

## Consultation on proposals to reform fees for grants of probate

Last month Shailesh Vara, Parliamentary Under-Secretary of State at the Ministry of Justice, launched a consultation on proposals to reform fees for grants of probate – see <https://consult.justice.gov.uk/digital-communications/fee-proposals-for-grants-of-probate>

Responses to the consultation are required by 1 April 2016, which is shorter than the normal consultation period.

There are six questions we are asked to answer as part of the review. My answers are:

1. Do you agree that it would be fairer to charge a fee that is proportionate to the value of the estate compared with charging a fixed fee for all applications for a Grant of Probate? **No. For the reasons are given below.**
2. Do you agree with the proposal to increase the threshold from £5,000 to £50,000? **Yes, particularly if the Small Estates limit was similarly increased.**
3. Do you agree with the government's proposals to charge fees for probate applications as set out in Table 1? **No. For the reasons given below.**
4. Are there other ways that executors should be supported to make payment of the fee and/or examples of banks or funding institutions who regularly assist with finances before the Grant of Probate? **A Government loan system with fixed rates for a limited period.**
5. Do you agree with the proposal to remove Grant of Probate fees from the fee remissions scheme? **No, as there are a number of cases where it will remain essential for justice to be done.**
6. We would welcome views on our assessment of the impacts of the proposals set out in Chapter 1 on those with protected characteristics. We would in particular welcome any data or evidence which would help support these views. **I do not have access to the kind of data you seek.**

There are a number of misconceptions contained in the report:

1. **General** - No mention is made of other Grants only Grants of Probate when more people die intestate than testate each year. Is something different proposed for intestate estates and other Grants of Representation?
2. **Introduction** - The value of an estate on death does not affect the amount of work involved at the Probate Registry for obtaining a Grant of Representation.

3. **Chapter 1 – Background par 9** - The way Probate fees are calculated is based on the value of the estate before inheritance tax is calculated – i.e. before an exemption or relief is applied.
4. **Chapter 1 – Background par 10** - Whilst some small estates can be administered without a Grant of Representation no mention is made of increasing the Small Estates limit from £5,000 when it is already £10,000 in Northern Ireland and £36,000 in Scotland. The limit has not been increased for many years in England & Wales. Why not increase the Small Estate limit in England & Wales?
5. **Chapter 1 – Background par 11** - Only assets held as joint tenants which pass by survivorship (and not through the deceased's estate on death) are not included in the value of the estate for the purposes of calculating the probate fees. Thus an estate passing between husband and wife whilst exempt from IHT will still be subject to the proposed fees unless assets are held as joint tenants. This can result in high fees across the two estates on assets passing under their respective estates or a very high fee on the second death for estates where the assets are held as joint tenants. In the South-East where there are high property prices it will be very easy to reach the top rate of £20,000 for estate of £2million or more in value. With second marriages it is more common to have tenants in common ownership of the marital home and potential trusts included in the Wills of the parties with the result that you could be asking a bereaved widow/er to pay significant probate fees on the first death and to ask the bereaved family to pay more and probably higher probate fees on the second death.
6. **Chapter 1 – What does the executor have to pay? Par 17** - Executors can face difficulties with the payment of fees in quite a number of cases, for example:
  - a. In rural areas where farmers are often asset rich but cash poor this proposal could incur severe financial difficulties with little or no cash available to meet the fees where the farm is inherited by the family running it who cannot sell land to pay the fee until after obtaining a Grant of Representation and who may not be able to extend overdrafts further at the Bank or find the cash flow in the business.
  - b. Unmarried family members, such as sisters, living in the family home will not benefit from the new residential nil rate band from 6 April 2017 (as they do not have lineal descendants to inherit their qualifying property interests) and yet face significant probate fees on each death where their respective half shares in the property will undoubtedly go to more remote family members, friends or charity.
  - c. If the deceased died of a fatal accident then to pursue a claim a Grant is required. The right to compensation will be valued in the estate making it almost certain that the value of the estate will exceed the £2million threshold so incurring a fee of £20,000. Added to which the Court Issue fee for the compensation claim will be £10,000. Who will be able to foot that outlay as Executor and have it outstanding for many months?

7. **Chapter 1 – Accessing the bank accounts of the deceased and loans– par 18 - 19 -**  
 The grant of Representation cannot be obtained in taxable estates before any Inheritance Tax due has been paid. It has grown difficult, during the past 8 years, to obtain loans to pay the tax from banks if the deceased had insufficient liquid cash assets held in the accounts where the institution agreed that frozen funds on death could be paid directly to HMRC for this purpose. Solicitors can no longer provide ‘banking services’ to clients (as part of anti-money laundering protections). Thus if family members are not able to lend the money the MoJ appears to be expecting solicitors to fund it as a disbursement. Whilst solicitors may well be acting in the larger taxable estates it is unlikely that many firms would be able to act in this way given specialist firms would have many estates underway at the same time and cash flow would not permit this kind of outlay even if our accounting rules did so. What about the growing number of cases where the family decides to act for themselves? Even non-taxable cases in Winchester with an average house (average house price at December 2015 was £467,738 according to [www.home.co.uk](http://www.home.co.uk)) could face a new fee of £1,000.
8. **Chapter 1 – The probate service and our plans for reform -** The probate service has been under review since the late 1990s. Following the last review fees were reduced from a scale to a single low fee of £45 and almost immediately service levels declined, registrars left or retired and were not replaced such that we have now less than 3 full-time equivalents covering 30 registries and sub-registries around the country. Against this backdrop practitioners have worked hard alongside different Judges tasked with updating the Non-Contentious Probate Rules to enable online completion of the applications over a period of more than three years but still we have no final wording nor final processes agreed. The national user committee which was set up following the first review has not met for over 12 months much to the frustration of professional bodies whose members served on the committee. What guarantee is there that any of the returns from the proposed hike in fees will be used to improve the service levels in the Probate Registry?
9. **Chapter 1 – Previous fee schemes -** the proposal to return to scale fees is suggested as a fair development when in paragraph 27 you indicate that the increase in the flat fee to £155/215 has “reached full cost recovery of the Probate Service”. The increase from the previous flat fee only in 2014 already covers the operational cost of the Probate Service so why is it necessary for the bereaved to bear what amounts to a tax on death over and above inheritance tax to cover the costs of the under-funded remaining Courts and Tribunal services? Flat fees do produce unfairness unless there are ways to pay or more.
10. Progressive fee scales, in the context of existing fees which already meet the costs of running the Probate Service, are simply a tax not a fee and should be announced as such or included in general taxation. We do not pay to use the NHS; only for prescriptions so why are we paying in addition to general taxation a sum other than a fee to cover the cost of the service? Why should the bereaved of the wealthy subsidise the Courts and Tribunal service, over and above the Probate Service, other than through general taxation?

11. **Proposed fee scheme** - The references to Anti-social Behaviour Crime & Policing Act 2014 seems more than a little irrelevant in the context of Probate Services. In paragraph 33 it is said that the Lord Chancellor is required to have regard to access to the courts and competitiveness of the legal services market when considering setting enhanced fees to help finance an efficient and effective system of courts and tribunals. Access to the probate service is not denied by the fee set because access to the probate service is compulsory in cases where a Grant of Representation is required. It is not a choice and that should be remembered.
12. **Chapter 1 Probate Bands** – whilst having bands does enable the lower value estates to be exonerated from finding fees in order to administer what might be a small amount of assets nevertheless the need for taking out a Grant could be removed if the Small Estate limit in England and Wales were increased in line with the proposal. Over 40% of estate will see the probate fee increase from £155/215 to between £300 and £20,000. It is not clear to me why the bereaved should be obliged to pay more than the service costs to perform the administrative act of producing a Grant of Representation as a subsidy for users of other Courts and Tribunals.
13. **Chapter 1 Interplay with the government’s inheritance tax proposals** Did the author of the report ask for guidance on the government’s residential nil rate band (RNRB) proposals from HMRC? I suspect not as this section demonstrates a severe lack of understanding of the relief. It only applies if the taper threshold is not breached so on second deaths when all the estate is in the hands of the surviving spouse/civil partner the combined estate could easily be more than the taper threshold (£2million) and therefore be ineligible for the RNRB and be faced with a probate fee of £20,000. Similarly, it is simply not true that the smaller estate for probate fee purposes will be more likely to benefit from the RNRB – it depends on deceased having a qualifying property interest which passes to lineal descendants.
14. Thus to say that a single person’s estate worth just over £500,000 could see its IHT bill fall from £70,000 to zero while their probate fee would rise from £215 to £4,000 is spurious. A single person may have children but often they don’t so there would be no entitlement to the RNRB and their IHT position will not change from £70,000 and the probate fee will increase by 1,760%.
15. Similarly, in paragraph 39 it is suggested a surviving spouse’s estate worth more than £2 million could see its inheritance tax bill fall from £540,000 to £400,000 while their probate fee would rise to £20,000. Whilst the latter is true the former is not necessarily true because of the taper threshold at the relevant time. I doubt many bereaved families will believe an increase in probate fees of over 9,000% but possibly only a modest fall in IHT from £540,000 to £470,000 (assuming the RNRB on the first spouse’s death is available for carry forward; but not RNRB on the second death because of the taper threshold).

16. Please remember there are plenty of married couples who do not have lineal descendants and so will not qualify for either the RNRB nor any carry forward RNRB and so no extra IHT allowances.
17. **Chapter 1 – Help with fees** It is of course erroneous to say that the executor is never personally liable for the probate fee since in family cases the executor is usually the next of kin – such as a surviving spouse or civil partner so the more you increase probate fees the less is in the estate of the deceased for them to live on. Whilst the fee is recoverable from the estate the estate is then depleted by the fee. If borrowing is the only way that the fee can be met (and that might be particularly true in high value property cases) then there is a cost to borrowing funds commercially which is borne ultimately by the residuary beneficiary. In the common case this may be the surviving spouse or civil partner or charities who then receive less than they would otherwise have done. Commercial borrowing often requires an arrangement fee as well as interest.
18. Asset rich but cash poor person may still need the Help with Fees scheme particularly where their home might otherwise have to be sold to meet the borrowing (surviving sister living in the property) or their business might be adversely affected by having to increase borrowing or having to sell assets in the business – such as farmers.
19. **Chapter 2 – Equalities Duties** - surely the proposals are indeed discriminatory as women are said on average to live longer than men and therefore are more likely to face higher probate fees particularly where the parties were not married or civil partners.
20. The proposals would make it more likely that elderly unmarried women or widows/surviving civil partners where assets were either not co-owned or if co-owned held as tenants in common (e.g. on second relationships) would face having to meet higher probate fees which would reduce the estate and would have to incur the costs of applying for remission of the fee to the Court.
21. It is not clear how the proposals present a proportionate means of protecting access to justice by funding the rest of the Courts and Tribunals service through bereaved people paying a higher fee rather than wealthy persons paying higher general taxation.

The consultation has not invited ideas as to how the Probate Service might be improved without further increase in the current fee structure. May I suggest that the earlier reviews be considered and the consolidation of the probate registries into a smaller number registries might help reduce the overhead cost. This would potentially release funds to invest in properly trained staff, appropriate IT systems and supervision by a few more registrars. This will aid the bringing of the service into the modern legal services world. It would also make it comparable to the Land Registry where the maximum fees payable are a fraction of what is proposed here. Such changes may reduce the impact of this compulsory

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service at a time of bereavement on families who need swift and accurate help to administer their loved ones estate at a reasonable cost.