

## **STEP comments on the consultation on fee proposals for grants of probate dated 18 February 2016 by the Ministry of Justice**

### **Introduction**

STEP is the worldwide professional association for those advising families across generations. We help people understand the issues families face in this area and promote best practice, professional integrity and education to our members.

Today we have over 20,000 members across 95 countries, with over 7,000 members in the UK. Our membership is drawn from a range of professions, including lawyers, accountants and other specialists. Our members help families plan for their futures: from drafting a will or advising family businesses, to helping international families and protecting vulnerable family members.

We take a leading role in explaining our members' views and expertise to governments, tax authorities, regulators and the public. We work with governments and regulatory authorities to examine the likely impact of any proposed changes, providing technical advice and support and responding to consultations.

STEP welcomes this opportunity to comment on the consultation paper on fee proposals for grants of probate to be introduced in April 2016 and completed by April 2017.

### **Response**

**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?**

STEP notes the proposed changes to probate application fees and the increase of the current fee exemption for estates valued up to £5,000 which will increase to £50,000. We understand that this increased exemption will result in approximately 57% of estates in England & Wales being exempt from paying an application fee. However, the remaining 43% will be obliged to pay between £300 and £20,000 which is a significant uplift on the current flat fee of £155 if made by a solicitor, and £215 if made by an individual. It is, however, recognised that nobody will pay more than 1% of the value of the estate after £2 million.

We are concerned that the proposed fees do not bear any relationship to the service provided by the probate court, and are simply proportionate to and rise with the value of the estate, to the disadvantage of families with estates valued over £300,000. The proposed fee appears to be an 'ad valorem' tax as opposed to an administration fee and bears no relation to the cost of processing the application. We note that between 1981 and 1999 the paper refers to the probate scheme whereby the fee was linked to the net value of the estate with higher fees for higher value estates. Under this scheme the fee was £250 for an estate worth £100,000 (2.5% of net worth) increasing by £50 per £100,000. We presume that the MOJ intended to quote 0.25% instead of 2.5%, therefore, an estate valued at £2 million would have paid a probate fee of £1,200. Even at the lowest rate we calculate that the new fee payable will still be almost a 100% increase on the original system. The old system was also based on the net value of the estate, after reliefs but pre IHT, unlike the new proposal which will be based on the gross estate. In addition, we note from the House of Commons written answers dated 21 May 1999 that the old scheme was abolished in favour of the new scheme in 1999, 'to ensure that the fee charged accurately reflects the cost of the service provided.' This was stated by Keith Vaz, MP of the Lord Chancellor's Department, clearly reinforcing that the 'ad valorem' system was deemed unfair and disproportionate to the service provided at that time.

We understand that the Government must seek the approval of Parliament before it can change tax levels or indeed, introduce a new tax. One of the main duties of the MPs in the House of Commons is to ensure that taxes are not increased without good reason and the Government's financial activities should be supervised. Has approval been obtained by the MOJ for the introduction of the probate tax? Please could you clarify the Parliamentary procedure for a new tax approval?

We have no objection to a 'user pays' system even if the higher value estates are charged a slighter higher fee to reflect the additional administration involved, as long as it is proportionate and consistent with other fee structures. The Land Registry imposes application fees, the highest being a £910 application fee for a scale 1 transaction for a property over £1 million, which, by comparison, is significantly lower than the probate fees being proposed. The Court of Protection also imposes a fixed fee for registration of an enduring or lasting power of attorney, regardless of the value of the assets that will come under control of the power. Both of these fee systems are fair. The proposed probate fees, however, are excessive, and unfair.

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

We generally have no objection to the increase of fee exempt estates from £5,000 to £50,000.

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

The proposed fee seems disproportionate in the way that a £20 million estate and a £2 million estate will both pay the same application fee. We propose that the application fee should be fixed at a level which enables the probate service to cover its costs. However, if the Government wants the rest of the court service to be self-financing, then the Government should ensure there are appropriate fees in other areas. Members of the public are obliged to obtain a grant of probate whereas pursuing a civil claim is voluntary, therefore the probate service should not have to subsidise civil claims.

The consultation paper states that the probate service generates an annual income of £45 million which covers the cost of providing the service. It also states that the annual running costs of the HMCTS are £1.8 billion. Therefore the running costs of the probate service are about 2.5% of the total HMCTS costs. If the new fee structure is implemented the probate service will operate at a surplus of £256 million - approximately 667% of the cost of running the service. In the meantime, the other services run by HMCTS will generate income of roughly £655 million, at a cost of £1.755 billion, representing a recovery rate of 38%. Based on these figures it is difficult to comprehend the fairness or proportionality of the proposed new scale of fees.

#### **We propose the following in order to cover the requisite £45 million referred to in the consultation paper:**

- The consultation paper estimates that the first 37% of estates will generate £30 million, therefore
- The next 6% of estate valued between £500,000 and £1.6 million could generate the remaining £15 million by fixing the fee at a far lower and more reasonable fee than is currently proposed.
- Estates valued above could £1.6 million could generate further income but at a more reasonable and proportionate fee in accordance with the previous two points.

### **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?**

We are concerned that the payment of the fees could be problematic for law firms that would normally pay the fee up front on behalf of the executors. If a firm has several active probate applications on the go at the same time, it will not be financially viable to cover all application fees. If it is not viable for the law

firm to pay and if there are limited cash funds available in the deceased's estate then the executors will have to apply for a bridging loan to finance the payment using the estate as security. We anticipate that the financing will incur further delay, cost and administrative burden to the detriment of the executors and the beneficiaries. The IHT423 was introduced in 2008 to assist with the payment of inheritance tax due from an estate yet experience shows some banks simply will not accept this application and have set a policy that they will not comply with this request from a practitioner or an executor. In the same way, banks are also likely to be reluctant to provide this kind of financing for the probate fee, particularly at its highest level.

Further to advanced money laundering requirements, we anticipate it will be increasingly difficult to obtain loans for this purpose. Indeed, we also wonder whether an executor can validly charge the assets of an estate as security for a loan as suggested in the consultation paper. If the executor does not obtain a grant of probate or it is delayed we are uncertain whether the financial institution has the right to recover the advanced funds from the assets purportedly charged to it. Whilst most financial institutions are willing to enable a grant to be obtained they are coming under increasing pressure to ensure that any lending is appropriately protected. We foresee great difficulties with this proposed solution to the shortfall of the application fee.

Regrettably, it may become a common scenario that the executors and beneficiaries are forced to sell the house, in order to raise the requisite funds, which is a scenario that the Government seems keen to avoid. A common example of a cash poor estate would be a surviving pensioner who has nominal cash available to pay the fee, particularly if cash has already been depleted due to nursing home fees, and he or she may be forced to sell the home. There will also be farmers who are land rich but have very little cash and will be unable to produce the £20,000 or more from the estate. Children in their twenties and thirties may have been left the family home but will not have access to the £20,000 plus required in order to obtain the grant. Not to mention of course the charities that will be penalised by having to deduct a sizeable amount from the legacy.

This scenario will also be a significant deterrent to a potential administrator if the estate is intestate and to be administered under the rules of intestacy. It may also deter people from agreeing to act as an executor in the will drafting stage or encourage them to revoke their executorship post death.

### **Do you agree with the proposal to remove grant of probate fees from the fee remissions scheme?**

We anticipate that the proposed changes will incur some problematic funding and borrowing issues, therefore, the fee remission scheme will probably be more useful and in demand than it has been in previous years. In particular, it

will be useful when homes need to be sold in order to meet the borrowing or where businesses have been adversely affected by increased borrowing or the sale business assets.

**We would welcome views on our assessment of the impacts of the proposals set out in Chapter 1 on those with protected characteristics.**

We are uncertain whether the proposed fees would breach any of the rights of individuals with protected characteristics. However, the increased fees could contribute to greater inequality and poorer outcomes for families with estates valued over £300,000. It also seems to have an unfavourable impact on the surviving partner of a couple that are not married or in a civil partnership.

## **Conclusion**

STEP supports the Ministry of Justice's proposal to modernise the courts and tribunals system and to transition from a paper system to an online system but we are concerned that this investment is enabled at a steep cost to the public while incurring additional stress for bereaved families. It appears as though the probate service is subsidising the shortfall in income in other parts of the court service. We realise that the probate service has been overstretched for some time and consequently it has not been able to provide the requisite level of service to enable the timely administration of many estates. There is no indication in the paper that the surplus generated will be attributed to the probate service, instead being used purely to subsidise other areas of the courts and tribunals services.

We anticipate that the enactment of the increased fees will incentivise people to put their assets into joint names, as joint tenants, with their intended beneficiary whether it be their spouse or children to mitigate the application fee. This incentive may increase the number of vulnerable people being persuaded to 'gift' their property to others in order to avoid the probate fee. Another undesirable consequence of the increased fee is that non UK domiciled individuals may transfer their assets out of the UK to remove them from their UK estate. No doubt it will also encourage people to ring-fence their property and assets in trusts, unless HMRC prohibits this kind of estate planning as a means of avoiding probate fees, although that may be difficult to monitor.

Clause 38 suggests that the additional inheritance tax relief that will be phased in and available to the public from 2017 will outweigh the proposed increase to the probate application fee. However, the requirements are extremely complicated and for estates over £2 million the tax benefit reduces and is then completely unavailable after £2.35 million. The tax relief will only be applicable in certain circumstances and will provide no 'offset' where the estate is left to a

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surviving spouse, civil partner or charity. The increased fees may well penalise the individuals that the Government asserts it most wishes to support. Therefore, for most estates in the higher value bracket there is no corresponding benefit or interplay with IHT rates and the probate fee is a significant and additional cost. Clause 39 presumes that there are direct descendants in a scenario which attracts relief, which may not be the case, for example, an unmarried sister living in the family home will not benefit from the new residential nil rate band. The same sister will also incur a significant probate fee on her death when her share passes to a more remote family member, friend or charity.

We understand that a review is required, however some of the figures provided in the consultation are incorrect and there is little or no correlation to the IHT relief. We anticipate that if the proposals are enforced, the public will endeavour to arrange their assets in a way to avoid the requirement for probate, hence avoiding the requirement to submit an IHT return resulting in an increased number of estates where the obligation to pay IHT is not properly recognised. The result of which could be a significant financial loss to the Government.

**Submitted by STEP UK Practice Committee  
31 March 2016**