

# Proposals to reform fees for grants of probate

A submission by  
The Chartered Institute of Legal Executives (CILEx)

April 2016

<b>Contents</b>	<b>Page</b>
1. Introduction	2
2. General points	2
3. Question 1	3
4. Question 2	4
5. Question 3	4
6. Question 4	5
7. Question 5	6
8. Question 6	6
9. Summary of recommendations	7

## For further details

Should you require any  
further information,  
please contact;

Richard Doughty  
Public Affairs Officer  
rdoughty@cilex.org.uk  
01234 845710

April 2016

## **1. Introduction**

- 1.1. The Chartered Institute of Legal Executives (CILEx) is the professional association and governing body for Chartered Legal Executive lawyers, other legal practitioners and paralegals. CILEx has around 20,000 in membership, including approximately 7,500 qualified Chartered Legal Executive lawyers.
- 1.2. As an Approved Regulator under the Legal Services Act 2007, we are authorised to grant practice rights in relation to litigation, advocacy, probate, reserved instrument activities, immigration services and the administration of oaths. We have delegated our regulatory functions to the independent regulator CILEx Regulation Ltd.
- 1.3. This response was compiled with contributions from CILEx's members practicing in the field of probate following a call for evidence.

## **2. General points**

- 2.1. CILEx members who specialise in probate raised a number of concerns around the proposals relating to their feasibility and proportionality. One member summarised several of the issues succinctly in saying;

*'Inheritance tax is already taken prior to an application for a grant of representation - further costs which are unrelated to the expense of providing a grant are unwarranted and unfair, placing the burden of running the court system on the beneficiaries of the recently deceased. Raising probate fees to the level proposed also runs the risk of a number of unwanted and apparently unforeseen consequences. The number of administered estates may increase as executors or potential administrators become reluctant to bear the cost of the fees. Creditors will not want to apply for grants where there are no other potential administrators due to incurring further costs which might not be recouped. Individuals may make unwise gifts or place their assets into trust during their lifetime in efforts to reduce the fees payable.'*

- 2.2. There was also a general concern over the targeting of bereaved families for additional fees when they do not make a choice to use the system. As one CILEx member put it;

*'The recommendations 'do not see that there will be a fall in demand' because of the new fees - that is perhaps because death is not optional and these proposals take advantage of this.'*

2.3. In light of these and other concerns we urge caution in how these proposals are assessed and developed, and we have identified the following issues that we would like to see carefully considered and impact assessed.

**3. 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.**

3.1. Whilst a certain degree of cost variation might be tolerable, in recognition that those with greater means can make a larger contribution, this is unlikely to be workable or acceptable with regard to the size of the estate in grant of probate applications.

3.1.1. Firstly because applicants do not engage in the process out of choice, they must do so in order to administer a deceased's estate.

3.1.2. Secondly as a graduated fee is difficult to justify because the administration and work required to process the application is the same regardless of the value of the estate.

3.1.3. Thirdly, because the value of an estate and access to liquidity are not the same.

3.2. Because of this, CILEx members have raised concerns that this proposal would be tantamount to taxing individuals for being involved in a process they have no choice but to be involved in, at a time of potential emotional distress and on assets that they have neither accrued nor have control over. This may result in significant cash flow issues or, in extreme circumstances, the forced-selling of property prematurely to cover the increased fees.

3.3. Basing the fee level on the value of the estate as a whole could have an unfair and disproportionate effect on some bereaved parties, particularly in cases where property makes up the majority of the estate's value.

3.4. Estates with property in London and the South East will pay disproportionately higher fees than elsewhere in the country, and in cases where the estate has low liquidity it could cause significant cash flow issues, or require families to sell their homes in order to cover the fees.

3.5. As such we would either recommend that fees be based on the estate's accessible liquid assets, or be proportioned so inflated property values do not lead to excessive fees.

- 3.6. Alternatively, the Government may consider classing probate fees as a permitted deduction for inheritance tax purposes so as not to compound the effect of excessive fees.
- 3.7. If probate fees are to be tied to the value of the estate, then greater consideration should be given to the relevant exemptions that currently apply to other levies that are drawn from the same source.
- 3.7.1. For example, estates which pass either entirely or in the majority to the surviving spouse or to charity attract exemptions from inheritance tax. Unfortunately the proposals, as worded, have the potential to impose significant fees on estates regardless of who the beneficiaries are, including charities. That may have unintended, unforeseen, adverse effects.

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

- 4.1. A lifting of the threshold would reduce the burden on smaller estates, and more accurately reflects that some banks are willing to close accounts on the basis of a statutory declaration with balances of up to £30,000 in some cases, and without the need for production of a grant of probate.
- 4.2. Whilst this may make administration simpler for smaller estates, consideration should be given for the increased risk of false claimants or instances where a grant of probate should be obtained but is not. This has the potential to disproportionately disadvantage poorer members of society.

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

- 5.1. We are concerned that the proposed fee increases are not proportionate to the cost of the service. With current fee levels covering the cost of the Probate Service, we do not feel the proposed increased fees are justified, and increasing fees in the manner proposed risks placing additional administrative burdens on the service. Additionally, with practitioner fees having more than trebled in recent years we do not feel the increase is historically proportionate.

- 5.2. CILEx members raised concerns around the level of additional administration that falls on the Probate Service when processing applications from individuals, as opposed to those applications that have been supported by probate practitioners. To standardise the fee would increase the likelihood of individuals not seeking assistance with applications out of a perception that they would be saving money by doing it themselves, which would only create more work and expense for the Probate Service. This could inhibit access to justice for individuals and could result in advice increasingly being given by unregulated persons and resultant consumer detriment.
- 5.3. Currently, probate practitioners prepare and check applications prior to submission, answer queries, correct errors, and remedy issues that otherwise would take up time and resource for the Probate Service. As such, the fee scheme should continue to recognise the service that probate practitioners provide which, by incentivising individuals to seek professional assistance, reduces the administrative burden on the service.
- 5.4. Elsewhere in the courts system we have seen delays and problems caused because the system is not set up for individuals to navigate it without professional support, and we are concerned that the same issues are not replicated elsewhere. The lack of plain English guidance potentially exacerbates the problem.

**6. 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.**

- 6.1. The willingness of banks and law firms to assist with finances prior to the grant of probate is based on current fee levels. We are sceptical that if fees are to significantly increase that this level of assistance would remain.
- 6.2. The ability for law firms to offer assistance will decrease in cases with significant fees, as it will be less likely that fees can be covered by the firm's accounts.
- 6.3. We also expect banks will be more likely to introduce loan arrangements as a means of offsetting costs through interest payments, which will only make the process more complicated, drawn-out, and expensive for the applicant. There would need to be a degree of vigilance to ensure that loans were not being

offered at disadvantageous rates, consumers may be vulnerable as they would be potentially making a decision at a time of emotional distress.

- 6.4. Practitioners recommended that probate fees should be adopted into existing mechanisms that allow for the payment of inheritance tax or funeral expenses from liquid assets where there are sufficient funds available.

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

- 7.1. We consider the fee remission scheme to be in greater, not lesser, need if these proposals are to be enacted.
- 7.2. The individual paying application fees for a grant of probate is not the person who is deceased, it is the executor. This person may not have access to the estate's liquid assets to pay the fee (assuming there are sufficient liquid assets to do so) and may not be able to secure suitable interim arrangements before the fee can be recovered. A great deal of time can elapse before this is resolved.
- 7.3. Additionally, less well-off beneficiaries inheriting the family home without other assets may be required to sell their family home in order to recoup the fee. In these instances, and many others, it is only appropriate that a robust fee remission scheme is available to ensure estates are properly administered.

**8. 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.**

- 8.1. It is likely that those on lower incomes and in socially disadvantaged groups could be disproportionately affected. CILEx is not able to supply specific data on the potential impact on individuals with protected characteristics. However, we would urge consideration for the affected groups identified elsewhere in the submission.

## 9. Summary of recommendations

- Probate fees should be kept at their current levels, which are providing full cost recovery for the probate service.
- If fee levels are to directly relate to the size of the relevant estate;
  - They should either primarily be based on the estate's accessible liquid assets, or be proportioned so as inflated property values do not lead to excessive fees.
  - Greater consideration should be given to the relevant exemptions that currently apply to other levies that are drawn from the same source – such as exemptions or reductions for charities.
- Probate fees should be adopted into existing mechanisms that allow for the payment of inheritance tax or funeral expenses from liquid assets, where there are sufficient funds available.
- If fee levels are to be significantly increased, the Government may consider classing probate fees as a permitted deduction for inheritance tax purposes so as not to compound the effect of excessive fees.
- The fee scheme should continue to recognise the service that probate practitioners provide, which by incentivising individuals to seek professional assistance reduces the administrative burden on the service.
- Access to justice is a principle that safeguards individual rights and the duty to protect this at a time of vulnerability and bereavement is heightened.
- Probate fees should remain within the fee remission scheme.