HOUSE OF COMMONS LIBRARY

BRIEFING PAPER

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Probate fees

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Summary

This briefing paper deals with the law in England and Wales. Scotland and Northern Ireland have separate processes for dealing with the estates of deceased persons.

Grants of probate

Personal representatives – executors where they are appointed by a will, or administrators otherwise – are responsible for dealing with the estate of a deceased person. Their authority to receive the assets in the estate is proved by a grant of representation. A grant of probate is one type of grant of representation but the expression "grant of probate" is sometimes used as a generic term for all types of grant. In this briefing paper, the expression "grant of probate" includes other forms of grants of representation.

It is not always necessary to apply for a grant of representation. Much depends on the size of the estate and the type of assets it comprises.

Current fees

At present, probate applications are charged a fee of £155 if made by a solicitor, and £215 if made by an individual. These fees apply to estates worth £5,000 or more. The fees are currently set at cost recovery levels.

2016 consultation

In 2016, the Government consulted on proposals to reform probate fees. The consultation asked for views on introducing a fee structure for applications for grants of probate based on the value of the estate; increasing the threshold below which no fee is payable for applications for grants of probate from £5,000 to £50,000; and removing applications from the general fee remissions ('help with fees') scheme.

Using a statutory power to charge enhanced fees, the Government proposed fees set above cost recovery levels. The Government intended to use the additional fee income to subsidise other court costs.

The Government proposed seven fee bands, with the fee increasing in line with the value of the estate. Fees were to start at £300 for estates worth between £50,000 and £300,000, rising to a maximum fee of £20,000 for estates worth more than £2 million.

2017 response to consultation

On 24 February 2017, the Government published its response to the consultation and confirmed that it would proceed with the proposals, subject to approval from Parliament.

A large majority of the 853 respondents to the consultation disagreed with the proposal to charge a fee based on the size of the estate, and with the proposed new fee structure. Opponents argued, among other things, that the size of the fee should not exceed the cost of delivering the service; that the cost of delivering the service is the same regardless of the value of the estate; and that the new fees were excessive and would effectively amount to a form of taxation. In response, the Government said that the increased fees were necessary to ensure adequate funding for the court service, in order to provide access to justice in the long term.

The draft Non-Contentious Probate Fees Order 2017, (the 2017 draft Order) intended to implement the Government's proposals, was laid before Parliament on 24 February 2017. The Order required the formal approval of both Houses of Parliament to become law.

The 2017 draft Order was passed by Commons Committee debate on 19th April 2017. However, there was not enough time for the Order to complete its passage through

Parliament due to the General Election in June 2017. The 2017 draft Order has now been withdrawn.

The House of Lords Secondary Legislation Committee and the Joint Committee on Statutory Instruments drew special attention to the 2017 draft Order.

2018: Revised proposals

On 5 November 2018, junior Justice Minister, Lucy Frazer announced revised proposals. She said that a new statutory instrument had been laid before Parliament which would implement a banded structure of fees for a grant of probate. Lucy Frazer said that the Government had listened to the concerns expressed about the fees previously proposed and had reduced the amounts so that they would now never be more than 0.5% of the value of the estate. She stated that all income raised would be spent on running the courts and tribunal service.

The draft Non-Contentious Probate Fees Order 2018, (the 2018 draft Order) was laid before Parliament on 5 November 2018. It would introduce a new regime of fees for applications for a grant of probate, with a banded structure based on the value of the estate. In short it would:

- increase the estate threshold below which no fee for an application for a grant of probate is payable from £5,000 to £50,000;
- introduce fees ranging from £250 for estates worth between £50,000 and £300,000, to £6,000 for estates worth more than £2 million – the Government has said that, under the new structure, "for those who pay, around 80% of estates will pay £750 or less and 60% of applicants will still be paying a comparable fee to what they pay now";
- remove applications for a grant of probate from the generally applicable remissions scheme for courts and tribunal fees while retaining the Lord Chancellor's power to remit or reduce a fee in exceptional circumstances.

The 2018 draft Order would apply to England and Wales only. It will need the formal approval of both Houses of Parliament to become law.

The Government estimates that the revised proposals would generate over £145 million in additional fee income in 2019/20, rising each subsequent year in line with increases in estate values.

The House of Lords Secondary Legislation Scrutiny Committee (Sub-Committee A) has drawn the 2018 draft Order to the special attention of the House, on the ground that it gives rise to issues of public policy likely to be of interest to the House. The Joint Committee on Statutory Instruments has also drawn the special attention of both Houses to the 2018 draft Order on the grounds that, if it is approved and made, there will be a doubt whether it is intra vires, and that it would in any event make an unexpected use of the power conferred by the enabling Act.

On 18 December 2018, Lord Keen of Elie, Government spokesperson for Ministry of Justice business in the House of Lords, moved that the 2018 draft Order be approved. Lord Marks of Henley-on-Thames, Liberal Democrat Justice Spokesperson in the Lords, moved an amendment, intended to object to the draft Order becoming law. That motion was defeated on division by 187 votes to 90. The Lords then voted by 186 to 161 in favour of a non-fatal motion to regret moved by Lord Beecham. The motion to approve the 2018 draft Order was agreed as amended.

The 2018 draft Order still needs to be approved by the House of Commons.

1. Background

1.1 What is a grant of probate?

Personal representatives – executors where they are appointed by a will, or administrators otherwise – are responsible for dealing with the estate of a deceased person.

Their authority to receive the assets in the estate is proved by a grant of representation.

There are three types of grant of representation:

- Probate: granted to the executors named in the deceased person's will;
- Letters of Administration (with Will): issued when no executor is named in the will, or when the named executors are unable or unwilling to apply for the grant; and
- Letters of Administration: granted when the deceased did not leave a valid will.

A grant of probate, therefore, is one type of grant of representation but the expression "grant of probate" is sometimes used as a generic term for all types of grant. In this briefing paper, the expression "grant of probate" includes other forms of grants of representation.

The Probate Service, part of HM Courts and Tribunals Service (HMCTS), administers the system of probate in England and Wales, and issues grants of representation.

The Probate Service helped 275,000 applicants in 2017/18 and issued a total of 260,000 grants of probate in the same period.[1]

Box 1: Applying for a grant of probate

Information about applying for a grant of probate, and dealing with the estate of a deceased person, is available online, including:

- HM Courts and Tribunals Service, PA2 How to obtain probate - A guide for people acting without a solicitor, 1 March 2017;
- Gov.UK, Wills, probate and inheritance;
- Citizens Advice, Dealing with the financial affairs of someone who has died.[2]

1 Draft Explanatory Memorandum to The Non-Contentious Probate (Fees) Order 2018, paragraph 7.1

2 All web material accessed 6 November 2018 unless stated otherwise

1.2 Is a grant of probate necessary in all cases?

It is not always necessary to apply for a grant of representation. The Government has stated that, in England and Wales, only around 50% of deaths lead to an application for a grant of probate.[3]

Much depends on the size of the estate and the type of assets it comprises. An HM Courts and Tribunals Service leaflet provides further information:

> A grant may not be needed if:
>
> - the home is held in joint names and is passing by survivorship to the other joint owner(s).
> - there is a joint bank or building society account. In this case, the bank may only need to see the death certificate, in order to arrange for the money to be transferred solely to the other joint owner. However, a grant could still be needed to access assets held in accounts not held in joint names, or insurance policies.
> - the amount held in each account was small (even if held in the deceased's sole name). You will need to check with the organisations (banks, building societies or insurance companies) involved to find out if they will release the assets without a grant.
>
> You may wish to ask anyone holding the deceased's money (such as a bank or insurance company) whether they will release it to you without seeing a grant. If they agree, they may attach conditions such as asking you to sign a statutory declaration before a solicitor. You will then be able to decide whether it is cheaper or easier to do this than to apply for a grant.
>
> Please note that a grant must be presented in order to sell or transfer a property held in the deceased's sole name or a share of a property held jointly with the deceased and one or more other people as tenants-in-common. Tenancy-in-common is a written agreement between two or more people who own a joint asset (usually land or buildings). If you aren't sure about this you may wish to consult a solicitor.[4]

1.3 Current fees

At present, probate applications are charged a fee of £155 if made by a solicitor, and £215 if made by an individual. These fees apply to estates worth £5,000 or more.[5]

In December 2016, the then Justice Minister, Sir Oliver Heald, confirmed that "applications for a grant of probate are … currently set at cost recovery levels".[6]

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3 Ministry of Justice, Court Fees Consultation on proposals to reform fees for grants of probate, Cm 9195, February 2016, paragraph 10

4 HM Courts and Tribunals Service, PA2 How to obtain probate - A guide for people acting without a solicitor, March 2017, p2

5 The Non-Contentious Probate Fees Order 2004 (as amended)

6 PQ 53318 [on Courts: Fees and Charges], 12 December 2016

1.4 Statutory power to charge enhanced fees

Section 180 of the Anti-social Behaviour Crime and Policing Act 2014 provides a power for the Lord Chancellor, with the consent of the Treasury, to prescribe fees at a level intended to exceed the costs of the proceedings for which they are charged ("enhanced fees").

The income from enhanced fees must be used to finance an efficient and effective system of courts and tribunals.

Before prescribing enhanced fees, the Lord Chancellor must have regard to:

- the financial position of the courts and tribunals service, including any costs incurred that are not being met by current fee income; and
- the competitiveness of the legal services market.

The Lord Chancellor must also have regard to the principle that access to the courts must not be denied.[7]

Any statutory instrument intended to introduce an enhanced fee is subject to the affirmative resolution procedure.[8]

1.5 Cost of Court Service

The Government has stated that, in 2016/17, the courts service cost £1.6bn in running costs but recovered less than half of that in fees (£740m) (and of which £49m was fee income from the Probate Service issuing over 250,000 grants of representation).[9]

7 Courts Act 2003 section 92(3)
8 Requiring the approval of both Houses of Parliament to become law
9 Draft Explanatory Memorandum to The Non-Contentious Probate (Fees) Order 2018, paragraph 7.5

2. 2016: Government consultation

In 2016, the Government consulted on proposals to reform probate fees.[10] Related documents are available on the Ministry of Justice consultation hub. The consultation period ran from 18 February 2016 to 1 April 2016. The consultation asked for views on:

- introducing a fee structure for applications for grants of probate (or letters of administration) based on the value of the estate;
- increasing the threshold below which no fee is payable for applications for grants of probate from £5,000 to £50,000; and
- removing applications from the general fee remissions ('help with fees') scheme.

2.1 Proposed new fee structure

The Government proposed seven fee bands, with the fee increasing in line with the value of the estate (after outstanding debts, but before inheritance tax liabilities have been applied).[11] At that time it was proposed that fees would start at £300 for estates worth between £50,000 and £300,000, rising to a maximum fee of £20,000 for estates worth more than £2 million. (The proposed fees have since been revised.) The threshold for paying a fee was also to be raised, to £50,000.

In a written Ministerial statement, Shailesh Vara, who was then a junior Justice Minister, set out how the fees proposed at that time would affect estates of different values:

> We propose raising [the] threshold from £5,000 to £50,000, lifting 30,000 estates out of the need to pay a probate fee altogether. The proportion of estates paying no fee would rise to 57%.
>
> Above that threshold, we propose that the probate fee increases in line with the value of the estate. Estates worth over £50,000 but below £300,000 would see their fee rise to £300, a modest increase of £85 on the current maximum fee of £215. 84% of estates would pay £300 or nothing and 94% of estates would pay £1000 or less. The maximum fee of £20,000 would only be paid by the very wealthiest estates, worth more than £2 million. The fee would never exceed 1% of the value of the estate and in many cases it would be considerably less.[12]

In the consultation paper, the Government indicated the broader context for the proposals, including the plans for court reform, and a planned new online service for applications for a grant of probate.

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10 Ministry of Justice, Court Fees Consultation on proposals to reform fees for grants of probate, Cm 9195, February 2016

11 The fee structure proposed at that time is set out as Table 1 on page 12 of the consultation paper

12 HCWS541 [on Consultation on fee proposals for grants of probate], 22 February 2016. The percentages specified in the Government's response to the consultation are slightly different, based on updated underlying data – see section 3.1 of this briefing paper

Using the statutory power to charge enhanced fees, the Government proposed fees set above cost recovery levels. The Government's intention was to protect access to justice and address the funding of the court service more generally:

> The case for revisiting the way we charge court and tribunal fees is based firmly on the need to ensure that Her Majesty's Courts & Tribunals Service ('HMCTS') is funded properly to protect the vital principle of access to justice. The courts and tribunals fulfil a vital function in this country, providing access to justice for those who need it, and underpinning the rule of law. A fully functioning and funded justice system not only provides everyone with the ability to seek redress for their problems in an efficient and effective forum, but also underpins our growing economy.
>
> Despite the significant economic progress that has been made over almost six years, the wider financial climate in which the government is operating remains challenging. The government was elected to continue its work to fix the economy, by reducing public spending to eliminate the deficit. The courts, and those who use them, must make their contribution.
>
> The courts and tribunals administered by HMCTS cost £1.8 billion in 2014/15, but we only received £700 million in income. This leaves a net cost to the taxpayer of around £1.1bn in one year alone. In addition to the investment to improve the courts system, the Ministry of Justice needs to play its part in reducing the deficit, and putting HMCTS's funding on a long-term sustainable footing.[13]

In 2014/15, HMCTS costs for administering the courts and tribunals were £1.8 billion against an income of £700m

The consultation paper stated that the enhanced fees then proposed would generate around £250 million in additional income which would be used to subsidise other court costs:

> …Income raised through probate fees has reached full cost recovery of the Probate Service – around £45 million per year (based on current estimates for 2015/16). In light however, of the current financial circumstances, the need to eliminate the deficit and to meet the commitments in our Spending Review settlement, we need to go further to reduce the overall demands of the courts and tribunals on the Exchequer.
>
> (…)
>
> We therefore propose moving to a system similar to that which applied between 1981 and 1999: where the level of the probate fee is linked to the value of the estate, where the probate fee is applied in a more progressive way, and where money raised from the probate fee subsidises the rest of the court and tribunal system.
>
> (…)
>
> 30. In the current financial climate it is necessary to ask that those users of HMCTS who can afford to do so to pay a greater contribution towards the operating costs of the courts. Our proposals in this consultation would generate around £250 million in additional income. The additional income raised would be applied solely to the running costs of HMCTS, allowing us to reduce the Ministry of Justice's overall demands on the Treasury.[14]

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13 Ministry of Justice, Court Fees Consultation on proposals to reform fees for grants of probate, Cm 9195, February 2016, paragraphs 1 to 3

14 Ibid, paragraphs 27 to 30

2.2 Interplay with Government's inheritance tax proposals

In his July 2015 Budget speech, the then Chancellor, George Osborne, announced a new relief for the bequest of a family home:

> From 2017, we will phase in a new £175,000 allowance for someone's home when they leave it to their children or grandchildren. That sits on top of the existing £325,000 threshold, which will be fixed until the end of 2020-21. Both allowances can be transferred to a spouse or partner. From today, we will make sure that those who choose to downsize do not lose any of the allowance from the property that they used to own, but we will taper the relief away for estates worth more than £2 million.[15]

Information about the operation of the new nil rate band is given in another Library briefing paper, Inheritance tax: a basic guide,[16] and in an HMRC policy paper, Inheritance Tax: main residence nil-rate band and the existing nil-rate band.[17]

In its 2016 consultation paper, the Government considered that the increase in probate fees would be outweighed in estates which benefitted from this new relief.[18]

2.3 Proposals related to fee remission

The consultation paper also set out a proposal to remove probate fees from the "Help with Fees" scheme which HMCTS operates for civil, family and tribunal proceedings. The scheme is intended to ensure that those of limited financial means are not prevented from bringing proceedings in court because they cannot afford to pay the fee. For those who qualify for help under the scheme, the fee may be reduced or waived in full.

The Lord Chancellor's power to grant a remission in exceptional circumstances would continue to be available in probate to those who could show that the requirement to pay the fee would cause them undue financial or other hardship.[19]

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15 HC Deb 8 July 2015 cc330-1. See also Budget 2015, HC 264, July 2015 para 1.217-21

16 SN00573, 30 April 2018

17 Updated 12 June 2017

18 Ministry of Justice, Court Fees Consultation on proposals to reform fees for grants of probate, Cm 9195, February 2016, paragraphs 37-9

19 Ministry of Justice, Court Fees Consultation on proposals to reform fees for grants of probate, Cm 9195, February 2016, paragraphs 40-48

3. 2017: Government response

3.1 Government's intention to proceed

In 2017, the Government said that it intended to proceed with the consultation proposals, subject to approval from Parliament

On 24 February 2017, the Government published its response to the consultation and confirmed that it intended to proceed with the consultation proposals, subject to approval from Parliament.[20] A final impact assessment was also published.[21]

Sir Oliver Heald provided further information in an accompanying written Ministerial statement:

> The Government is committed to providing a modern, world-leading justice system which is proportionate and accessible. In 2015/16, the courts and tribunals system cost £1.9 billion to run and we recovered only £700m of that through fees and other income.
>
> The best way to protect access to justice in the long term is with a properly funded justice system. The income fees generate is necessary for an effective courts and tribunals system that supports victims and vulnerable people, and is easy for people to use.
>
> The Government will therefore, subject to approval from Parliament:
>
> - implement the fee structure as consulted on;
> - raise the threshold under which no probate fee is payable from £5,000 to £50,000; and
> - remove the grant of probate fee from the fee remissions scheme. We will retain the Lord Chancellor's power to remit fees in exceptional circumstances.
>
> This means we are abolishing flat fees and replacing them with a banded structure, related to the value of the estate. This includes raising the fee threshold from £5,000 to £50,000 and lifting 25,000 estates out of fees altogether. Overall, 58% of estates will pay no fee at all and 92% will pay £1,000 or less for this service.
>
> We are confident through our engagement with organisations like the British Banking Association and Building Societies' Association that executors will have a range of options to finance the payment.
>
> The new fee structure will generate around £300m per year in additional fee income, which will all be reinvested back into Her Majesty's Courts and Tribunals Service.[22]

The response document set out how the Government considered that executors would pay the fee, and stated that, in exceptional circumstances, it might be possible to get a limited grant of probate for that purpose:

> In exceptional circumstances where executors have been unable to access funds to pay the fee in any of these ways, the Probate

[20] The Government response to consultation on proposals to reform fees for grants of probate, Cm 9426, February 2017
[21] IA No: MoJ010/2016, 24 February 2017
[22] HCWS501 [on Justice update], 24 February 2017

Service will be able to provide limited access for executors to the assets of the estate for the sole purpose of paying the necessary fee, via a limited grant of probate.[23]

3.2 2017 proposed fee structure

The new fee structure at that time, based on the value of the estate, was for the amounts set out in the consultation paper - this has now been superseded: [24]

New fee structure

Value of estate (before inheritance tax)	Proportion of all estates in England and Wales	Proposed Fee
Up to £50,000 or exempt from requiring a grant of probate	58%	£0
Exceeds £50,000 but does not exceed £300,000	23%	£300
Exceeds £300,000 but does not exceed £500,000	11%	£1,000
Exceeds £500,000 but does not exceed £1m	6%	£4,000
Exceeds £1m but does not exceed £1.6m	1%	£8,000
Exceeds £1.6m but does not exceed £2m	0.30%	£12,000
Above £2m	0.50%	£20,000

Source: The Government Response to consultation on proposals to reform fees for grants of probate, February 2017

3.3 Consultation responses

There had been a total of 853 responses to the consultation. A large majority disagreed with the proposal to charge a fee based on the size of the estate, and with the proposed new fee structure. A smaller majority disagreed with the proposal to increase the threshold above which the fee is payable from £5,000 to £50,000.

Opponents argued, among other things, that the size of the fee should not exceed the cost of delivering the service; that the cost of delivering the service is the same regardless of the value of the estate; and that the new fees were excessive and would effectively amount to a form of taxation.

In response, the Government said that it had considered all the responses to the consultation very carefully, but still considered the increases to be necessary to ensure adequate funding of the court service.[25]

Information about the responses to all the consultation proposals is provided in the Government's response.

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23 The Government response to consultation on proposals to reform fees for grants of probate, Cm 9426, February 2017, paragraph 58

24 The proportion of estates in each fee band varied slightly from those published in the consultation paper. The Government stated that this was because it had updated the underlying data provided by HMRC on the distribution of estates, The Government response to consultation on proposals to reform fees for grants of probate, Cm 9426, February 2017, paragraph 49 and footnote 4

25 The Government response to consultation on proposals to reform fees for grants of probate, Cm 9426, February 2017, paragraph 50

4. The draft Non-Contentious Probate Fees Order 2017

4.1 The draft Order

The draft Non-Contentious Probate Fees Order 2017, (the 2017 draft Order) intended to implement the Government's proposals, was laid before Parliament on 24 February 2017. A draft Explanatory Memorandum was also published. The Order required the formal approval of both Houses of Parliament to become law.

The 2017 draft Order was passed by Commons Committee debate on 19th April 2017. However, there was not enough time for the Order to complete its passage through Parliament due to the General Election in June 2017.[26]

The 2017 draft Order has now been withdrawn.

4.2 Consideration of the 2017 draft Order by Committees

Before Parliament was dissolved for the General Election in 2017, the 2017 draft Order was considered by the House of Lords Secondary Legislation Scrutiny Committee and the Joint Committee on Statutory Instruments.

House of Lords Secondary Legislation Scrutiny Committee

In its 28th Report of 2016-17, the House of Lords Secondary Legislation Committee drew the 2017 draft Order to the special attention of the House on the ground that it gave rise to issues of public policy likely to be of interest to the House.[27]

The Committee considered that the proposed fee for some estates would be "contrary to standard practice":

> 1.6. We note, however, that those paying £1,000 will be paying approximately 400% above the actual cost of the service. This is contrary to standard practice. In the guidance to government departments, Managing Public Money, paragraph 6.3.6 states: "different groups of customers should not be charged different amounts for a service costing the same, eg charging firms more than individuals. Similarly, cross subsidies are not standard practice, eg charging large businesses more than small ones where the cost of supply is the same".

The Committee wondered whether the House envisaged the power to charge enhanced fees, in section 180(1) of the Anti-Social Behaviour, Crime and Policing Act 2014, being used to this degree: "Executors of

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26 Draft Explanatory Memorandum to The Non-Contentious Probate (Fees) Order 2018, paragraph 10.5

27 House of Lords Secondary Legislation Scrutiny Committee 28th Report of Session 2016–17, HL Paper 131, 16 March 2017, pp 1-3

an estate worth more than £2 million will pay 129 times the actual cost of the service in addition to any inheritance tax liability".

The Committee considered that the proposed new fees could arguably amount to a "stealth tax" and a misuse of the fee-levying power:

> 10. While it is MoJ's stated aim to address the £1.2 billion annual deficit for running the courts, we note that another extract from Managing Public Money, paragraph 6.4.3 states: "The Office for National Statistics normally classifies charges higher than the cost of provision, or not clearly related to a service to the charge payer, as taxes". A number of respondents to the consultation also raised this point. MoJ's statement in the IA that the bands are capped at no more than 1% of the value of the estate also gives the fee the appearance of a tax rather than a charge linked to the actual cost of the service provided. **To charge a fee so far above the actual cost of the service arguably amounts to a "stealth tax" and, therefore, a misuse of the fee-levying power**.

The Committee also expressed concern about how executors would afford to pay the fees upfront, and that there might be increased bureaucracy:

> 12. A number of respondents added that many people would not be able to afford the fee because, while they might be handling a valuable asset, they would not necessarily have the liquid funds to pay the fee. While some banks allow the executor limited access to the funds of the deceased to pay for fees related to the death this is not universal and fees for short-term loans are high. MoJ states that in such circumstances the Probate Service will provide limited access to the assets of the estate for this purpose or the Lord Chancellor will have the power to remit fees in exceptional circumstances. We feel that this is all adding bureaucracy to the current system and that many, including small firms of solicitors acting as executors, will not have sufficient funds to pay such fees up front.

Joint Committee on Statutory Instruments

The Joint Committee on Statutory Instruments also drew special attention to the draft Order:

> The Committee draws the special attention of both Houses to this draft Order on the grounds that, if it is approved and made, there will be a doubt whether it is intra vires, and that it would in any event make an unexpected use of the power conferred by the enabling Act.[28]

The extent of the power to charge enhanced fees

The Joint Committee had asked the Ministry of Justice a number of questions in order to probe whether the Lord Chancellor, in making the draft Order, might be acting beyond the enabling powers "because she would, in substance, be imposing a tax on estates rather than prescribing probate fees". The Joint Committee summarised the Ministry of Justice's response:

- The provisions of section 180(3) of the 2014 Act demonstrate "Parliament's clear intention that the Lord

[28] Joint Committee on Statutory Instruments Twenty-sixth Report of Session 2016–17, HL 152 HC 93-xxvi, 31 March 2017, pp3-8 and Appendix 1

> Chancellor may set certain fees above cost recovery levels in one part of the court and tribunal system in order to help maintain the efficient and effective operation of the rest of the system".
>
> - The fact that "the Lord Chancellor is required to consider those courts and tribunals where the costs are not being met when exercising the power at section 180 anticipates this cross-subsidisation".
> - There is no restriction on this power, such that the fee must be directly related to the cost of the service.
> - The Probate Service forms part of the courts and tribunal system, but there is no legislative requirement that the costs raised by probate fees must be reserved to the Probate Service.
> - Other above-cost court fees are not reserved to the area in which they are imposed; so, for example, fees raised in respect of civil money claims are not reserved for the funding of the civil courts but may be used to support the operation of the criminal courts.
> - The powers in section 180 have been used previously in this manner and approved by Parliament. For example, the Civil Proceedings Fees (Amendment) Order 2015 sets enhanced fees for the issuing of a money claim by reference to the value of a claim – from £35 for a claim not exceeding £300 to £10,000 for a claim not exceeding £200,000.

Even after this response from the Government, the Joint Committee had doubts about the proposed use of the power in this way:

> 1.8 The Committee understands that, where a statute authorises the charging of a fee in respect of a service, the word "fee" has connotations of recovery of costs, direct or indirect, incurred in the provision of the service concerned or in the administration of the process, and that there must be express authority to charge a fee which exceeds the cost of the service – in this context, the cost of issuing a grant of probate in an individual case. The Committee acknowledges that section 180 of the 2014 Act provides that authority. Nonetheless it remains a power to prescribe a "fee", a concept which is subject to inherent limitations about the relationship to the service for which it is charged – including (arguably) one of proportionality.[29] The Lord Chancellor is not permitted to impose a tax.
>
> 1.9 Therefore, despite the arguments put forward by the Ministry of Justice, the Committee has a real doubt as to whether the Lord Chancellor may use a power to prescribe non-contentious probate fees for the purpose of funding services which executors do not seek to use – namely those provided by courts and tribunals dealing with litigation.

The Joint Committee considered that the position of executors was different from that of litigants:

> Applying for probate is not to be compared with the commencement of proceedings. A person can choose whether to litigate, and therefore whether to incur the fees payable on issuing a claim – which may be recoverable from the defendant if

[29] Footnote to text: "See the Supreme Court's judgment in R (on the application of Hemming) v Westminster City Council [2015] UKSC 25"

> the case succeeds. In contrast, executors have to obtain probate to allow them to administer an estate, and the fee for doing so is not refundable. This is an administrative process, akin to the registration of a life event. Nobody applying for an uncontested probate would think for a moment that they were engaging in litigation. That makes it difficult for the Committee to accept that a power to charge enhanced court fees can be extended naturally to require probate fees to reflect the general costs of the court and tribunal system.

The Joint Committee was not convinced that the generally-worded provision to charge enhanced fees gave the Lord Chancellor "a licence to compel executors to pay whatever amounts she regards as appropriate for the purpose of providing funds for the courts and tribunals – as opposed to the Probate Registry in particular".

The Joint Committee considered that the fees appeared to have the "hallmarks of taxes rather than fees", particularly in view of the scale of the proposed increases and because "the charges are disproportionate to the service provided by the Probate Registry". The Committee noted the "important constitutional principle that there is no taxation without the consent of Parliament, which must be embodied in statute and expressed in clear terms".

Use of powers

The Committee had also asked the Ministry of Justice to explain what indication was given to Parliament, during the passage of the Bill for the 2014 Act, that the power to prescribe probate fees would be used in the way proposed. In response, the Ministry of Justice pointed in particular to statements made by the Minister in the House of Commons. The Committee noted that nothing appeared to have been said about probate fees "which, of course, are not a cost of litigation":

> 1.19 Indeed the Committee can find no evidence that the Government suggested to Parliament that the section 180 power would be used to prescribe probate fees in order to fund the operation of the courts and tribunals service generally, or to provide for such large and immediate increases of fees in the way now proposed.

4.3 Reaction to the 2017 proposals

Many of the respondents to the consultation published their responses online. The Law Society and the Bar Council were among those critical of the Government's approach.

- The Law Society said:

> 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.[30]

- The Bar Council stated:

> If these proposals are taken forward, the bereaved, who apply to the probate registries for a single sheet of paper, produced with very little scrutiny by a small division of a government department, will end up paying a tax which covers the entire annual shortfall of the family courts, the civil courts, the asylum and immigration tribunals, the employment tribunals, and all other tribunals. The Bar Council does not consider this just. [31]

The Bar Council considered that it was not only those accessing the justice system that benefitted from it, and that this should be reflected in funding:

> The Bar Council believes that a fair, efficient and accessible civil justice system is one of the fundamental prerequisites to an effective democratic society. Crucially, it is not only those accessing the justice system who benefit from the existence, availability and proper administration of such a system, but all members of society, and society as a whole. It is therefore right that a significant proportion of the costs of the system should be borne by the taxpayer. We remain concerned about the continued shift in paying for the justice system away from the state and towards those who use the justice system and appear before the courts to resolve their legal issues. …

The Bar Council also set out this information about the process involved in granting probate:

> While the probate registry is historically part of the England and Wales court system, the grant of probate itself is not in reality a judicial or court act at all. It is a simple but authoritative piece of paper, bearing a stamp, produced by a civil servant on a relatively low pay grade in a relatively short period of time, the average cost of which is £166. There are only one or two registrars left in the probate registry, who now cover the entire country. The real scrutiny given to grants of probate is by HMRC. While the probate is not quite a rubber stamp, it is little more. We note that it is only when probate cases become contentious that they use up court time, at which point separate court proceedings are issued, generating separate fees.

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30 Law Society, MoJ consultation on fee proposals for grants of probate - Law Society response, 4 April 2016, paragraph 6

31 Bar Council response to the court fees consultation on proposals to reform fees for grants of probate, April 2016, p3

5. 2018: Revised proposals

5.1 Government announcement

On 5 November 2018, junior Justice Minister, Lucy Frazer, announced revised proposals.[32] She said that a new statutory instrument had been laid before Parliament which would implement a new, banded structure of fees for a grant of probate. The new proposed fees are lower than those proposed in 2017.

The junior Minister set out the purpose of charging fees:

> Fees are an essential element of funding an effective, modern courts and tribunals service, thereby ensuring and protecting access to justice. The Government is investing £1 billion to modernise and upgrade the courts system so that it works even better for everyone, including victims, witnesses, litigants, judges and legal professionals. This includes introducing changes to our Probate Service, who offer an important service to those who are bereaved. The reform of the service allows people to apply for a grant of probate online, access assisted digital support for those who many not necessarily have the skills or access to engage digitally and empowers individuals to make applications themselves instead of needing to instruct and pay for solicitors. This aims to reduce the burden on applicants, by providing a more efficient and simpler application process.
>
> But such a courts system is simply not possible without proper funding.

Lucy Frazer said that the Government had listened to the concerns expressed about the fees previously proposed and had revised the amounts so that they would now never be more than 0.5% of the value of the estate. The Government still intends to raise the estate value threshold for paying any fee:

> Moreover, by raising the estate value threshold from £5,000 to £50,000, we will be lifting around 25,000 estates annually out of fees altogether.

Lucy Frazer stated that all income raised would be spent on running the courts and tribunal service:

> It has long been the case that the users of our courts make a contribution to its costs, and we believe this remains both relevant and reasonable – minimising the burden on other taxpayers. Crucially, by asking those who use the courts to pay more, where they can afford to do so, we are able to fund areas where we charge no fees to vulnerable victims and users, including for example domestic violence and non-molestation orders, and for cases before the First-tier Tribunal concerning mental health.

The junior Minister said that the new banded fee model represented "a fair and more progressive way to pay for probate services compared to the current flat fee" and reflected the Government's commitment to "protecting access to justice by ensuring we have a properly funded and resourced courts system". She said that the fees would not be

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32 HCWS1066 [Justice Update], 5 November 2018

unaffordable, and that the Government would publish a guidance document on how to pay:

> We are also confident these fees will never be unaffordable. The cost of the fee is recoverable from the estate and executors have several options to fund it. Moreover, the Lord Chancellor retains a power to remit a fee if he considers there are exceptional circumstances.
>
> We will also publish a guidance document before the Statutory Instrument comes into force, entitled Guidance on Ways to Pay for Probate Fees. This will benefit from external stakeholder input, and will help applicants to choose the option to pay which most suits their circumstances, providing reassurance at a difficult time.

5.2 The Draft Non-Contentious Probate (Fees) Order 2018

The draft Non-Contentious Probate Fees Order 2018, (the 2018 draft Order) intended to implement the Government's revised proposals, was laid before Parliament on 5 November 2018. A draft Explanatory Memorandum has also been published. The 2018 draft Order requires the formal approval of both Houses of Parliament to become law.

The 2018 draft Order would introduce a new regime of fees for applications for a grant of probate, with a banded structure based on the value of the estate. In short it would:

- increase the estate threshold below which no fee for an application for a grant of probate is payable from £5,000 to £50,000;
- introduce fees ranging from £250 for estates worth between £50,000 and £300,000, to £6,000 for estates worth more than £2 million – the Government has said that, under the new structure, "for those who pay, around 80% of estates will pay £750 or less and 60% of applicants will still be paying a comparable fee to what they pay now;[33]
- remove applications for a grant of probate from the generally applicable remissions scheme for courts and tribunal fees while retaining the Lord Chancellor's power to remit or reduce a fee in exceptional circumstances.

The 2018 draft Order would apply to England and Wales only.

The Government estimates that the revised proposals would generate over £145 million in additional fee income in 2019/20, rising each subsequent year in line with increases in estate values.[34]

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33 Draft Explanatory Memorandum to The Non-Contentious Probate (Fees) Order 2018, paragraph 10.8 Footnote to text: "Calculated by MOJ internal analysis, based on probate estate projects data provided by HMRC and using ONS population projections. Population projections can be found here: https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationprojections"

34 Draft Explanatory Memorandum to The Non-Contentious Probate (Fees) Order 2018, paragraph 12.2

5.3 How do the fees proposed in 2018 differ from those proposed in 2017?

The following table sets out how the fees now proposed differ from those previously proposed in 2017:

Proposed new fee structure

Value of estate (before inheritance tax)	Fee proposal 2017	Fee proposal 2018
Up to £50,000 or exempt from requiring a grant of probate	£0	£0
Exceeds £50,000 but does not exceed £300,000	£300	£250
Exceeds £300,000 but does not exceed £500,000	£1,000	£750
Exceeds £500,000 but does not exceed £1m	£4,000	£2,500
Exceeds £1m but does not exceed £1.6m	£8,000	£4,000
Exceeds £1.6m but does not exceed £2m	£12,000	£5,000
Above £2m	£20,000	£6,000

Source: The Government Response to Consultation on Proposals to Reform Fees for Grants of Probate, February 2017, Explanatory Memorandum to the Non-Contentious Probate (Fees) Order 2018

5.4 Consideration of 2018 draft Order by Committees

House of Lords Secondary Legislation Scrutiny Committee (Sub-Committee A)

In its Sixth Report of Session 2017-19, published on 21 November 2018, the House of Lords Secondary Legislation Scrutiny Committee (Sub-Committee A) drew the 2018 draft Order, together with a negative instrument laid at the same time, the Non-Contentious Probate (Amendment) Rules 2018 (the Rules),[35] to the special attention of the House, on the ground that they gave rise to issues of public policy likely to be of interest to the House.[36]

The Committee welcomed the negative instrument which, it said, "modernises and improves the efficiency of the probate service". However, the Committee expressed "very serious concerns" about the 2018 draft Order. The concerns were very similar to those expressed previously in relation to the 2017 draft Order.

The Committee said that the Rules enabled the introduction of "a more efficient and convenient on-line application process for a grant of probate". It noted that the Ministry of Justice anticipated a reduction in the administrative cost of probate of about £1 million per year as a result of these changes (an average of £9.30 per application).

In contrast, the Committee said that the 2018 draft Order would increase the fees for those same applications for probate "on a sliding scale which bears no relation to recovering the actual cost of providing the service". The Committee acknowledged that the proposed fees were lower than those proposed in the 2017 draft Order but said that there would still be a significant move away from the principle that fees for a public service should recover the cost of providing it and no more.

35 SI 2018/1137

36 House of Lords Secondary Legislation Scrutiny Committee (Sub-Committee A) Sixth Report of Session 2017-19, HL Paper 235, 21 November 2018

The Committee's conclusions were similar to those made previously in relation to the 2017 draft Order:

> 20.The proposed scale of fees does not conform with the normal requirements set out in Managing Public Money. The Committee therefore feels that the MoJ needs to explain its basis for taking this course rather more clearly so that the House may better understand its approach. This view is underpinned by our recollection that the Joint Committee on Statutory Instruments published a report on the previous draft of this instrument that questioned the MoJ's assumptions on the scope of the powers cited.
>
> 21.The Committee takes the view that, though the scale of the individual fees has been reduced, the principle underlying the policy has not changed from the first version. We therefore reiterate the conclusion expressed in our 28th Report of Session 2016–17: "while section 180 of the Anti-social Behaviour, Crime and Policing Act 2014 permits the levying of enhanced fees, we are surprised to see it used to this extent. To charge a fee so far above the actual cost of the service arguably amounts to a "stealth tax" and, therefore, a misuse of the fee-levying power."
>
> 22.That the draft MoJ Order seeks to increase these fees by so much at the same time as laying the Rules (SI 2018/1137), that will reduce the unit cost of an application by an average of £9.30, only serves to highlight the Committee's concerns about the disproportionate increase in the fee levels proposed by the affirmative instrument.

The Committee noted that the Impact Assessment stated that 80% of the executors for estates that are subject to a fee would pay £750 or less, which, it said, was "somewhere above three times the cost of the service". For estates above £2 million fees would rise by £5,785, or "27 times the actual cost".

Referring again to the guidance issued to Government departments, Managing Public Money,[37] the Committee considered that by lifting the point at which fees become payable to estates valued at more than £50,000, fee payers would already be providing a substantial cross-subsidy to run the Probate Service for those less well off.

The Committee quoted paragraph 6.4.5 of Managing Public Money:

> "Cross-subsidies always involve a mixture of overcharging and undercharging, even if the net effect is to recover full costs for the service as a whole. So cross-subsidised charges are normally classified as taxes. They always call for explicit ministerial decision and parliamentary approval through either primary legislation or a s102 order."

The Committee considered that the statement at paragraph 7.3 of the Explanatory Memorandum, that "even the highest fee in our scheme would represent no more than 0.5% of the value of the estate" gave the fee the appearance of a tax rather than a fee linked to the actual cost of providing the service.

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[37] See p13 of this paper, above

Joint Committee on Statutory Instruments

The Joint Committee on Statutory Instruments also drew special attention to the draft Order:

> The Committee draws the special attention of both Houses to this draft Order on the grounds that, if it is approved and made, there will be a doubt whether it is *intra vires*, and that it would in any event make an unexpected use of the power conferred by the enabling Act.[38]

The Committee said that, as it was concerned that the 2018 draft Order "may be flawed for similar reasons to those given in its report on the 2017 Order", it had asked the Ministry of Justice to explain, in light of the conclusions reached in that report, why the fees prescribed by the 2018 Order were: (a) considered to be within the Lord Chancellor's powers; and (b) within the contemplation of Parliament when it conferred those powers. The Ministry of Justice's response, dated 27 November 2018, is set out at Appendix 1 to the Committee's report.

The Committee said that the arguments set out in the response did not dispel the doubts about vires expressed in its report on the 2017 Order:

> 1.15 The Committee is not convinced that section 180(3) of the 2014 Act, which simply requires the Lord Chancellor to have regard to the financial position of courts and tribunals, clearly authorises him to require executors to pay whatever amounts he regards as appropriate for the purpose of providing funds for the courts and tribunals—as opposed to the Probate Registry in particular. The Committee remains of the view that, if Parliament had intended to confer power on the Lord Chancellor to legislate in such a way, it would have included explicit provisions in section 180.

The Committee considered that the proposed charges had the characteristics of taxation rather than fees:

> This is particularly in view of the amounts that would be payable for larger estates and the scale of the proposed increases (from £155 to as much as £6,000—a rise of 3,770%)—and because (a) the charges bear no proportion at all to any service provided by the Probate Registry, and (b) the revenue generated is to be used to fund completely different services. Moreover, the Government's justification for the proposed charges given in the Explanatory Memorandum appears to support the Committee's assessment that this is a taxation measure:
>
> > "We believe … it is appropriate and progressive to charge an increased fee for a grant of probate in order to increase the contribution from those users of the court and tribunals services who can afford to do so. This, therefore, goes some way to rebalancing the contribution to the courts and tribunal service between the taxpayer and direct user."

The Committee drew a comparison with stamp duty:

> 1.17 It strikes the Committee that the 2018 Order would, in effect, levy a type of stamp duty on grants of probate, although dressed up as "fees". Indeed, the proposed banded system of

[38] Joint Committee on Statutory Instruments Fortieth Report of Session 2017–19, HL 247 HC 542-xl, 7 December 2018, pp3-8 and Appendix 1

> fees has much in common with the banded system of Stamp Duty Land Tax payable on transfers of residential property.

The Committee considered the 2018 draft Order to be "a measure of taxation for which there is no clear statutory authority".

The Committee referred to its report on the 2017 draft Order which said that there appeared to be "no evidence that the Government suggested to Parliament that the section 180 power would be used to prescribe probate fees in order to fund the operation of the courts and tribunals service generally, or to provide for such large and immediate increases of fees in the way now proposed". The Committee said that the Ministry of Justice had provided no new evidence or arguments that would cause the Committee to change that assessment.

5.5 House of Lords debate

On 18 December 2018, Lord Keen of Elie, Government spokesperson for Ministry of Justice business in the House of Lords, moved that the draft 2018 Order be approved.[39]

Government position

Lord Keen described the new fees as being "fair and proportionate". He said that the Government had looked closely at the criticisms of the draft 2017 Order, which, he said, were centred largely on the level of fees, rather than on the principle of a banded structure. Accordingly, the Government now proposed reduced fees payable at all bands, but had not amended the underlying policy rationale, and would retain the same progressive banded structure as previously proposed.[40]

Lord Keen acknowledged the concerns raised by the Committees which had considered the draft Order but disagreed with them and with the idea that the fee changes were disproportionate:

> As we have already made clear, users will experience a better system which has benefited from significant investment from the taxpayer. It is still right that the additional income is used to cross-subsidise in other areas where vulnerable users and victims are charged either no fee or a nominal fee.
>
> More specifically, we have significantly reduced the fees at all levels compared to our previous proposal, which I believe responds to concerns about what fee is proportionate. We are clear that this is an application fee for a specific service: to obtain a grant of representation to deal with a person's estate. This is distinct from general taxation, which is paid into a consolidated fund held by HM Treasury. Charging fees is justified as a way of funding our courts system to provide access to justice, which the Government are committed to maintaining.[41]

Peers spoke both for and against the Government's proposals.[42]

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39 HL Deb 18 December 2018 c1722
40 HL Deb 18 December 2018 c1723
41 HL Deb 18 December 2018 c1725
42 HL Deb 18 December 2018 cc1722-52

Motion to decline to approve: defeated on division

Lord Marks of Henley-on-Thames, Liberal Democrat Justice Spokesperson in the Lords, moved an amendment, intended to object to the draft Order becoming law:

> "this House declines to approve the draft Order, because it would be an abuse of the fee-levying power, since the proposed increased fees substantially exceed the cost involved in making grants of probate and would amount to a tax, which should only be introduced, if at all, by primary legislation."[43]

Lord Marks accepted that a fatal amendment was unusual:

> However, the Cunningham committee, in its report Conventions of the UK Parliament in 2006, concluded that there are situations in which it is right for the Lords to threaten to defeat a statutory instrument, citing as an example,
>
> > where special attention is drawn to the instrument by the Joint Committee on Statutory Instruments or the Lords Select Committee on the Merits of SIs".[44]

Lord Marks said that the draft Order should be struck down:

> Of course, it is a serious matter, but I suggest that this statutory instrument ought to be struck down precisely because it is seeking to dress up taxes as fees in a way that is impermissible. That is a wrong use of the statute. In answer to the noble and learned Lord, Lord Judge, the statute may be slightly carelessly drawn—it could have been more specific—but that should not be used by Ministers to drive a coach and horses through the statute when seeking to rely on the enabling powers to pass statutory instruments. That is what they do when they use the permission to exceed the cost to drive through a wild, excessive charge such as this one.
>
> Striking this statutory instrument down is the correct course to take. A regret amendment will not achieve the end that ought to be achieved. The Government will be at liberty to reconsider their position and bring back revised fees, certainly, but not fees on this scale, which many noble Lords have deplored. I have heard nothing that dissuades me from seeking to test the opinion of the House.[45]

Following debate, Peers voted by 187 votes to 90 against the amendment to decline to approve the 2018 draft Order.

Motion to regret: agreed on division

Lord Beecham, Shadow Justice Spokesperson considered there to be an important principle:

> The Ministry of Justice is struggling with an overcrowded and underfunded Prison Service, an overstretched probation service, court closures and diminishing access to justice. Of course the justice system desperately needs better funding, but this should be provided not by a stealth tax but out of general taxation including, possibly, inheritance tax. If the Government go ahead with the provisions of this order, how can we rely on them not to

43 HL Deb 18 December 2018 c1726
44 HL Deb 18 December 2018 c1728
45 HL Deb 18 December 2018 c1747

> adopt similar stealth taxes to fund other key services, for example by increasing prescription charges to a level exceeding the cost of the treatment supplied by the health service?[46]

However, Lord Beecham considered that annulling the Order would cause problems for the House of Lords and said his party would abstain in any vote on Lord Marks's amendment.[47]

When that amendment had been defeated, the Lords voted by 186 to 161 in favour of a non-fatal motion to regret moved by Lord Beecham by way of an amendment to the original motion:

> "but this House regrets that the draft Order will introduce a revised non-contentious probate fee structure considered by the Secondary Legislation Scrutiny Committee to be "so far above the actual cost of the service [it] arguably amounts to a stealth tax and, therefore, a misuse of the fee-levying power" under section 180 of the Anti-social Behaviour, Crime and Policing Act 2014; and that this Order represents a significant move away from the principle that fees for a public service should recover the cost of providing it and no more."[48]

Motion to approve 2018 draft Order agreed as amended

The original motion, as amended, was agreed to.[49]

5.6 What happens next?

The 2018 draft Order still needs to be approved by the House of Commons.

46 HL Deb 18 December 2018 cc1730-31
47 HL Deb 18 December 2018 cc1731
48 HL Deb 18 December 2018 cc1749
49 HL Deb 18 December 2018 cc1722-52

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