

EXPLANATORY MEMORANDUM TO

THE NON-CONTENTIOUS PROBATE (AMENDMENT) RULES 2017

2017 No. 1034 (L. 15)

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.

2. Purpose of the instrument

- 2.1 The instrument amends the Non-Contentious Probate Rules 1987 (“NCPR”) to create two new application for a grant of probate procedures for use on a pilot basis. The first, *Alternative procedure for applications through solicitors or probate practitioners*, will enable applications through a solicitor or probate practitioner (‘professional applicants’) to be made online. The second, *Personal applications using statement of truth*, will enable applications by personal applicants to be made with a statement of truth instead of an oath. Both procedures will be restricted to applicants who are invited to take part in the pilot scheme by a probate registry. The applicants will be required to comply with the instructions of the registry when completing the application.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 The purpose of the NCPR, which are made under section 127 of the Senior Courts Act 1981, is to regulate and prescribe the practice and procedure of the High Court with respect to non-contentious probate business. The NCPR require applications for grants of representation (other than those within the present pilot scheme for personal applicants making online applications authorised by rule 5A (“rule 5A pilot”), which was added in 2016)¹ to be supported by an oath. It is therefore not possible, outside the rule 5A pilot, to make applications for grants of representation at present without the applicant swearing an oath at the court or before a solicitor or commissioner for oaths.
- 4.2 The applications made within the proposed pilot projects will lead to grants of representation and will be verified by a statement of truth rather than an oath. These applications would therefore not currently be authorised by the NCPR. A statement of truth is a written statement that the person making the statement believes the facts

¹ The Non-Contentious Probate (Amendment) Rules 2016 (S.I. 2016 No.972 (L.17)).

stated to be true (cf. rule 22.1(4) of the Civil Procedure Rules 1998). An oath is a statement sworn before a court or person authorised to administer oaths that the person swearing the oath believes the facts stated to be true. Making a false statement or oath to a court is a contempt of court punishable by a range of sanctions including committal to prison.

- 4.3 Such pilot projects would, if the rules were Family Procedure Rules or Civil Procedure Rules, be made by a practice direction. Although non-contentious probate is family business, the power to make Family Procedure Rules does not apply (by virtue of section 76(1) of the Courts Act 2003), and the powers to make the NCPR (unlike those to make Family Procedure Rules) do not provide that the NCPR may, instead of making provision about a matter, refer to provision made or to be made about that the relevant matter by practice directions. The proposed applications, and the necessary modifications of the rules, therefore cannot be provided for by practice directions. The NCPR therefore must be amended to permit the proposed pilot projects to take place.
- 4.4 The instrument only authorises applications made by the invitation of a probate registry and allows such application to be made at any registry. Further amendments to the NCPR will be necessary to make procedures being piloted available to all applicants.
- 4.5 Further amendments will be made to the NCPR as other online applications are developed and implemented.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is England and Wales only.
- 5.2 The territorial application of this instrument is England and Wales only.

6. European Convention on Human Rights

- 6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

- 7.1 Probate is the process in England and Wales by which the High Court grants or confirms the authority of a personal representative (an executor if the deceased left a valid will or an administrator if the estate died intestate) to administer the estate of a deceased person. The process is governed by provisions of the Senior Courts Act 1981 and the NCPR (which are rules of court made under that Act), and is administered by the Probate Service (part of Her Majesty's Courts and Tribunals Service). The Probate Service is committed to introducing online application services designed to increase the efficiency of its services, whilst meeting the needs of personal or professional applicants and improving its customer service. The rule 5A pilot began the process of creating online application services.
- 7.2 The terms of the instrument relating to the proposed pilot projects follow (with necessary modifications) those already successfully piloted under the rule 5A pilot, which also replaced the oath with a statement of truth.

- 7.3 In relation to the professional applicants' pilot, the instrument makes the necessary amendments to the NCPR to permit online applications to be made by selected professional applicants. This is intended as a pilot scheme to enable the full development of an online application process that allows an application for a grant of probate through a solicitor or probate practitioner, and allows such application to be made at any registry. This pilot should be completed by the end of March 2018.
- 7.4 Invitations to participate will be limited to applicants whose circumstances are appropriate for the stage of development of the information technology. It is expected that initially about three professional applicants per day with relatively simple client circumstances will be invited to take part, with numbers and complexity of circumstances increasing as experience is gained, and the capacity of the software develops.
- 7.5 Invitees who agree to use the online application process will be invited to complete an application form online. If the applicant decides to use the online process, he or she will complete the online application form in accordance with the instructions of the Probate Service, which will ask for the information necessary to determine whether the applicant's client is entitled to a grant. The applicant will verify the content of the application form by a statement of truth online.
- 7.6 In relation to the personal applicants' pilot, the instrument makes the necessary amendments to the NCPR to permit personal applicants, who are not applying online, to make an application without swearing an oath. Invitees who agree to participate will be invited to complete an application form designed to provide all the information necessary to enable the Probate Service to decide whether and on what terms a grant can be issued. This pilot should be completed by the end of 2017.
- 7.7 In relation to both pilots, the information supplied will be verified by a statement of truth by the applicant contained within the application form - and the form will warn the applicant of the possible consequences of a false statement. The Probate Service will also instruct the applicant how to send it supporting documents, such as the original last will and testament, any necessary further evidence and information, and the fee payable.
- 7.8 Following a successful pilot, the procedure can then, subject to the necessary rule change, be opened to applicants generally on a voluntary basis. It is expected that take-up of the online application procedure will rise quickly, but there are no plans to withdraw the equivalent offline application procedure.

Consolidation

- 7.9 As the amendments made to the NCPR by the instrument will apply until the end of the respective pilots, when they will be replaced by more permanent provisions, the department does not propose to consolidate the NCPR as amended by the instrument.

8. Consultation outcome

- 8.1 There has not been any formal consultation by the department on the introduction of the proposed prototype for probate services authorised by the instrument. The introduction of online services and the replacement of the oath by a statement of truth was, however, proposed by the President of the Family Division's Working Group on the NCPR in its 2013 consultation paper and recommended by it to the then Lord Chancellor in 2014. The recommendations of the Working Group, which if

implemented would result in the replacement of the NCPR by new rules, are under consideration by the department.

9. Guidance

- 9.1 The department does not intend to publish any general guidance in relation to the new rules as the new procedure will be limited to invited applicants who will be guided through the process by the instructions issued by the Probate Service.

10. Impact

- 10.1 The pilots will have a small impact on businesses as the removal of the fee for the oath by applicants will cause solicitors to lose the fee that is charged for administering the oath (£5 per oath and £2 for each exhibit). It is expected that the pilots will only initially involve about three applications each per day and increase as experience is gained. There is no impact on charities or voluntary organisations.
- 10.2 There is no impact on the public sector. The expected costs of the pilot projects will be managed within the overall development budget of HMCTS.
- 10.3 An Impact Assessment has not been prepared for this instrument as its impact is expected to be very small and well below the threshold of £5 million per annum at which an assessment must be prepared. The expected benefits (if any) in relation to the applications going through the pilot projects will be small or negative as the numbers will be limited and input into the development process relatively significant for both the Probate Service and applicants.
- 10.4 Ultimately, the development of a successful online application service for professional applicants could make a considerable difference to applicants, professional advisers and the Probate Service. Online services should be easier to use than paper forms and improve the quality of the experience for the user. They should also produce correct applications, errors being corrected as they occur during the completion of the online application form. Removing the requirement for an oath in the online process and for personal applicants will remove any need for applicants to attend physically at a probate registry or the premises of someone able to administer an oath to swear it. For professionals, online services for personal applicants may result in a reduction of work but the development of online services for professionals will provide new opportunities. For the Probate Service, online services should increase efficiency.

11. Regulating small business

- 11.1 The legislation applies to activities that are undertaken by small businesses; but does not propose to put regulatory burdens on businesses.
- 11.2 The procedure is being introduced as part of the development of a prototype online service and will be restricted to professional applicants who are invited to take part in the pilot scheme by a probate registry. Therefore, the option to participate in the pilot will be on a voluntary basis.
- 11.3 Furthermore, the number of applicants engaged in the pilot is expected to be very small therefore the overall impact on small businesses is expected to be minimal.

12. Monitoring & review

- 12.1 The instrument does not regulate business. There are no plans to monitor and review the instrument separately from the conduct of the proposed pilot projects. Once the

application processes have been adequately developed the services are intended to be opened to all applicants. The monitoring and reviewing of the effect of the instrument will be an integral part of the pilot projects. The success of the projects will be measured by the success of the resulting services.

13. Contact

- 13.1 Paul Hughes at the Ministry of Justice Tel: 020 3 334 3198 or email: paul.hughes@justice.gov.uk can answer any queries regarding the instrument.