

**Ministry of Justice Consultation
Fee Proposals for Grants of Probate
Chancery Bar Association Response**

The Chancery Bar Association (“ChBA”) is one of the longest established Bar Associations and represents the interests of over 1,250 barristers. Its members handle the full breadth of Chancery work at all levels of seniority, both in London and throughout England and Wales and in cases overseas. It is recognized as a Specialist Bar Association. Full membership of the Association is restricted to those barristers whose practice consists primarily of Chancery work, but there are also academic and overseas members whose teaching, research or practice consists primarily of Chancery work.

The Chancery Bar Association (ChBA) has responded to the Ministry of Justice’s consultation on the Fee Proposals for Grants of Probate. This paper has been drawn up by a small working group, and takes into account the views expressed by those ChBA members who responded to a request for comments.

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? Please give reasons.

We do not express a view as to whether, in principle, it is ‘fairer’ to charge a proportionate fee or a fixed fee. We do note however that the cost of providing the service does not depend in any way on the value of the estate in question. There is no *a priori* justification for re-introducing a proportionate fee. We therefore consider that it is for the government to satisfy itself that there is a political justification for spreading the cost in that way.

However, we note that the consultation paper does not in fact propose a fee that is *proportionate* to the value of the estate at all, but one that becomes increasing disproportionate to the value of the estate. In contrast to the system in force between 1981 and 1999, which simply charged a percentage, it runs from 0% of the value of the estate to 1%.

Question 2: Do you agree with the proposal to increase the threshold above which the fee is payable from £5,000 to £50,000? Please give reasons.

No. It is hard to see the rationale for a proposal which intends to increase the overall fee income by a factor of 6, yet exempts not a minority but the majority of applications from that fee. Were the fee truly proportionate, such a threshold would be unnecessary.

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.

1. Probate fees were increased dramatically less than two years ago (<https://consult.justice.gov.uk/digital-communications/court-fees-proposals-for-reform/results/cm8845-court-fees-proposals-for-reform.pdf>). No change of circumstance justifying a further review the fees after so short a period has been made out.

2. The fees are intended to raise revenue with which to fund the rest of HMCTS. It is surprising, to say the least, that the consultation paper does not ask the most obvious question arising out of the proposal: namely whether it is fair for the users of the Probate Registry to be asked to raise an additional £250,000 towards the costs of the HMCTS generally, when the Probate Registry itself is already entirely self-funding.
3. The Probate Registry has little or nothing to do with the rest of HMCTS. Those who apply for probate do so out of necessity, not out of choice. There is no justification for putting this burden on the bereaved – why should the cost of funding the criminal courts, for example, fall disproportionately on their shoulders?
4. Raising additional revenue by this means is simply a tax, akin to inheritance tax. Taxation is properly the province of the Treasury, and subject to the appropriate Parliamentary procedures. It should not be done by statutory instrument, under the guise of court fees.
5. This burden would particularly and unfairly affect estates in London and the Home Counties where property prices have experienced steep increases in the past few years and are expected to continue to do so in view of an escalating housing demand and concomitant pressure in London and the South East. It would result in real difficulty for the bereaved in estates which primarily comprise real property i.e. the majority of estates over a certain threshold, rather than substantial liquid assets. This difficulty can be anticipated to be especially pronounced where the deceased left family which includes a dependent spouse and minor children, and/or adult children who may be vulnerable individuals, or others who need to be maintained out of estate funds.
6. A charge of £20,000 is out of all proportion for a service which costs around £200 to provide. The consultation paper does not provide any rationale for this disproportionate burden. We are concerned that this level of fee is likely to provoke avoidance measures (see below).
7. The Impact Assessment states that there is no intention to review the proposals once implemented. Yet it includes no calculation as to how the new fees will operate in the future, as estates are pushed into higher and higher brackets by operation of inflation particularly in respect to real property.

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.

These proposals would cause serious inconvenience. Given the increase in the nil-rate band to as much as £1m, many of the estates which would pay dramatically increased fees under the proposals will be free of inheritance tax. Those estates will now have to find substantial sums of money to pay the fee before a grant can be obtained. As to those estates who will have to pay inheritance tax, some will have provided for the incidence of inheritance tax by taking out life assurance. They will not have allowed for a new fee of this scale. To require estates which would not otherwise have needed to go to the bank for a loan simply in order to pay a registry fee is we think unfair.

It must also be borne in mind that personal representatives have a choice as to whether to take up the role. The administrative difficulty of funding the fee in advance of a grant could deter executors from taking a grant at all, preferring to leave that task to others (beneficiaries). This could lead to an increase in renunciations, and non-contentious probate applications.

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

Both the present and proposed systems exempt the lower valued estates from paying the fees. In the ordinary case, there is no reason why a larger estate should be exempted. Although there may be cases where the proposed fee regime could cause difficulty (set out above), these are not easy to define, and they would not necessarily be the same cases where the fee remission scheme would operate.

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.

We are concerned by the Impact Assessment, which appears to us to have seriously underestimated the extent to which the need for a grant of probate can be avoided. The Impact Assessment has also failed to take account of the wider problems that such avoidance techniques could give rise.

Besides those considered in the Impact Assessment of undervaluation and fraudulent removal of chattels, the simple avoidance techniques that occur to us include:

- Lifetime giving – the elderly person simply gives away his assets during his life.
- Joint tenancies – the elderly person puts their assets into the joint names of himself and his intended beneficiaries
- Trusts – the elderly person settles his assets on trust for himself for life with remainder to his intended beneficiary, or some other form of trust

HMRC has huge experience in dealing with these and other techniques as means of inheritance tax avoidance. It is remarkable that the neither the Consultation Paper nor the Impact Assessment considers these to be an issue with regard to probate fees, where probate fees are self-evidently easier to avoid.

Probate Registry officers are plainly not equipped, whether in terms of training or investigative resources, to be tax inspectors, which is what this proposal would require them to be.

The ‘slab’ rates proposed – whereby a difference of £1 in the value of the estate could make the difference between a £12,000 fee and a £20,000 fee – make the proposals particularly vulnerable to such avoidance.

It is also possible that an increased uptake in the use of the techniques identified above, caused by a desire to avoid probate fees, would have an adverse impact on HMRC receipts and well-being of members of the public:

- Vulnerable would-be testators may feel an increased pressure to prefer lifetime

giving to testamentary dispositions. This circumvents the safeguards inherent in the statutory formalities required for the execution of wills, and makes it much harder for donors to change their minds after the event. We fear the financial abuse of the elderly, already prevalent, would be increased.

- The stage at which most people to complete an inheritance tax return is as an essential part of the process of applying for a grant of probate. Having avoided the probate registry fee by arranging their affairs so no grant was needed, there would be nothing to force personal representatives to fill in their inheritance tax return. One may see an increase in both deliberate and unwitting tax evasion.

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