

**EXPLANATORY MEMORANDUM TO**  
**THE NON-CONTENTIOUS PROBATE (AMENDMENT) RULES 2018**  
**2018 No. 1137 (L. 13)**

**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 Non-Contentious Probate (Amendment) Rules 2018 will improve the practice and procedure for obtaining a grant of representation for the estate of a deceased person from the court. The instrument will amend the Non-Contentious Probate Rules 1987 (“NCPR”) to: (a) allow online applications for probate to be made by an unrepresented applicant; (b) enable all applications for probate to be verified by a statement of truth (instead of an oath) and without the will having to be marked (signed by the applicant); (c) extend time limits in the caveat process, which gives the person registering the caveat notice of any application for probate; (d) allow caveat applications and standing searches (which give notice of grants being issued) to be made electronically; (e) extend the powers of district probate registrars; and (f) make further provision for the issue of directions (instructions to the parties) in relation to hearings.

**3. Matters of special interest to Parliament**

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

- 3.1 None.

*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)*

- 3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

**4. Extent and Territorial Application**

- 4.1 The territorial extent of this instrument is England and Wales only.  
4.2 The territorial application of this instrument is England and Wales only.

**5. European Convention on Human Rights**

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

**6. Legislative Context**

- 6.1 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.

- 6.2 At present, online applications for a grant of probate by a personal applicant (that is an applicant who makes the application directly rather than through a solicitor or probate practitioner) and off-line applications for probate supported by a statement of truth instead of an oath (as required by NCPR r.8) may only be made following an invitation from a probate registry to do so (NCPR, r.5A, inserted by SI 2016/972, and NCPR r.5B, inserted by SI 2017/1034).
- 6.3 The requirement for a will be marked is set out in rule 10(1)(a) of the NCPR.
- 6.4 The procedures for standing searches (which enable persons to be given notice of the issue of a grant of representation) and caveats (which enable persons to be notified of applications for a grant of representation) are set out in rules 43 and 44 of the NCPR.
- 6.5 The extensions of the powers of district probate registrars amend the rules governing caveats, probate actions and citations specified in rules 44, 45 and 46 of the NCPR.
- 6.6 Rule 61 of the NCPR sets out the powers of district judges and district probate registrars to require applications to be made by summons (to a hearing).

## **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 grant of representation in a case where there is a valid will is referred to as a grant of probate: in other cases, it is referred to as a grant of administration. The term “probate” is, however, used to refer to both situations.
- 7.2 Non-contentious probate business is allocated to the Family Division of the High Court. It encompasses obtaining probate where there is no dispute as to the applicant’s right to the grant: for example, where there is no dispute as to the validity of the will or as to whether a person is related to the deceased in the way necessary to entitle him or her to a grant. The vast majority of probate business is non-contentious business.
- 7.3 The process for obtaining a grant of representation 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). Applications for a grant must be made to the Principal Registry of the Family Division or a District Probate Registry, which are the offices of the court that deal with non-contentious probate business. The practices and procedures of the court are supported administratively by the Probate Service, which is 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. Applications may be made by the applicant personally or through a solicitor or probate practitioner. There are about 270,000 applications for a grant of representation made annually and, of these, about 110,000 are personal applications and 160,000 are through solicitors or probate practitioners.
- 7.4 *Online applications and statements of truth* - As part of this process of modernisation and improvement, a pilot scheme enabling personal applicants for probate to use an online process if invited to do so by a probate registry was begun under rule 5A of the NCPR in 2016. This pilot is still in operation and is currently used in about 20% -

25% of all personal applications for a grant of probate. Applications within the pilot have to be supported by a statement of truth rather than an oath, because requiring the making of an oath, which required physical attendance before a person empowered by law to administer the oath, is incompatible with an online application process.

- 7.5 A statement of truth is a written statement that the person making the statement believes the facts referred to in the statement 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 of truth or a false oath to a court is a contempt of court punishable by a range of sanctions, including committal to prison.
- 7.6 The online pilot scheme under rule 5A was supplemented in 2017 by a further pilot scheme under rule 5B of the NCPR enabling personal applicants making an off-line application under rule 5 to make a statement of truth rather than an oath in support of their applications if invited to do so by a probate registry.
- 7.7 The changes to the NCPR made by rules 4, 5 and 8 of the amending instrument will remove the requirement of an invitation in relation to both pilot schemes. This will mean that all personal applicants for probate will have the option of applying online under the new rule 5ZA inserted by rule 5 of the amending instrument. They will also, by virtue of the amendments to rule 8 made by rule 8 of the amending instrument, be able to support their application, whether online or off-line, with a statement of truth. This will save them the time and expense of attending on a person authorised to administer an oath before they can submit their application.
- 7.8 At present, applicants for a grant of probate through solicitors and probate professionals may only make a statement of truth instead of an oath if they are applying under rule 4A of the NCPR. This pilot scheme is restricted to applicants invited to participate by a probate registry. The instrument does not change the extent of that scheme, but the changes made to rule 4A and rule 8 of the NCPR by rules 3 and 8 of the amending instrument will enable all applicants through solicitors and probate professionals to support their applications with a statement of truth instead of an oath.
- 7.9 As a result of these changes an oath will no longer be required to support an application for probate. Rule 5B, which authorised the piloting of statements of truth for off-line applications for personal applicants, is no longer necessary and is repealed by article 7 of the amending instrument.
- 7.10 The amendments to the NCPR made by rules 3, 9, 11 and 12 of the amending instrument are consequential on these changes.
- 7.11 *Pilot projects* - Rule 5A provides for an alternative application procedure to be made available to applicants at the invitation of the registry. This permits pilot projects to be undertaken, such as the testing of the online application for personal applications for a grant. Rule 5A is retained to enable further aspects of proposed online services in connection with applications for grants to be tested and developed. Rule 6 of the amending instrument amends rule 5A of the NCPR to reflect the fact that this retained pilot procedure is an alternative to the online procedure that is available to all personal applicants.
- 7.12 *Marking the will* - Rule 10(1)(a) of the NCPR requires that every will in respect of which an application for a grant is made is to be “marked” by the signatures of the applicant and the person before whom the oath in support of the application is to be

sworn. This requirement is modified by rule 4A in respect of online applications through solicitors and probate practitioners; by rule 5A in respect of online applications by personal applicants; and, by rule 5B for personal applicants applying off-line. In all of these cases, the application is supported by a statement of truth rather than an oath, so that only the applicant is required to mark the will before sending it to the relevant probate registry. The online pilot schemes require the “marked” will to be sent to the registry in accordance with the instructions provided, but about 3% of applicants fail to mark the will, which then has to be returned and re-submitted. This unnecessarily delays the process in these cases and, overall, the requirement of marking does not materially add to the security of the system. Rule 10 of the amending instrument therefore removes the requirement of marking the will under rule 10(1)(a).

- 7.13 *Electronic standing searches and caveats* - Persons who wish to know when a grant of probate is issued can submit a standing search by lodging it at or posting it to any registry or sub-registry (NCPR r.43). Persons who are concerned that a grant of probate may be made without their knowledge can enter or extend a caveat at any registry or sub-registry by attendance at the registry or by post (NCPR, r.44). Neither process can be carried out electronically. Rules 12 and 13 of the amending instrument amend rules 43 and 44 so that standing searches and caveats may be sent electronically to an address provided by the Probate Service provided that the appropriate fee is paid electronically.
- 7.14 *Caveat time limits* - If a caveat has been entered and a caveator, who has no interest in the estate of the deceased contrary to that of a person challenging the caveat, wishes to prevent the issue of a grant to that person, he or she has eight days from the service of a warning (issued by the probate registry) on him or her to make an application to the court. Similarly, a caveator, who does have such an interest, has eight days from the service of a warning requiring him or her to specify his or her interest to do so. Failure to act in the eight-day period may result in the caveat ceasing to have effect. The time available to act within the prescribed period can, in practice, be significantly reduced by non-working days. This potentially places the caveator at an unfair disadvantage. Rule 13(4) of the amending instrument therefore extends these periods to fourteen days.
- 7.15 *District Probate Registrars* - The majority of the judicial business of the probate registry is dealt with by district probate registrars. They may make grants of probate in the name of the High Court under the seal used in the registry. To qualify for appointment as a district probate registrar, a person must either (1) satisfy the judicial-appointment eligibility condition on a five-year basis; or (2) be a civil servant who has served at least five years in the Principal Registry of the Family Division or a district probate registry. District probate registrars are officers of the Supreme Court and (except in the case of a temporary registrar) are deemed for all purposes to be employed in the civil service. They are appointed by the Lord Chancellor and hold office during Her Majesty's pleasure.
- 7.16 In general, in relation to the conduct of cases under the NCPR, district probate registrars have equivalent powers to district judges, but this is not the case in relation to NCPR rr.44(13) and (14), 45(3) and 46(3), which deal with aspects of procedure relating to caveats, probate actions and citations.
- 7.17 Rule 44(13) restricts the power of a registrar to direct that a caveat is not to remain in force to cases where the application to discontinue a caveat is made by consent. Rule

44(14) restricts to district judges the granting of leave for entry of a further caveat on behalf of a caveator, who has a caveat in force or has previously had a caveat that is no longer in force as a result of specified rules. Rule 45(3) provides that starting a probate action prevents the sealing of a grant unless a district judge directs to the contrary. Rule 46(3) provides that a caveat in force when citation proceedings begin will remain in force until an application is made by the person approved by the court in the probate action unless it is withdrawn or a district judge so directs. The amendments made by rules 14(5) and (6), 15 and 16 of the amending instrument will give district probate registrars equal power to district judges in these cases. This will facilitate the conduct of this business and reduce the burden on district judges, who will, however, still be able to be dealt with appropriate cases.

- 7.18 *Hearings of applications* - The NCPR provide that a district judge or district probate registrar can require any application under the NCPR to be made by summons to a district judge or registrar in chambers or a judge in chambers or open court (NCPR, rr.61(1)). This power enables district judges and registrars to convene a hearing in connection with an application. There are about 70-100 hearings annually. In doing so, they will issue instructions (“directions”) to the parties. The NCPR do not specify the matters to which the directions can relate.
- 7.19 To provide certainty, the new rule 61(5) inserted by rule 17 of the amending instrument states the power to give directions to the parties and specifies that the directions may specify the consequences of failure to comply (for example, in costs or in terms of enabling a party to proceed) and may be issued before the application is listed to be heard. This is expected to precipitate earlier resolution of issues, thereby removing the need for hearings in some cases. Where hearings have to take place, the new rule 61(5) also provides that they may be held remotely. This will save travelling and waiting time for the judiciary and the parties.

## **8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union**

- 8.1 This instrument does not relate to withdrawal from the European Union.

## **9. Consolidation**

- 9.1 As the present pilot scheme for online applications through solicitors and probate practitioners under rule 4A is continuing and further reform and pilot schemes may follow as the modernisation of the probate process continues, the department does not propose to consolidate the NCPR as amended by the instrument at this stage.

## **10. Consultation outcome**

- 10.1 There has not been any formal consultation by the department on the changes proposed. The introduction of online services, the replacement of the oath by a statement of truth and the removal of the requirement of marking were, 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.

## **11. Guidance**

- 11.1 The department does not intend to publish any general guidance in relation to the new rules. Customer service centres operated by Her Majesty's Courts and Tribunals Service will provide assistance to online users.

## **12. Impact**

- 12.1 The impact on business, charities or voluntary bodies is expected to be limited and is described in the following paragraphs.
- 12.2 The changes are not expected to have any impact on charities and voluntary bodies, unless they are personal applicants for probate in which case they will benefit in the same way as other personal applicants from improved and more efficient services. The changes are expected to have a small effect on business.
- 12.3 *Online services and statement of truth* - The introduction of online services and remote hearings is expected to have a small impact on business. Remote hearings will reduce travel costs incurred by parties involved in applications for probate that presently involve a hearing (there are about 70-100 cases annually). Remote hearings should also cut down on time spent waiting in court premises for hearings to begin. This time can be more efficiently spent.
- 12.4 The removal of the requirement for an oath in support of the application may have a small impact on businesses as the removal of the fee for the oath by applicants will cause solicitors to lose the small fee that is charged for administering the oath (£5 per oath and £2 for each exhibit). However, most probate oaths are thought to be sworn at court premises where a fee is not charged and, even where the oath is administered by a solicitor, this fee is understood generally to be retained by the individual administering the oath rather than the business. This benefit will be lost.
- 12.5 Making online applications available to all personal applicants may reduce the proportion of applicants using solicitors or probate practitioners to make their applications. An online service for solicitors and probate practitioners is being piloted currently and will be made available more generally when the necessary technology has been developed.
- 12.6 Personal applicants will benefit from the greater efficiency of online application forms in reducing errors in application forms, which should expedite the successful completion of the application. 5,900 personal applications have been processed through the pilot scheme (2,600 since July 2018) with an approval rating by users of about 95%.
- 12.7 *Other changes* - The changes to the powers of district probate registrars and the time periods for caveats are not expected to have any material effect on businesses or personal applicants, save in so far as parties who would otherwise have been delayed by obstructive tactics may find the obstacles removed by earlier and sanctioned case management. The removal of the requirement for marking is not expected to have a material effect on cost.
- 12.8 The impact on the public sector is to contribute to reducing the cost of administering the probate process. The changes made by the amending instrument are part of a £1 billion investment to modernise the court system which, based on current assumptions, is expected to realise in total over £14.6 million in public expenditure by March 2025 (of which the new personal applicant service is expected to save £7.4

million). The amending instrument makes many of the changes to the NCPR required to enable these savings.

- 12.9 An Impact Assessment has not been prepared for this instrument, because the aggregate impact of the measures is expected to be well below the threshold of £5 million per annum at which an assessment must be prepared.

### **13. Regulating small business**

- 13.1 The legislation applies to activities that are undertaken by small businesses. The businesses affected are those that provide services in connection with applications for probate.
- 13.2 To minimise the impact of the requirements on small businesses (employing up to 50 people), the approach taken is to provide the court with powers to manage cases in an efficient and effective way.

### **14. Monitoring & review**

- 14.1 The instrument does not regulate business. The only mandatory requirements imposed on business by the amending regulation are to make electronic payments when applying electronically for caveats and standing searches, which businesses are not required to do. There are no plans to monitor and review the instrument separately from the conduct of the ongoing modernisation of the probate service. The success of the projects will be measured by the success of the resulting services.

### **15. Contact**

- 15.1 Paul Hughes at the Ministry of Justice Telephone: 07580 906942 or email: paul.hughes@justice.gov.uk can answer any queries regarding the instrument.
- 15.2 David Parkin, Deputy Director for Civil Justice and Law at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Lucy Frazer QC MP at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.