

**EXPLANATORY MEMORANDUM TO THE
NON-CONTENTIOUS PROBATE FEES ORDER 2004**

2004 No. 3120 (L. 22)

1. This explanatory memorandum has been prepared by the Department of Constitutional Affairs and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments

2. **Description**

- 2.1 This order replaces the Non-Contentious Probate Fees Order 1999 [SI 1999/688]. It incorporates the provisions of various amending instruments since the 1999 order was made and provides for some fee reductions.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

- 3.1 Under HM Treasury Guidelines (para. 2.1 of HMT Fees and Charges Guide) departments and agencies are normally expected to meet full cost recovery of services through fees. However, there may be cases in which Ministers agree that a service should recover less than its full cost. This applies to the provision of non-contentious probate proceedings, where allowance is made for exemption and remission of fees where payment would cause undue financial hardship. The balance of cost should then be recovered through fees charged.

- 3.2 All fees are set on the basis of the staff and judicial time (with their share of overheads) spent performing tasks related to the proceeding for which the fee is charged. The Department for Constitutional Affairs (DCA) continues to examine how to address the problem of reduced demand for civil litigation as part of a longer-term programme. Any fee increases (or decreases) following the wider programme will be the subject of future consultation.

- 3.3 No increases have been made for probate fees however; two fees have been reduced.

- 3.4 When section 92 of the Courts Act 2003 is brought into force, section 130 of the Supreme Court Act 1981 (fee making power for fees in the Supreme Court) will be repealed. The repeal of this section will also repeal all orders made under it unless saved. The Non-Contentious Probate Fees (Amendment) Order 2000 (S.I. 2000/642) was also made under section 128 of the Finance Act 1990. It is necessary therefore, as this section will not be repealed, to use the power in section 108(6) of the Courts Act 2003 to revoke that Order to the extent that it was made under section 128.

4. Legislative background

4.1 Section 92 of the Courts Act 2003 provides the Lord Chancellor with a single fee setting power, with HM Treasury consent, to prescribe the fees payable in respect of anything dealt with in the Supreme Court, county courts and magistrates' courts.

4.2 Fee increases are necessary to improve the overall cost recovery and the fee increases that are being introduced are in accordance with the Lord Chancellor's key principles announced in Parliament on 19 November 1998 (source: Hansard 1998 (House of Lords Debate) Vol 594 Col WA176).
Namely:

- Fees should not prevent access to justice
- Protection must be provided for litigants of modest means
- Fees should match the cost of the service for which they are charged
- The pay-as-you-go system should be extended without deterring access to justice
- Flat rate fees reflecting the cost of the stage or application should be paid at other charging points
- Issue and enforcement fees should reflect the value of the claim
- Flat rate fees should be set on the basis of average not actual costs
- Fees should be paid by the claimant, or where a specific application is made, by the party who made that application
- Fees should be paid in advance

4.3 Fee changes, whether increases or decreases of fees, are made in accordance with government policy referred to when in the Courts bill was passed.

5. Extent

5.1 This fees order only extend to courts within England and Wales.

6. European Convention on Human Rights

6.1 Not applicable

7. Policy Background

7.1 Paragraphs 6 to 15 of the Regulatory Impact Assessment sets out the policy, risk and rationale for fee setting.

7.2 Key proposals made in the recent consultation (Consultation Paper CP 10/04) were that the two fee would be reduced namely:

- Application for a grant - The fee has been reduced from £50 to £40 to reflect cost recovery
- Personal Application Fee - The fee has been reduced from £80 to £50 to reflect cost recovery.

7.3 The main reasons that these fees were reduced are that since the last major revision of probate fees in April 1999 the Principal Registry of the Family Division had vacated its former offices in Somerset House and achieved some economies. Also income had been better than expected making it possible to reduce the above mentioned fees.

8. Impact

8.3 A Partial Regulatory Impact Assessment was prepared and attached to the Consultation Paper on Civil Court Fees. Attached is a copy of the Final Regulatory Impact Assessment (RIA).

9. Contact

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