

## EXPLANATORY MEMORANDUM TO

### THE NON-CONTENTIOUS PROBATE RULES (AMENDMENT) 2020

2020 No. 1059

#### 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 (SI 1987/2024) (“the Rules”) which govern practice and procedure in the Probate Registry. The amendments relate to increasing use of the online probate service by solicitors and other probate practitioners by mandating use of the online process for certain types of probate application.
- 2.2 The instrument also enables the use of a witness statement verified by a statement of truth to be sent with applications as an alternative to affidavits to allow more applications to be sent electronically via the online probate service.
- 2.3 The instrument also introduces a rule providing the courts and Probate Registry with an overriding objective to enable them to determine applications justly and proportionately.

#### 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.
- 4.2 The territorial application of this instrument is England and Wales.

#### 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 Section 25 of the Senior Courts Act 1981 (“the 1981 Act”) gives the High Court jurisdiction over contentious and non-contentious probate cases. The Non-Contentious Probate Rules are made by the President of the Family Division, with the

concurrence of the Lord Chancellor, under the terms of Section 127 of the 1981 Act and Section 2(5) of the Colonial Probates Act 1892.

## **7. Policy background**

### *What is being done and why?*

- 7.1 HM Courts and Tribunals Service is modernising services and providing access to online services as a means of issuing and defending proceedings in courts and tribunals. An online probate service commenced in 2017 following amendments by statutory instrument to the Rules (2017/1034), and extended in 2018 (2018/1137) and 2019 (2019/1057) by further instruments. The online service enables applications to be made electronically, as part of which it requires statements of truth to be made in place of oaths and witness statements as an alternative to affidavits. The new service is much more accessible to professional and lay users and will generate a number of benefits and cost savings.
- 7.2 The existing Rules provided complete discretion to professional users on whether to use the online process, but the technology and support service has now matured and developed to the extent that it can take an increasingly high proportion of professional user applications. For the system to generate the operational savings on which the investment in technology was premised, the proportion of online applications from professional users needs to increase.
- 7.3 The Government is clear on the benefits and savings for professional users that the online process offers. As such, these rule changes provide for mandating the use of the online probate service for professional users for grants of probate, with a small number of exceptions set out in the new Third Schedule to the 1987 Rules. However, the Government has agreed that, for now, applications by professional users for grants of administration can be made either online (where possible) or via a Registry. This will remain under review and subject to future reform. Personal probate applications by non-professional users may be made online or via the Registry.
- 7.4 The amendment to add an Overriding Objective to these rules mirrors provision in the Civil and Family Procedure Rules. This was a recommended addition to the Non-Contentious Probate Rules by a Working Group established by the President of the Family Division, and supported by responses to a consultation carried out in 2013. It is felt that this new rule will assist in applications being dealt with efficiently and expeditiously.
- 7.5 The amendment to allow witness statements supported by statements of truth across a range of probate applications as an alternative to affidavits (specified in several existing rules) will enable both professional users and the public to send applications electronically. This will make the process much simpler and less costly, as well as make permanent the practice guidance issued by the President of the Family Division in April 2020 to enable applications to be made during the Covid-19 pandemic. That guidance is due to cease to apply on 30 October 2020.

## **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 / trigger the statement requirements under the European Union (Withdrawal) Act.

## **9. Consolidation**

9.1 No further consolidation of the rules is planned at present.

## **10. Consultation outcome**

10.1 The mandating of online probate applications by professional users was consulted on in August and September 2020. Responses were received from professional bodies, law firms and individual practitioners. A majority of respondents supported the wider adoption of the online Probate service although views were mixed on timing for it becoming mandatory. The Government believes that mandating probate applications by professional users to the online process will result in benefits and savings for practitioners and HM Courts and Tribunals Service alike, but decided that for now there should remain exceptions for paper-based applications for grants of administration and specified exceptions. The Government's response document is available at: <https://www.gov.uk/government/consultations/non-contentious-probate-mandating-online-professional-applications>.

## **11. Guidance**

11.1 Amendments to the Non-Contentious Probate Rules are drawn to the attention of solicitors and probate practitioners by correspondence addressed to members of the judiciary, to relevant representative bodies (for example the Law Society, Bar Council) and to the editors of relevant legal publications; as well as by publicity within HM Courts and Tribunal Service.

## **12. Impact**

12.1 There is no significant, impact on business, charities or voluntary bodies.

12.2 There is no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because the reform affects only a specialist group of businesses, many of whom are already using the online probate service.

## **13. Regulating small business**

13.1 The legislation applies to activities that are undertaken by those small businesses who are engaged in probate applications.

## **14. Monitoring & review**

14.1 The approach to monitoring of this legislation is through the Non-Contentious Probate Rules being kept under continuous review by the President of the Family Division and the Lord Chancellor. HM Courts and Tribunals Service has regular stakeholder engagement with professional representatives on the Probate Service.

## **15. Contact**

15.1 Peter Farr, Head of Civil Law at the Ministry of Justice, email: [peter.farr@justice.gov.uk](mailto:peter.farr@justice.gov.uk) can be contacted with 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 Chris Philp MP at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.