



The Law Society

**Response of the Law Society of England and Wales
to the consultation issued by the Ministry of Justice
on proposals to reform fees for grants of probate**

April 2016



PREFACE

1. The Law Society of England and Wales ("The Society") is the professional body for the solicitors' profession in England and Wales, representing over 160,000 registered legal practitioners. The Society represents the profession to parliament, government and regulatory bodies and has a public interest in the reform of the law.
2. In preparing its response, the Society has consulted its Wills and Equity Committee and Legal Affairs and Policy Board.
3. The Society welcomes the opportunity to respond to this consultation.

EXECUTIVE SUMMARY

Introduction

4. The probate process takes place at what is usually an extremely stressful and difficult time for family members and friends of the deceased. It is important that this process is as uncomplicated as possible to avoid adding unduly an administrative and financial burden to their grief.
5. The Society supports the Ministry of Justice's (MoJ) overall aim to make a simpler, more streamlined process for users of the probate service and understands that funds are needed to facilitate change and development. That said, the proposed increases are excessive, particularly for high value estates, and would be in addition to the amount already paid in inheritance tax (IHT).
6. The courts and related services provide a vital function to society which have to be provided by the government, and need to be funded accordingly, but it is unfair and discriminatory to expect the bereaved to fund/subsidise other parts of the court and tribunal services. Court fees are a necessary source of funding, but should not be charged over and above the cost of the specific service being provided and should not be deliberately run to make an excessive profit.

Recommendations

7. Whilst it might seem fairer to calculate probate fees based on the amount of work required to complete probate, the Society accepts that this approach is impractical and recognises that a graduated fee according to the value of the estate is another option. However, the top end of the proposed fee structure becomes excessively inflated and amounts to a significant tax imposition. There should be some tapering of the fee increases and they should rise with the value of the estate in smaller increments.
8. In our view, if probate fees are to be calculated based on the value of the estate, they should be based on the value after IHT has been paid.

RESPONSE

9. The probate process is not necessarily more complicated and time consuming for higher value estates, but we appreciate that calculating a fee based on the time and complexity of completing probate on a particular estate may not be practical. We therefore have no objection to charging a reasonable and realistic probate fee based on the value of an estate. That said, the proposed rates mean a dramatic increase

from the current fees, particularly for higher value estates. The fees charged should be much lower and, if they are to be based on the value of the estate, they should increase in gradual increments.

10. The probate service should not be treated as a profit centre. The fees collected through the probate service should be allocated to cover the cost of running and improving the probate registry and not to subsidise others areas of the court system. The court system should not take advantage of often vulnerable individuals who are recently bereaved by charging excessive probate fees when individuals are obliged to apply for probate (on estates over the threshold amount).
11. The MoJ should consider more closely whether it is appropriate for probate fees to be calculated on the value of the estate prior to IHT being applied. A substantial amount can be taken from an estate in IHT (the current standard rate is 40%), so an additional fee of up to £20,000 on the gross value of the estate would result in the estate being depleted by a significant amount. In our view, if the probate fee is to be based on the value of the estate, it should be based on the value after IHT has been calculated and paid. Under the current proposals the fees would effectively act as another progressive tax.
12. Probate fees ultimately reduce the amount the beneficiary/ies receive, which may already be significantly reduced by IHT. At the upper end of the proposed fee scale, the amount the estate would be depleted by the probate fee is significant. This does not present a fair approach, as it is not always the case that a wealthy estate results in wealthy beneficiaries. For example:
 - the estate may be divided between numerous beneficiaries, which results in each beneficiary receiving a small net proportion of the estate;
 - the estate is left to a charity;
 - if the beneficiary is a dependent of the deceased who has high living costs and expenses due to a disability, illness or similar and the deceased was their sole carer and financial provider; and
 - the value of the estate is primarily tied up in one asset, such as a house which is left to a surviving spouse, civil partner or a sole child. There may not be sufficient cash assets to pay up to £20,000 probate fee without liquidating the asset (i.e. in this case, selling the house).
13. Under the proposals, there would no longer be a reduced fee for solicitors applying for probate over individuals. This may encourage more individuals to undertake probate themselves when there are many good reasons why people should take legal advice or instruct a solicitor to undertake the probate process, which presently can be quite complex. The consultation document states (at paragraph 20) that, generally, probate applications made by non-solicitors require some additional administrative work. It may be pre-emptive to remove the reduced fee for applications made by solicitors ahead of any improvements or simplifications to the probate system.
14. Under the current fee structure, some solicitor firms are willing to assist the executors of an asset rich, cash poor estate by paying the probate fee as a disbursement. If the proposed fee increases were introduced, firms may withdraw this goodwill gesture as a fee of up to £20,000 is potentially too much for firms to fund as a disbursement. This would particularly be the case for smaller high street firms and sole practitioners, who are often involved in probate work.

15. An executor has responsibilities that include the payment of relevant fees (e.g. probate fee), IHT and expenses (e.g. funeral costs). The probate fee, along with IHT and other reasonable fees and expenses, is recoverable from the estate, but it must be paid upfront, before probate is granted. The executor must find the funds from their own resources to cover the costs until probate is granted. Even then, there must be sufficient cash assets to reimburse the executor. If there are not sufficient cash assets, the executor must wait until any non-cash assets (e.g. property) are liquidated before they can recover their costs. This means the executor could potentially be owed a substantial sum of money for some time.
16. The proposed increases to probate fees will add to the amount the executor must pay and, for the higher value estates, this amount would be significant. An executor is often a relative or close friend of the deceased, who may be faced with undue financial stress at an already difficult time if these fee proposals are introduced.
17. Currently, there may be loans available for executors in advance of probate, but they can be difficult to obtain and many banks have withdrawn from this market completely. Those that do still provide executor loans will only do so where the deceased had at least the same amount in cash deposits as the executors wish to borrow. Under the new proposals this could be problematic for estates over £2 million where there are no liquid funds (e.g. where the majority of the value of the estate is in property) as there is no cash to secure the loan. Further, probate loans incur fees and interest which deplete the value of the estate and unnecessarily reduce the amount the beneficiaries receive.
18. In some circumstances, HMRC will issue grants of probate 'on credit', without the payment of IHT upfront, upon an undertaking from the executor to pay the IHT when sufficient assets in the estate have been liquidated. This can often occur where there is insufficient cash in the estate to pay the IHT upfront, but there is a valuable asset (e.g. a house) that can be sold to pay IHT. HMRC will then grant the probate 'on credit', to enable the asset to be sold, with the IHT being paid within an agreed time of the executor receiving the sale proceeds. Whilst this is helpful for IHT payments, it will not assist executors in paying a probate fee of up to £20,000 if the new fees were introduced. Further, if the fee for a grant of probate were removed from the Help with Fees scheme, this would add to the difficulties faced by the executor in paying a potentially large probate fee upfront.
19. Increasing the fees significantly for higher value estates may encourage individuals to take steps to reduce the value of their estate in order to lessen their probate fee or avoid it all together. For example: by adding a second name on a property or bank account, the asset passes by joint ownership/survivorship and no probate is needed. Wealthier individuals may be more inclined to hold their money or assets offshore, in countries where the probate fees are lower, so the proposals could work to reduce the amount of revenue expected from probate fee paid for higher value estates. Increasing fees in line with the value of the estate in much more gradual and lower increments may give individuals less incentive to take such steps.
20. With an incentive to reduce the value of estates prior to probate, there may well be an increase in "schemes" being promoted to avoid probate fees. Unregulated and unqualified providers may offer services which encourage individuals to transfer assets early into potentially inappropriate trusts to reduce the value of their estate and avoid increased probate fees. This could lead to vulnerable clients falling victim to

unregulated providers who tout expensive schemes on the pretext of saving clients thousands in probate fees.

21. We note the comments at paragraphs 37 through 39 regarding the interplay with the government's IHT proposals. The new IHT proposals only benefit those who pass their primary residence to a direct descendent. Individuals who do not have a primary residence as part of their estate or who are not leaving their estate to direct descendents, will not benefit from these proposals. Further, the current IHT exemption only applies to individuals who are married or in a civil partnership. It does not extend to unmarried co-inhabitants, children or other relatives.
22. Both the existing and new IHT exemptions are calculated after the probate fee has been paid, so they do not assist in lowering the value of the estate for the purpose of calculating the probate fee.
23. We disagree that the benefit to estates gained from the existing and proposed IHT exemptions will outweigh the cost of the proposed probate fees increase. This is particularly the case for individuals who do not benefit from the IHT exemptions at all.
24. We have already seen substantial court fees increases in the last 12 months, which should already be raising significant funds for HMCTS.
25. Previous court fee increases, announced in December 2015, were said to increase the court revenue by £15 million per annum (Court and Tribunal Fees, The Government response to consultation on further fees proposals).
26. Furthermore, savings have already been made elsewhere, such as £97 million of resource savings from court closures, and gross capital proceeds of £48 million from the sale of court buildings. Extra financing has also been available by HM Treasury, which has agreed a package of investment of up to £75 million per annum from 2015/16 that it says will deliver a more efficient courts and tribunals service.
27. In the recent government response in relation to court closures, it was said that the resulting savings from court closures was £27 million, plus an extra £39 million from the sale of freehold buildings. It was noted that these figures may change somewhat following the decisions made, but it could be reasonably assumed that the savings would not fall too short of these figures (as only 5 of the relevant 91 court and tribunal buildings will be retained).
28. Court closures and court fee increases in recent years have produced income and savings, but we are yet to see any tangible improvement to the court systems. Fees obtained by the probate service are designed to cover the cost of running and improving the probate service and should not be siphoned off to fund other areas of the court system.

Question 1: Do you agree that it would be fairer to charge a fee that is proportionate to the value of the estate compared with charging a fixed fee for all applications for a grant of probate applications? Please give reasons.

Whilst it would seem fairer to calculate probate fees based on the amount of work required to complete probate, this could be difficult to administer, so we accept that a graduated fee according to the value of the estate is a practical solution.

If probate fees are to be based on the value of the estate, the increments should increase more gradually. The highest fee payable should be significantly less than the current £20,000 proposed.

Question 2: Do you agree with the proposal to increase the threshold from £5,000 to £50,000? Please give reasons.

Yes, we agree with this proposal. That said, it is also our view that the trade-off between the increase in the threshold for no fee being paid and the increase in fees for larger value estates is disproportionate.

Question 3: Do you agree with the government's proposals to charge fees for probate applications as set out in Table 1? Please give reasons.

No, we do not agree with these proposals. In our view, these fees are too high, particularly for high value estates, as we previously outline in detail above.

Question 4: Are there other ways that executors should be supported to make payment of the fee and/or examples of banks or funding institutions who regularly assist with finances before the grant of probate? Please provide details.

No, we are not aware of any other ways that executors could be supported to make the payment of the fee, nor are we aware of examples of banks or funding institutions who regularly assist with finances before the grant of probate.

Question 5: Do you agree with the proposal to remove grant of probate fees from the fee remissions scheme? Please give reasons.

No, we believe that probate fees should remain in the fee remissions scheme. There are often times where an executor will experience difficulty in paying the requisite probate fee upfront (particularly if they are set to rise to the proposed rate) and getting a loan is not always easy or desirable (see paragraph 17 above). Unlike other court fees, an individual does not have a choice whether to apply for probate and pay the associated fee (for estates over the minimum amount), and should therefore be eligible for fee remission in appropriate circumstances.

Question 6: We would welcome views on our assessment of the impacts of the proposals set out in Chapter 1 on those with protected characteristics. We would in particular welcome any data or evidence which would help to support these views.

We have no comment.

FOR FURTHER INFORMATION

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