HOUSE OF COMMONS LIBRARY

BRIEFING PAPER

Number 07929, 23 October 2019

Probate fees

By Catherine Fairbairn

Contents:

Contents

Summary

This briefing paper, which is no longer being updated, considers the Government's previous proposals to reform probate fees, which attracted widespread comment and criticism. The Government has now announced that **it no longer intends to proceed with these proposals**.

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. 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.

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.

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.

Government announcement: October 2019

On 12 October 2019, Lord Chancellor and Secretary of State for Justice, Robert Buckland, announced that the Government was withdrawing its previous proposals to reform probate fees, and would keep the current system pending an annual wider review of court fees. On 16 October 2019, giving oral evidence to the House of Commons Justice Committee, Robert Buckland said, "Having reflected carefully on the matter, we feel now that we are in a position to make this announcement and revisit the issue as soon as possible, but on the principle of sustainability rather than taxing bereaved people".

Background: What had the Government proposed?

2016 consultation

In 2016, the Government consulted on proposals to introduce a fee structure for applications for grants of probate based on the value of the estate; increasing the threshold below which no fee would be payable for applications for grants of probate; 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, with the intention of using 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. At that time, 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

A large majority of the 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 confirmed that it would proceed with the proposals, subject to approval from Parliament. It 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 in February 2017. The Order required the formal approval of both Houses of Parliament to become law. The House of Lords Secondary Legislation Committee and the Joint Committee on Statutory Instruments drew special attention to the 2017 draft Order. There was not enough time for the Order to complete its passage through Parliament due to the General Election in June 2017 and it was subsequently withdrawn.

2018: Revised proposals

On 5 November 2018, Lucy Frazer, who was then a junior Justice Minister, announced that the draft Non-Contentious Probate (Fees) Order 2018, (the 2018 draft Order) had been laid before Parliament, and that this would implement revised proposals. She said that the Government had listened to the concerns expressed about the fees previously proposed and had reduced the amounts. The 2018 draft Order proposed fees ranging from £250 for estates worth between £50,000 and £300,000, to £6,000 for estates worth more than £2 million. The 2018 draft Order would also have removed 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. Lucy Frazer stated that all income raised would be spent on running the courts and tribunal service.

The 2018 draft Order was to apply to England and Wales only and needed the formal approval of both Houses of Parliament to become law.

Consideration of 2018 draft Order by Committees

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

Parliamentary debate

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, Shadow Justice Spokesperson. The motion to approve the 2018 draft Order was agreed as amended.

The 2018 draft Order was considered by a House of Commons Delegated Legislation Committee on 7 February 2019. Lucy Frazer disagreed with the conclusions of the Joint Committee on Statutory Instruments and the House of Lords Secondary Legislation

Scrutiny Committee. She said that the Government had authority to impose enhanced fees and was clear that there would be an application fee for a specific purpose, distinct from general taxation. Shadow Justice Minister, Gloria De Piero, spoke of "fierce opposition to these proposed changes, from legal experts, charities and legislative bodies". On division, the Committee resolved that it had considered the 2018 draft Order by 9 votes to 8.

Proposed ONS classification of new fee structure

The Office for Budget Responsibility's, Economic and Fiscal Outlook, published in March 2019, stated that the Treasury expected the Office for National Statistics (ONS) to classify the new fee structure as a tax in the National Accounts. The Ministry of Justice later reiterated that the new fee structure was not a tax, and that any ONS classification would be for accounting purposes only. The Joint Committee on Statutory Instruments had previously agreed that the ONS classification was not relevant to the question of whether there was power to make the proposed Order, but considered that this was a further indication that the Lord Chancellor was proposing to use the enabling power in a surprising way.

What happened next?

No date was ever fixed for the House of Commons motion to approve the 2018 draft Order. This motion fell when Parliament was prorogued on 8 October 2019. (It would not have been necessary to lay the 2018 draft Order itself again).

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]

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, updated September 2019;
- Gov.UK, Applying for probate;
- 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 in this briefing paper accessed 23 October 2019 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. In 2016, the Government 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. Gov.UK provides further information:

> You may not need probate if the person who died:
>
> - had jointly owned land, property, shares or money - these will automatically pass to the surviving owners
> - only had savings or premium bonds
>
> Contact each asset holder (for example a bank or mortgage company) to find out if you'll need probate to get access to their assets. Every organisation has its own rules.[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]

Fees must be paid by the executors in advance, but they can recover them from the estate once probate is issued.[7]

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.

---

3 Ministry of Justice, Court Fees Consultation on proposals to reform fees for grants of probate, Cm 9195, February 2016, paragraph 10
4 Gov.UK, Applying for probate, Overview
5 The Non-Contentious Probate Fees Order 2004 (as amended)
6 PQ 53318 [on Courts: Fees and Charges], 12 December 2016
7 Joint Committee on Statutory Instruments Twenty-sixth Report of Session 2016–17, HL 152 HC 93-xxvi, 31 March 2017, paragraph 1.1

The Lord Chancellor must also have regard to the principle that access to the courts must not be denied.[8]

Any statutory instrument intended to introduce an enhanced fee is subject to the affirmative resolution procedure.[9]

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);[10]
- in 2017/18, the running costs of HMCTS were £1.8 bn and only £710m of that (less than 40%) was recovered in fee income.[11]

8 Courts Act 2003 section 92(3)
9 Requiring the approval of both Houses of Parliament to become law
10 Draft Explanatory Memorandum to The Non-Contentious Probate (Fees) Order 2018, paragraph 7.5
11 Fourteenth Delegated Legislation Committee, Draft Non-Contentious Probate (Fees) Order 2018, 7 February 2019, c4

2. Government's proposals to reform probate fees withdrawn

2.1 Brief overview of proposals

In 2016, the Government consulted on proposals to introduce a fee structure for applications for grants of probate based on the value of the estate; increasing the threshold below which no fee would be payable for applications for grants of probate; and removing applications from the general fee remissions ('help with fees') scheme.

Using the statutory power to charge enhanced fees, the Government proposed fees set above cost recovery levels, with the intention of using the additional fee income to subsidise other court costs.

The Government's proposals attracted widespread comment and criticism. Opponents considered that, among other things, the new fees were excessive and would effectively amount to a form of taxation. Although the Government subsequently reduced the proposed fees, opposition to the proposals continued.

The statutory instrument intended to implement the Government's revised proposals needed the formal approval of both Houses of Parliament to become law. Most of the Parliamentary stages required to achieve approval were completed by February 2019. However, no date was ever fixed for the House of Commons motion to approve the draft instrument. This motion fell when Parliament was prorogued on 8 October 2019. (It would not have been necessary to lay the statutory instrument itself again).

More detailed information about the Government's proposals is provided in section 3 of this briefing paper.

2.2 Proposals withdrawn

On 12 October 2019, the Daily Mail reported that Robert Buckland, Lord Chancellor and Secretary of State for Justice, had decided to withdraw the proposals to reform probate fees.[12] The Lord Chancellor was reported to have said:

> While fees are necessary to properly fund our world-leading courts system, they must be fair and proportionate. We will withdraw these proposals, and keep the current system while we take a closer look at these court fees as part of our annual wider review.

This announcement was welcomed by those opposed to the proposed new fees. For example:

- Law Society, "U-turn on probate fees hike welcomed", 14 October 2019;

[12] Jack Doyle, "Death tax hike is axed: Victory for the Mail as minister lifts threat of £6,000 probate fees from grieving families", Daily Mail, 12 October 2019

- Kirsty Weakley, "Government U-turns on probate fee plans that would have cost charities millions", Civil Society, 14 October 2019.

The Lord Chancellor confirmed the position when he gave oral evidence to the House of Commons Justice Committee on 16 October 2019.[13] He said that his decision had been made "as a result of a lot of reflection about the function of the system and what we should be doing".

Robert Buckland said that he wanted to maintain an appropriate balance:

> I felt, having looked at it and considered it, that we were not striking the right balance with this proposal and that, although it is important to listen to the public and their concerns, it was not just about that. It was about whether it was "the right thing" to do in terms of striking the balance. I felt that it was not, on balance, but at the same time I am very mindful of my duty to make sure that we have a sustainable system, as we develop it in the future, so we will be working very closely with officials and the Treasury to do that.

Responding to a question from Victoria Prentis, the Lord Chancellor said that he did not want to amend the system in a way which might be seen as a tax on the bereaved:

> I was very anxious to make sure that, in developing what clearly needs to be some change, and a system that is much more in line with balancing the books, we respect inflation but do not recast the system in a way that would be seen as some sort of tax on the bereaved.

Robert Buckland agreed that "a 28 times increase was too far":

> It was too far for me. Clearly, the Department had to make some difficult decisions with regard to revenue. We have talked about the pressures we were under. Having reflected carefully on the matter, we feel now that we are in a position to make this announcement and revisit the issue as soon as possible, but on the principle of sustainability rather than taxing bereaved people.

[13] Justice Committee, Oral evidence: The work of the Lord Chancellor, HC 41, 16 October 2019, Q112 - Q116

3. What had the Government proposed?

This section of this briefing paper provides information about the Government's proposals to reform probate fees. **As these proposals have now been withdrawn it is included as background information only.**

3.1 2016: Government consultation

In 2016, the Government consulted on proposals to reform probate fees.[14] 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 would be 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.

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 had been applied).[15] 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 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

[14] Ministry of Justice, Court Fees Consultation on proposals to reform fees for grants of probate, Cm 9195, February 2016. Related documents are available on the Ministry of Justice consultation hub.

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

> fee would never exceed 1% of the value of the estate and in many cases it would be considerably less.[16]

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.[17]

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

---

16 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

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

> 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.[18]

Interplay with Government's inheritance tax proposals

In his July 2015 Budget speech, the then Chancellor, George Osborne, announced a new inheritance tax relief for the bequest of a family home.[19] Information about this is given in another Library briefing paper, Inheritance tax: a basic guide,[20] and in an HMRC policy paper, Inheritance Tax: main residence nil-rate band and the existing nil-rate band.[21]

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.[22]

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 Government proposed that 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.[23]

3.2 2017: Government response

Government's intention to proceed

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.[24] A final impact assessment was also published.[25]

The then Justice Minister, Sir Oliver Heald, provided further information in an accompanying written Ministerial statement.[26]

---

18 Ibid, paragraphs 27 to 30
19 HC Deb 8 July 2015 cc330-1. See also Budget 2015, HC 264, July 2015 para 1.217-21
20 SN00573, 5 July 2019
21 Updated 12 June 2017
22 Ministry of Justice, Court Fees Consultation on proposals to reform fees for grants of probate, Cm 9195, February 2016, paragraphs 37-39
23 Ministry of Justice, Court Fees Consultation on proposals to reform fees for grants of probate, Cm 9195, February 2016, paragraphs 40-48
24 The Government response to consultation on proposals to reform fees for grants of probate, Cm 9426, February 2017
25 IA No: MoJ010/2016, 24 February 2017
26 HCWS501 [on Justice update], 24 February 2017

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.[27]

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: [28]

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

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.[29]

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

---

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

28 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

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

3.3 The draft Non-Contentious Probate Fees Order 2017

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.[30]

The 2017 draft Order was subsequently withdrawn.

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.[31]

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

> 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 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:

---

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

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

> 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 2017 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**.[32]

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 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

[32] 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

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:

> 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.[33] 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 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

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

> 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 Committee considered that the proposed 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".

The Joint 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 to statements made by the Minister in the House of Commons. The Committee noted that nothing appeared to have been said about probate fees:

> 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.

Reaction to the 2017 proposals

Many of the respondents to the consultation published their responses online. The Law Society[34] and the Bar Council[35] were among those critical of the Government's approach.

3.4 2018: Revised proposals

Government announcement

On 5 November 2018, Lucy Frazer, who was then a junior Justice Minister, announced revised proposals.[36] She said that a new statutory instrument had been laid before Parliament to implement a new, banded structure of fees for a grant of probate. The new proposed fees were lower than those proposed in 2017.

The junior Minister set out the purpose of charging fees:

---

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

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

36 HCWS1066 [Justice Update], 5 November 2018

> 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 never be more than 0.5% of the value of the estate. The Government still intended 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 unaffordable, and that the Government would publish a guidance document on how to pay.

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 was also published. The 2018 draft Order required the formal approval of both Houses of Parliament to become law.

The 2018 draft Order was intended to 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 have:

- increased the estate threshold below which no fee for an application for a grant of probate would be payable from £5,000 to £50,000;
- introduced 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 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;[37]
- removed 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 was to apply to England and Wales only.

The Government estimated 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.[38]

How did the fees proposed in 2018 differ from those proposed in 2017?

The following table sets out how the fees proposed in 2018 differed 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

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),[39] to the special attention of the

37 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"

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

39 SI 2018/1137

House, on the ground that they gave rise to issues of public policy likely to be of interest to the House.[40]

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.

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 executors for estates subject to a fee would pay £750 or less, which, it said, was "somewhere above three times the cost of the service". For

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

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, the Committee considered that, by lifting the point at which fees became 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.

Joint Committee on Statutory Instruments

The Joint Committee on Statutory Instruments also drew special attention to the 2018 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**.[41]

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.

---

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

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 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.

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.[42]

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 2017 draft 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.[43]

---

42 HL Deb 18 December 2018 c1722
43 HL Deb 18 December 2018 c1723

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. [44]

Peers spoke both for and against the Government's proposals.[45]

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." [46]

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". [47]

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

44 HL Deb 18 December 2018 c1725
45 HL Deb 18 December 2018 cc1722-52
46 HL Deb 18 December 2018 c1726
47 HL Deb 18 December 2018 c1728

> 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.[48]

Following debate, the amendment to decline to approve the 2018 draft Order was defeated by 187 votes to 90.

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.[49]

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.[50]

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."[51]

Motion to approve 2018 draft Order agreed as amended

The original motion, as amended, was agreed to.[52]

House of Commons Delegated Legislation Committee debate

The 2018 draft Order was considered by the 14th Delegated Legislation Committee on 7 February 2019.[53]

The then Junior Justice Minister, Lucy Frazer, reiterated that the draft Order would implement "a new, more progressive banded

48 HL Deb 18 December 2018 c1747
49 HL Deb 18 December 2018 cc1730-31
50 HL Deb 18 December 2018 cc1731
51 HL Deb 18 December 2018 cc1749
52 HL Deb 18 December 2018 cc1722-52
53 Fourteenth Delegated Legislation Committee, Draft Non-Contentious Probate (Fees) Order 2018, 7 February 2019

structure of fees for the grant of representation", and said that it would come into force in April.

Susan Elan Jones (Labour) raised the "serious concerns" of the voluntary sector and the cost of the proposed fees to charities.[54] Lucy Frazer said that the Order would not affect the amount paid out to charities when there was a fixed bequest rather than a percentage.

Catherine West (Labour) queried whether the issue should have had fuller debate, "in the main Chamber and in Government time". Lucy Frazer replied: "We have the power to pass the legislation by way of statutory instrument, and that is how we are doing so".[55]

Lucy Frazer addressed concerns expressed by the Joint Committee on Statutory Instruments and the House of Lords Secondary Legislation Scrutiny Committee, disagreeing with their conclusions:

> The new fees come under the category of "enhanced" fees. As Members are aware, Parliament has expressly given power to the Lord Chancellor to set certain court and tribunal fees above the cost of providing the service, under section 180 of the 2014 Act. The Act gives the Lord Chancellor the explicit authority to impose enhanced fees in order to
>
> "prescribe a fee of an amount which is intended to exceed the cost of anything in respect of which the fee is charged."
>
> That is what the draft order seeks to do.
>
> In doing so, the Lord Chancellor must have regard to, among other factors, the financial position of the courts and tribunals for which he or she is responsible, including, in particular, any costs incurred by those courts and tribunals that are not met by the existing fee income. The Act is also clear that any income from the fees must be used to finance an efficient and effective system of courts and tribunals. Those provisions clearly demonstrate Parliament's intention that the Lord Chancellor should be able to set fees above cost in one part of the system in order to subsidise other parts, in order to maintain effective operation of the system as a whole.
>
> The JCSI went on to argue that the basic premise of the fee is that it should be directly related to the cost of the service. We do not accept that. The specific legislative provision in section 180 of the 2014 Act breaks the link between the cost of the service and the fee that may be charged. That was clearly the intention of Parliament. The proposals in the draft order are consistent with the primary power and with the assurances given to Parliament when the Bill was considered. This is not the first time the Government have sought to introduce enhanced fees, or fees that relate to the value of the issues at stake—it has been done for certain civil money claims, for example. We therefore do not consider the draft order to be an unexpected use of the section 180 power.
>
> (…)

54 Fourteenth Delegated Legislation Committee, Draft Non-Contentious Probate (Fees) Order 2018, 7 February 2019 c4

55 Fourteenth Delegated Legislation Committee, Draft Non-Contentious Probate (Fees) Order 2018, 7 February 2019 c4

> The SLSC also suggested that, as a result of the anticipated reduction in running costs following reform of the probate service, the fees are disproportionate. We disagree, as the fee is not tied to the cost to the service under the enhanced fee powers.

Lucy Frazer said that the Government was clear that there would be an application fee for a specific purpose, distinct from general taxation:

> What we are proposing is an enhanced fee, not a tax. It is not charged by the Treasury and will not be collected as general taxation; it will be ring-fenced for the courts. In fact, we are raising this money because it is our obligation to ensure that we have a fair and efficient Courts Service. …We have identified this measure as suitable to ensure that our Courts Service is properly funded, and we think it is fair and proportionate, which is why we are bringing it forward.[56]

The junior Minister considered that the fees would never be unaffordable and set out how executors might arrange payment. She confirmed that the Government would publish guidance, before any fees were changed, on ways to pay probate fees, "outlining all the options for financial support more clearly to those who are applying".

Lucy Frazer said that probate fees would not necessarily be paid on shared assets:

> On shared assets, it is interesting that couples—whether married, in a civil partnership or otherwise—are free to choose how to hold their property. Paying probate fees on property held by couples as joint tenants—the most common form of property ownership between couples—would not be required.[57]

The then Shadow Justice Minister, Gloria De Piero, spoke of "fierce opposition to these proposed changes, from legal experts, charities and legislative bodies".[58] She said that the proposals were "clearly disproportionate and excessive, but they also make a mockery of the long-standing principle that fees for a public service should recover the cost of providing it, and no more". The Shadow Minister referred to the Law Society description of the proposals as "a tax on grieving families".

Gloria De Piero also raised the position of charities:

> The charity sector has also warned of losses … to the tune of nearly £10 million a year. Cancer Research UK has cautioned that the stealth tax will diminish donations made in wills.[59]

On division, the Committee resolved that it had considered the 2018 draft Order by 9 votes to 8.

ONS classification of new fee structure

The Office for Budget Responsibility's Economic and fiscal outlook, published in March 2019, stated that the Treasury expected the Office

---

56 Fourteenth Delegated Legislation Committee, Draft Non-Contentious Probate (Fees) Order 2018, 7 February 2019 c10

57 Ibid

58 Fourteenth Delegated Legislation Committee, Draft Non-Contentious Probate (Fees) Order 2018, 7 February 2019 cc7-8

59 Fourteenth Delegated Legislation Committee, Draft Non-Contentious Probate (Fees) Order 2018, 7 February 2019 c9

for National Statistics (ONS) to classify the new fee structure as a tax in the National Accounts:

> **Probate fees**: the Government has confirmed its plans to change the fees payable for an application for a grant of probate. The new rates range between £250 and £6,000 depending on the value of the estate, and come into effect in April. The Treasury expects the ONS to classify the new structure – with its 2,700 per cent increase in cost for estates valued over £2 million – as a tax in the National Accounts. The new probate fee structure is expected to generate £155 million a year in additional tax receipts...[60]

A spokesperson for the Ministry of Justice was subsequently reported to have reiterated its stance that the new fee structure was not a tax, adding that any decision by the ONS to define it as such would be for accounting purposes only. The spokesperson was reported to have said, 'The income raised from probate fees will go towards funding a more efficient and effective courts and tribunals system'.[61]

In March 2017, the Ministry of Justice had made the same point in its response to the Joint Committee on Statutory Instruments:

> Regardless of the accounting treatment, it does not change our view that these are fees charged in return for a specific service – a grant of probate – under a wide power explicitly designed to allow for cross-subsidisation in the court and tribunal system. We do not consider that the classification for accounting purposes has any bearing on the interpretation of this legislative provision and we do not see any reason in principle for reading down the power in such a way as to preclude its exercise in this manner.[62]

The Joint Committee said that, while it agreed that the ONS classification was not relevant to the question of whether there was power to make the proposed Order, it considered that "this reference in Managing Public Money is a further indication that the Lord Chancellor is proposing to use the power in a surprising way".[63]

---

60 At p165

61 Max Walters, "New probate controversy as MoJ dismisses 'tax' definition", Law Society Gazette, 14 March 2019

62 Joint Committee on Statutory Instruments Twenty-sixth Report of Session 2016–17, HL 152 HC 93-xxvi, 31 March 2017, Appendix 1, paragraph 10

63 Joint Committee on Statutory Instruments Twenty-sixth Report of Session 2016–17, HL 152 HC 93-xxvi, 31 March 2017, paragraph 1.20

BRIEFING PAPER
Number 07929
23 October 2019

About the Library

The House of Commons Library research service provides MPs and their staff with the impartial briefing and evidence base they need to do their work in scrutinising Government, proposing legislation, and supporting constituents.

As well as providing MPs with a confidential service we publish open briefing papers, which are available on the Parliament website.

Every effort is made to ensure that the information contained in these publicly available research briefings is correct at the time of publication. Readers should be aware however that briefings are not necessarily updated or otherwise amended to reflect subsequent changes.

If you have any comments on our briefings please email papers@parliament.uk. Authors are available to discuss the content of this briefing only with Members and their staff.

If you have any general questions about the work of the House of Commons you can email hcenquiries@parliament.uk.

Disclaimer