

EXPLANATORY MEMORANDUM TO

THE NON-CONTENTIOUS PROBATE (AMENDMENT) RULES 2016

2016 No. 972 (L. 17)

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 The instrument amends the Non-Contentious Probate Rules 1987 (“NCPR”) to create a new online application procedure for use on a pilot basis by personal applicants (that is people who do not apply through a solicitor or probate practitioner) to obtain grants of probate or letters of administration in respect of the estates of deceased persons (“grants of representation”). As the procedure is being introduced as part of the development of a prototype online service it will be restricted to personal applicants who are invited to take part in the pilot scheme by a probate registry. The applicants will be required to comply with the instructions of the registry when completing the application.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 The purpose of the NCPR, which are made under section 127 of the Senior Courts Act 1981, is to regulate and prescribe the practice and procedure of the High Court with respect to non-contentious probate business. The NCPR require applications for grants of representation to be supported by an oath. It is therefore not possible to make online applications for grants of representation at present. The online applications made within the proposed pilot project will lead to grants of representation and will be verified by a statement of truth rather than an oath. These applications would therefore not be authorised by the NCPR.
- 4.2 Such a pilot project would, if the rules were Family Procedure Rules or Civil Procedure Rules, be made by a practice direction. Although non-contentious probate is family business, the power to make Family Procedure Rules does not apply (by virtue of section 76(1) of the Courts Act 2003), and the powers to make the NCPR (unlike those to make Family Procedure Rules) do not provide that the NCPR may, instead of making provision about a matter, refer to provision made or to be made about that the relevant matter by practice directions. The proposed applications, and

the necessary modifications of the rules, therefore cannot be provided for by practice directions. The NCPR have therefore to be amended to permit the pilot project for online applications for grants of representation by personal applicants to take place.

- 4.3 The instrument only authorises applications made by the invitation of a probate registry. A further amendment to the NCPR will be necessary to make an online process available to all personal applicants.
- 4.4 Further amendments will be made to the NCPR as other online applications are developed and implemented.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is England and Wales only.
- 5.2 The territorial application of this instrument is England and Wales only.

6. European Convention on Human Rights

- 6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

- 7.1 Probate is the process in England and Wales by which the High Court grants or confirms the authority of a personal representative (an executor if the deceased left a valid will or an administrator if the estate died intestate) to administer the estate of a deceased person. The process is governed by provisions of the Senior Courts Act 1981 and the NCPR (which are rules of court made under that Act), and is administered by the Probate Service (part of Her Majesty's Courts and Tribunals Service). The Probate Service is committed to introducing online application services designed to increase the efficiency of its services, whilst meeting the needs of applicants and improving its customer service. The instrument makes the necessary amendments to the NCPR to permit online applications to be made by selected applicants. This is intended as a pilot scheme to enable the full development of an online application process for personal applicants seeking a grant of representation.
- 7.2 The intention is that ultimately all probate applications will be able to be made online, but the online procedure authorised by the instrument is restricted to applicants invited to apply by a registry because the online application procedure is at an early stage of development. Applicants will therefore be limited to applicants whose circumstances are appropriate for the stage of development of the information technology. It is expected that initially about two applicants per day with relatively simple circumstances will be invited to take part with numbers and complexity of circumstances increasing as experience is gained and the capacity of the software develops. Applicants are expected to be potential personal applicants who make enquiries about probate to the Probate Service-HMRC probate helpline and are willing to take part.
- 7.3 Invitees who agree to use the online application process will be invited to complete an application form online. If the applicant decides to use the online process, he or she will complete the online application form in accordance with the instructions of the Probate Service, which will ask for the information necessary to determine whether

the applicant is entitled to a grant. The applicant will verify the content of the application form by a statement of truth – and the form will warn the applicant of the possible consequences of a false statement. The Probate Service will also instruct the applicant how to send it supporting documents, such as the original last will and testament, any necessary further evidence and information, and the fee payable.

- 7.4 As a consequence of the application being made online without an oath some of the requirements applied to other applications have to be modified. First, instead of being able to apply to any registry the application must be made to the registry issuing the invitation. Secondly, provisions requiring oaths and affidavits to be sworn before an authorised officer or as directed, provisions prohibiting the giving of legal advice to a personal applicant by officers of the registry and provisions restricting the role of the officers to the embodying of the applicant's instructions in a grant, will be disapplied. Thirdly, as the online application form must be completed in accordance with the instructions of the relevant registry, both the requirements to produce the death certificate and such other evidence of the death as the district judge or registrar may require and the requirement to produce such information as is necessary to enable the registry to prepare the papers leading to the grant will be redundant. Finally, as there will be no oath in support of the application, only the applicant will be required to mark the will where an affidavit is required in place of the applicant and the person administering the oath; and, instead of having to state in the oath that notice of the application has been given to any executors who have not applied, the online applicant will be required to confirm that notice in accordance with the instructions issued by the registry.

Consolidation

- 7.5 As the amendments made to the NCPR by the instrument are only expected to apply until April 2017, when they will be replaced by more permanent provisions, the department does not propose to consolidate the NCPR as amended by the instrument.

8. Consultation outcome

- 8.1 There has not been any formal consultation by the department on the introduction of the proposed prototype for online probate services authorised by the instrument. The introduction of online services was, however, proposed by the President of the Family Division's Working Group on the NCPR in its 2013 consultation paper and recommended by it to the then Lord Chancellor in 2014. The recommendations of the Working Group, which if implemented would result in the replacement of the NCPR by new rules, are under consideration by the department.

9. Guidance

- 9.1 The department does not intend to publish any general guidance in relation to the new rules as the new procedure will be limited to invited applicants who will be guided through the process by the instructions issued by the Probate Service.

10. Impact

- 10.1 There is no impact on business, charities or voluntary bodies.
- 10.2 The impact on the public sector is very small as the online application service authorised by the instrument will involve small numbers of people.

- 10.3 An Impact Assessment has not been prepared for this instrument as its impact is expected to be very small and well below the threshold of £1 million per annum at which an assessment has to be prepared. The expected costs of the pilot project will be managed within the overall development budget of HMCTS. The expected benefits (if any) in relation to the applications going through the pilot project will be small or negative as the numbers will be limited and input into the development process relatively significant for both the Probate Service and applicants.
- 10.4 Ultimately, the development of a successful online application service for personal applicants could make a considerable difference to applicants, professional advisers and the Probate Service. For personal applicants online services should be easier to use than paper forms and improve the quality of the experience for the applicant. The online process should, for example, only produce correct applications, errors being corrected as they occur during the completion of the online application form. Going online will also remove any need for the applicant to attend physically at a probate registry or the premises of someone able to administer an oath. For professionals, online services for personal applicants may result in a reduction of work but the intention is to develop online services for professionals as well, which will provide new opportunities. For the Probate Service online services should increase efficiency. A significant part of the Probate Service's role in connection with a personal application is to prepare the draft of the oath to be sworn by the personal applicant in support of his or her application, providing an online applications and statement of truth should be less resource intensive. However, the instrument only authorises the use of an online application process by invited persons and is only intended to apply for the duration of the pilot of the prototype service. The number of applicants so authorised is expected to be small and the impact similarly limited. Further legislation will be necessary to authorise the use of online applications for all personal applicants. The department anticipates that an impact assessment will be prepared at that stage.

11. Regulating small business

- 11.1 The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

- 12.1 The instrument does not regulate business. There are no plans to monitor and review the instrument separately from the conduct of the proposed pilot project. The piloting of online probate applications authorised by the instrument is intended to run from 1 November 2016 to April 2017. Once the application process has been adequately developed the service is intended to be opened to all personal applicants. The monitoring and reviewing of the effect of the instrument will be an integral part of the pilot project. The success of the project will be measured by the success of the resulting online application service.

13. Contact

- 13.1 Paul Hughes at the Ministry of Justice Tel: 020 3 334 3198 or email: paul.hughes@justice.gsi.gov.uk can answer any queries regarding the instrument.