

EXPLANATORY MEMORANDUM TO
THE NON-CONTENTIOUS PROBATE FEES (AMENDMENT) ORDER 2021
2021 No. 1451 (L. 20)

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.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This Order amends the Non-Contentious Probate Fees Order 2004 (S.I. 2004/3120). It increases the fee payable on the application for a grant of probate to £273 for all applicants and deletes the personal application fee.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This instrument amounts to imposing fee increases above the rate of inflation because probate fees are currently set below cost level. This means that aligning the fee to the cost of providing the service will involve an increase above the rate of inflation.

4. Extent and Territorial Application

- 4.1 The territorial extent and application of this instrument is England and Wales.

5. European Convention on Human Rights

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

6. Legislative Context

- 6.1 The power to prescribe court fees which are the subject of this instrument is contained within s.92 of the Courts Act 2003 (c.39). Fees set under this power cannot be set above the cost of the underlying service (non-enhanced fees). Statutory instruments made under s.92 are subject to the negative procedure as per section 108 of the 2003 Act.
- 6.2 The fees for applications for a grant of probate are set out in the Non-Contentious Probate Fees Order 2004. Currently, non-professional users who submit a personal application pay a higher fee than professional probate users. Both the personal and professional application fee is currently set below the cost of service.
- 6.3 The instrument removes the fee for non-professional applicants to create a single consolidated fee for both professional and personal applications, and aligns the fee to the cost of providing the service.

7. Policy background

What is being done and why?

- 7.1 The Lord Chancellor has a statutory and constitutional duty to protect access to justice, and to ensure that the courts and tribunals can operate effectively and efficiently. The income received from court fees helps to fund the cost of running the courts and tribunals but currently meets less than half of that cost. In 2019/20, there was a net fee income of £724m against the £2bn running costs of Her Majesty's Courts and Tribunal Service (HMCTS), a significant gap that requires substantial public funding from the taxpayer. Fees are a source of income for the Ministry of Justice and probate fees have not been increased since 2014, despite costs growing for HMCTS to provide the service.
- 7.2 This instrument will help to contribute to the funding of the HMCTS by rationalising the current dual fee structure to a single fee for all users set at £273 to achieve a self-funded service.

Explanations

What did any law do before the changes to be made by this instrument?

- 7.3 The legislation governing probate fees was last amended in 2014 and specifies a dual fee structure which varies depending on the applicant. Professional probate practitioners pay a fee of £155, while non-professional applicants must pay an additional personal application fee of £60 (taking the total fee to £215). Both these fees are set below the cost of service.

Why is it being changed?

- 7.4 The rationale justifying a higher fee for non-professional applicants reflected the fact that, at the time, personal applications created more administrative work for the Probate Service compared to the processing of those received from professionals. This justification no longer applies, as the cost of providing the service is now similar regardless of who submits the application.
- 7.5 It is also the case that both fees currently generate less income than the cost of processing those applications. In 2018/19, the total cost of processing probate applications was £69.3 million. By contrast, the income from probate fees in this period was £46.8 million. In total, the shortfall was approximately £22.5 million in 2018/19. This effectively amounted to a public subsidy of the probate application process by the taxpayer.
- 7.6 The overarching policy objectives which underpin this instrument are:
- to bring the fee structure into alignment with HM Treasury's Managing Public Money principles, which set that the same fee should be charged for all users of the same service;
 - to set the fee at a level that recovers the cost of providing the service, which would better align with the standard approach to charging fees under Managing Public Money principles;
 - and to protect access to justice by ensuring that courts and tribunals are adequately resourced in accordance with the Lord Chancellor's statutory and constitutional duty, while also reducing the overall taxpayer subsidy to HMCTS.

What will it now do?

7.7 The Ministry of Justice estimates that the potential income generated by the fee increase is £23-25 million per annum, from 2022/23 onwards. This additional funding will be crucial in removing the public subsidy of the probate application process and in supporting HMCTS to run an effective and efficient justice system, ensuring access to justice for all.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 It is not intended that this instrument will consolidate any legislation.

10. Consultation outcome

10.1 Before making this Order, the Lord Chancellor has consulted those persons and bodies required by section 92(5) and (6) of the Courts Act 2003.

10.2 The Ministry of Justice conducted a consultation exercise between 8 July 2021 and 23 September 2021 and received a total of 24 responses to their published consultation paper and Impact Assessment. The majority of responses came from the legal sector, either individual firms or practitioners, or membership bodies representing a legal profession.

10.3 Respondents were split on the question of whether to maintain a discounted fee for applications from professional probate applicants. The main argument provided for maintaining a discounted fee related to the quality of the service provided by practitioners, especially for vulnerable applicants and for those with complex estates. It was argued that deterring individuals from seeking professional support with their probate application by removing the discount would lead to more errors in applications received by the probate service. Furthermore, several respondents claimed they were concerned about the proposed increase being unjustifiable in relation to the quality of service currently provided by HMCTS.

10.4 On the contrary, the majority of respondents to the consultation agreed with the general principle that probate application fees should be increased to cover the cost to HMCTS of providing the service.

10.5 The Ministry of Justice has carefully considered the concerns raised by stakeholders and has published a response to the consultation paper and accompanying Impact Assessment on 13 December which can be accessed via [Aligning the fees for grants of probate to cost recovery - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/aligning-the-fees-for-grants-of-probate-to-cost-recovery).

11. Guidance

11.1 Accompanying guidance setting out the changes introduced by this instrument will be made available by HMCTS from January 2022.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 A full Impact Assessment is submitted with this memorandum and published alongside the Explanatory Memorandum on the legislation.gov.uk website.

13. Regulating small business

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

14. Monitoring & review

14.1 The Ministry of Justice monitors the impact of changes to court fees in accordance with the Lord Chancellor's duty to ensure an efficient and effective courts system, as described in section 1 of the Courts Act 2003.

14.2 A statutory review clause is not included in this instrument and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, the Parliamentary Under Secretary of State at the Ministry of Justice, James Cartlidge MP has made the following statement: “In my view the provisions of the Non-Contentious Probate Fees (Amendment) Order 2021 have no net cost to business”.

15. Contact

15.1 Abdul Huson at the Ministry of Justice (email: Abdul.Huson@justice.gov.uk) and Nicoletta Capizzi (email: Nicoletta.Capizzi@justice.gov.uk) can be contacted with any queries regarding the instrument.

15.2 Joanna Otterburn and Stephanie Hack, Deputy Directors for Legal Support and Fees Policy, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

15.3 Minister James Cartlidge at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.