 2014¹, which confers a power on the Lord Chancellor to set a fee which exceeds the cost of the service. This power is being used to help make sure that Her Majesty's Court and Tribunals Service is sufficiently funded. The Lord Chancellor has a statutory duty to ensure an efficient and effective courts and tribunals system is in operation. Furthermore, the Government believes it is right to introduce a more progressive fee structure where those who can afford to pay more are being asked to do so.
- 3.2 A previous draft statutory instrument (The Non-Contentious Probate Fees Order 2017) was laid in Parliament on 24th February 2017, and was drawn to the attention of both Houses in the Joint Committee's 26th report of Session 2016-17. This instrument replaces that previous instrument (which has now been withdrawn), and contains a revised banded fee structure in correlation to estate value.

¹ http://www.legislation.gov.uk/ukpga/2014/12/pdfs/ukpga_20140012_en.pdf

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.3 This entire instrument applies to England and Wales only.
- 3.4 For the purposes of House of Commons Standing Order 83P of the Standing Orders of the House of Commons relating to Public Business, this Department's view is that the subject-matter of this entire instrument would be within the devolved legislative competence of the Northern Ireland Assembly and the Scottish Parliament. This would be the case if an equivalent provision in relation to Northern Ireland were included in an Act of the Northern Ireland Assembly as a transferred matter, and an equivalent provision in relation to Scotland were included in an Act of the Scottish Parliament.

4. Extent and Territorial Application

- 4.1 This instrument extends to England and Wales only.
- 4.2 The territorial application of this instrument is set out in Section 3 under "Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)".

5. European Convention on Human Rights

- 5.1 The Parliamentary Under-Secretary of State for Justice, Lucy Frazer, has made the following statement regarding Human Rights:

"In my view, the provisions of the Non-Contentious Probate (Fees) Order 2018 are compatible with the Convention Rights."

6. Legislative Context

- 6.1 This instrument revokes and replaces the Non-Contentious Probate Fees Order 2004 (S.I. 2004/3120) and the amendments to that Order set out in Schedule 2 to this Order and imposes a new fee structure for applications for a grant of probate.

7. Policy background

What is being done and why?

- 7.1 The Probate Service is an important service that provides valuable support to those that are bereaved. The role of the Probate Service is to provide a professional, efficient and supportive service to those who are dealing with the estate of those who have passed away. The Probate Service helped 275,000 applicants in 2017/18 and issued a total of 260,000 grants of probate in the same period. In 2014, the fees for a grant of probate were adjusted to cost recovery levels, with a flat fee of £155 for an application by a solicitor and £215 for an application by an individual.
- 7.2 This instrument increases fees for the grant of probate for two primary reasons. First, it is right to introduce a more progressive fee scheme where those who can afford to pay more are asked to do so; second, it is necessary to fund the wider courts and tribunals system to ensure an efficient and effective service. This additional income is ring-fenced to the courts and tribunals service and therefore allows us to ensure we avoid charging court and tribunal fees in inappropriate cases and help maintain access to justice for all.

- 7.3 Estates under £50,000 will be exempted from paying a fee for an application for a grant of probate. Relating the fee to the size of the estate value makes our scheme equitable. Even the highest fee in our scheme would represent no more than 0.5% of the value of the estate.
- 7.4 The Lord Chancellor has a statutory duty to ensure an efficient and effective courts and tribunals system is in operation. The authorising legislation recognises that the Lord Chancellor has an ability to prescribe fees which can assist him to fulfil this duty (see section 180(3)(a) of the Anti-social Behaviour, Crime and Policing Act 2014).
- 7.5 In 2016/17, the courts service cost £1.6bn in running costs but recovered less than half of that in fees (£740m) (and of which £49m was fee income from the Probate Service issuing over 250,000 grants of representation). We believe that it is appropriate and progressive to charge an increased fee for a grant of probate in order to increase the contribution from those users of the court and tribunals services who can afford to do so. This, therefore, goes some way to rebalancing the contribution to the courts and tribunal service between the taxpayer and direct user.
- 7.6 The Government is investing over £1bn to transform the courts and tribunals service so that it is fit for the digital age. The vision of the reform is to modernise and upgrade the justice system so that it works even better for everyone, from the victims of crime, witnesses and litigants to judges and legal professionals. We want everyone who engages with the courts and tribunals to have the best justice system in the world available to them - making them straightforward, accessible and better value for the taxpayer and direct user.
- 7.7 As part of these reforms, we are implementing changes to the Probate Service to improve the service and experience of the user. This is part of the HMCTS Reform Programme and a separate SI (and accompanying explanatory note) will set out the details of those reforms. Overall, that SI will reduce the burden on those who are grieving by, amongst other things, ensuring faster processing times, allowing for assisted digital support and ensuring the public or their representatives can initiate cases online.
- 7.8 The fee structure is set out here:

Value of estate (before inheritance tax)	Fee
Up to £50,000 or exempt from requiring a grant of probate	£0
£50,000 but does not exceed £300,000	£250
Exceeds £300,000 but does not exceed £500,000	£750
Exceeds £500,000 but does not exceed £1m	£2,500
Exceeds £1m but does not exceed £1.6m	£4,000
Exceeds £1.6m but does not exceed £2m	£5,000
Above £2m	£6,000

8. Consolidation

8.1 It is not intended that this instrument will consolidate any other legislation.

9. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

9.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

10. Consultation outcome

10.1 On 18th February 2016, the Government consulted on proposals to increase fees for applications for a grant of probate. A copy of the original consultation can be found at the following link:

<https://consult.justice.gov.uk/digital-communications/fee-proposals-for-grants-of-probate/Consolidation>

10.2 The Government response was published on 24th February 2017. A copy of which can be found at: <https://www.gov.uk/government/consultations/fee-proposals-for-grants-of-probate>.

10.3 The consultation lasted 6 weeks from 18th February until 1st April and total of 853 responses were received ranging from members of the public to law firms and charitable organisations. The majority of respondents did not agree with the proposals as they thought the fees were too high and opposed the fact that the increases are over and above the running costs of the Probate Service.

10.4 After careful consideration of all the responses, the Government progressed to implement the original preferred model to maximise the contribution made to HMCTS funding and in light of the argument that the move to a banded structure is fairer, more progressive and helps fund an efficient and effective courts and tribunals service.

10.5 The relevant draft affirmative Statutory Instrument was laid in Parliament on 24th February 2017, and passed by Commons committee debate on 19th April 2017. However, there was not enough time for the Order to complete its passage through Parliament due to the General Election in June.

10.6 After the election and further consideration of concerns raised during the debate in the House of Commons and the consultation responses, the MoJ has decided to lower the fees in all bands in the table at paragraph 7.8 above.

10.7 We strongly believe that a more progressive fee structure is the most appropriate way of changing probate fees. Nonetheless, we have listened and responded to concerns about the levels of fees previously proposed. As such, these are significantly lower than those proposed last year. No estate would pay a fee greater than 0.5% of its value.

10.8 Under the new structure, for those who pay, around 80% of estates will pay £750 or less and 60% of applicants will still be paying a comparable fee to what they pay now

². The highest charge is £6,000, which is payable on an estate worth over £2m. In addition, the Government is raising the threshold for which no fee for an application for a grant of probate is required from £5,000 to £50,000 which will lift approximately an additional 25,000 estates out from having to pay a fee every year.

- 10.9 Whilst the Government accepts that many executors or administrators (“personal representatives”) will be paying a higher fee and have to fund this upfront, the issue is not of affordability because the fee is based on the value of the estate and the personal representative will be able to recover the fee from the estate once the grant of probate has been issued. HMRC data³ suggests that the average estate comprises 25% cash.
- 10.10 In addition, the Government has worked alongside the finance industry and consumer representatives to put together Guidance on Ways to Pay, which will be published before the SI comes into force, to help executors navigate the options and assistance available to them to pay the fee. If, for example, a personal representative is not able to pay the fee because there is not enough cash within the estate or they are unable to obtain financial assistance, then the Probate Service will provide limited access to the assets of the estate for the sole purpose of paying the necessary fee. The Lord Chancellor also retains the power to remit fees in exceptional circumstances. This will make sure that no one is denied access to a grant of probate because they cannot pay a fee.

11. Guidance

- 11.1 HMCTS will update its guidance on fees payable in line with these amendments and specifically, on the Lord Chancellor’s power to remit fees in exceptional circumstances. Forms and leaflets will also be amended to reflect the changes and any such changes will be in place before the fees come into force.

12. Impact

- 12.1 For applications for a grant of probate, it is the personal representative that applies for the grant. The personal representative can be an individual, professional (such as a solicitor, accountant or bank) or a charity. Beneficiaries of the estate can also be an individual, professional organisation or charity. Therefore, there may be some impact on businesses, charities, voluntary bodies or public-sector organisations. However, information is not routinely collected on these people or organisations for applications for a grant of probate and therefore the potential impact cannot be calculated.
- 12.2 It is estimated that these proposals will generate over £145 million in additional fee income in 2019/20, rising each subsequent year in line with increases in estate values.
- 12.3 A full Impact Assessment is submitted with this memorandum and published alongside the Explanatory Memorandum on the legislation.gov.uk website. In summary, this states that transitional costs to HMCTS (from making minor adjustments to IT systems and reissuing forms and guidance) are expected to be up to £0.5m and the additional ongoing cost to court users from paying increased probate fees is estimated to be around an average of £170m per annum (based on an average

² Calculated by MOJ internal analysis, based on probate estate projects data provided by HMRC and using ONS population projections. Population projections can be found here:

<https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationprojections>

³ Inheritance Tax Statistics, available here:

<https://www.gov.uk/government/statistics/inheritance-tax-statistics-table-124-assets-in-estates-by-range-of-net-estate-and-tax-due>

over 10 years). The wider impact on legal service providers (mainly solicitors) may vary, dependent on the behavioural change of personal representatives.

13. Regulating small business

- 13.1 The legislation applies to applications for a grant of probate which are made by a personal representative, who can be a professional. An application may also be made by a professional acting on behalf of an individual personal representative. MOJ data⁴ suggests that around 60% of applications for grant of probate are made by a solicitor acting on behalf of a personal representative. It is possible that in light of the fees increasing, some personal representatives may choose to make a personal application in order to save money elsewhere in the estate but we have no way of forecasting the impact or likelihood of this.

14. Monitoring & review

- 14.1 The approach to monitoring of this legislation is by way of feedback from courts and their customers, and the monitoring of application volumes and fee income.

15. Contact

- 15.1 The Court Fees Policy Team at the Ministry of Justice, 102 Petty France, London SW1H 9AJ or email: mojfeespolicy@justice.gov.uk can answer any queries regarding the instrument.
- 15.2 Matthew Shelley, Deputy Director for Legal Support and Court Fees Policy, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Lucy Frazer at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

⁴ October – December 2017 Family Statistics Quarterly, available here: <https://www.gov.uk/government/statistics/inheritance-tax-statistics-table-124-assets-in-estates-by-range-of-net-estate-and-tax-due>