



## **CJC response to Consultation on Proposals to reform fees for grants of probate**

**April 2016**

The CJC has previously expressed concern about the aggressive fees policy that has been pursued in relation to using courts in England and Wales, and the current proposals mark the fifth set of increase in less than three years.

The Council remains very concerned at the impact of higher court fees on access to justice, and the use of enhanced fees to charge sums that greatly outstrip the administrative costs for those types of case.

The current proposals are confined to non-contentious probate application fees, and the CJC is responding despite these cases being lodged within the Family Division, as probate disputes are commonly contested in civil courts. It is something of an accident of history that non-contentious probate is administered from the Family Division. All contested probate (i.e. disputes about probate) takes place in the Chancery Division or in the County Court.

Probate fees were raised in 2014, but the current proposals seek to dramatically increase fees further. There is hardly any basis for an increase to reflect the investment in technology and user friendly online systems (although ironically online application fees are 10% lower in the civil courts) because the end product will be completely automated, requiring no expensive routine human intervention at all. The increases suggested are excessive. These include increases of £215 to £4000 for estates valued at £0.5-1m and up to £20,000 for estates valued above £2m (a 9,202% increase). The equivalent sum payable in Scotland will be £230 for estates valued above £10,000.

This is an area in which the state has a monopoly for around half<sup>1</sup> of the deaths in England and Wales – in those cases a grant of probate is required to enable an executor or personal representative to have authority to deal with the estate of a deceased person.

The CJC considers this set of proposals exploit those obliged to follow a formal legal course – the normal considerations about people having a choice to litigate or not do not apply. The proposal to remove any entitlement to fee remissions adds a further negative dimension, but the level of fees proposed is simply excessive.

Probate is an essential part of the fabric of the rule of law. For hundreds of years the requirement to obtain probate has ensured that any challenge to the transmission of

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<sup>1</sup> The consultation paper gives examples of exceptions to those requiring probate, see also: [https://www.citizensadvice.org.uk/relationships/death-and-wills/dealing-with-the-financial-affairs-of-someone-who-has-died/#do\\_you\\_always\\_need\\_probate\\_or\\_letters\\_of\\_administration](https://www.citizensadvice.org.uk/relationships/death-and-wills/dealing-with-the-financial-affairs-of-someone-who-has-died/#do_you_always_need_probate_or_letters_of_administration)

property from someone who has died to those claiming to be entitled to it can be subjected to the scrutiny of the court, which is adept to identify undue influence, forgery, wills of which a testator lacked understanding and all other kinds of wrongful interference with the lawful passing of the property to its rightful owners. Further the grant of probate or letters of administration imposes important fiduciary duties on the recipients, to administer the estate in accordance with law.

The effect of placing grossly disproportionate charges on those using that process will detract from that aspect of the rule of law. In particular it will encourage people to transfer the legal title to their property to their successors prior to death using various imaginative avoidance techniques, so as to reduce the amount of their property requiring probate to a minimum, or even to avoid the need for probate at all.

The Chairman of the CJC, Lord Dyson, was not consulted in the preparation of this response – as a member of the Judicial Executive Board he endorsed the response sent on its behalf by the President of the Family Division.

### **Answers to individual consultation paper questions follow**

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

In principle we see some force in the argument that fees should be linked to some degree to the value of the estate. While the administrative process in the court will be identical, this would bring it in line with other court fees being related to the value of money claims. That said, as the proposed fees relate to non-contentious probate, where the court is not involved in dispute resolution, the argument on linkage falls away.

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

The superficially attractive feature of these proposals is raising the threshold tenfold, which the Government estimates would lead to an additional 30,000 estates not having to pay a probate fee. But probate is only needed where the transmission of some valuable property is at stake.

In an era of full and enhanced cost recovery, and the oft stated need to maximise fee income it does appear an odd proposal for the Government to be waiving fee income of around £6,450,000 per annum (assuming the estimate is correct that an extra 30,000 people would be seeking grants of probate for estates of less than £50,000).

By retaining the threshold at £5000 more modest increases would be possible across the range of estate values.

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

No – the proposed fees for what is a very basic administrative and soon automated online procedure are excessive. The highest fee proposed is double what the cap for civil multi-million value money claims is, and the Government decided in December 2015 not to increase that cap to £20,000. Property prices, particularly in London, will

inflate the value of many estates leaving successors to find large sums for fees – the average property price in London in December 2015<sup>2</sup> was £530,000, equating to a £4000 fee.

There must be a concern that where the value of an estate is tied up heavily in a property there will be little cash in a deceased person's account available to be released to pay for the court fee. Executors or heirs may need to borrow against their own assets to meet the fee costs.

Court users are, it appears, being asked to pay higher fees before the actual improvements in technology allowing for an online process (due to commence in April 2017) have become operational.

With such high fees some people will plan ahead, as happens with inheritance tax, and take action to avoid their successors being faced with large probate fees. One example would be taking out joint ownership of property as beneficial joint tenants.

Further, many will regard fees of this scale as representing a form of tax, on top of Inheritance Tax.

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

We do not hold any information on this. One important component of the implementation of the reforms must be to support executors by providing them with as much information on the process and their commitments as possible as part of the online process – for example with downloadable, plain language, guides.

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

No. We do not agree with a blanket approach to making fee remissions unavailable for any form of court application. Although the point is made about the existence of the Lord Chancellor's discretionary power to exceptionally grant remissions, this should be reserved for the very small number of exceptional qualifying cases. Ending the availability of remissions may prompt more applications and generate more administrative costs.

We fear there will be other cases where people may qualify quite properly for a remission on what would be an extremely large fee for them to bear. The period between the fee payment and the estate's finances becoming available may be difficult for people to manage, perhaps having to seek bridging or other loans set against their own assets.

The CJC is also very worried about the precedent of fee remissions being made unavailable for any specific form of court action.

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<sup>2</sup> Land Registry House price Index (January 2016)

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

As the consultation paper's equality statement notes, there is no readily available data on the social profile of probate applicants and we are unable to comment on the potential impact.