

PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT

Fourteenth Delegated Legislation Committee

DRAFT NON-CONTENTIOUS PROBATE (FEES)
ORDER 2018

Thursday 7 February 2019

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Monday 11 February 2019

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The Committee consisted of the following Members:

Chair: JAMES GRAY

- | | |
|--|--|
| † De Piero, Gloria (<i>Ashfield</i>) (Lab) | † Milling, Amanda (<i>Cannock Chase</i>) (Con) |
| † Foster, Kevin (<i>Torbay</i>) (Con) | † Throup, Maggie (<i>Erewash</i>) (Con) |
| † Foxcroft, Vicky (<i>Lewisham, Deptford</i>) (Lab) | † Tomlinson, Michael (<i>Mid Dorset and North Poole</i>) (Con) |
| † Frazer, Lucy (<i>Parliamentary Under-Secretary of State for Justice</i>) | † West, Catherine (<i>Hornsey and Wood Green</i>) (Lab) |
| † Goodwill, Mr Robert (<i>Scarborough and Whitby</i>) (Con) | † Western, Matt (<i>Warwick and Leamington</i>) (Lab) |
| † Harrison, Trudy (<i>Copeland</i>) (Con) | † Williams, Dr Paul (<i>Stockton South</i>) (Lab) |
| † Heaton-Jones, Peter (<i>North Devon</i>) (Con) | † Zeichner, Daniel (<i>Cambridge</i>) (Lab) |
| † Huddleston, Nigel (<i>Mid Worcestershire</i>) (Con) | Matthew Congreve, Masrur Ahmed, <i>Committee Clerks</i> |
| † Jones, Graham P. (<i>Hyndburn</i>) (Lab) | |
| † Jones, Susan Elan (<i>Clwyd South</i>) (Lab) | † attended the Committee |

Fourteenth Delegated Legislation Committee

Thursday 7 February 2019

[JAMES GRAY *in the Chair*]

Draft Non-Contentious Probate (Fees) Order 2018

11.30 am

The Parliamentary Under-Secretary of State for Justice (Lucy Frazer): I beg to move,

That the Committee has considered the draft Non-Contentious Probate (Fees) Order 2018.

It is a pleasure, as always, to serve under your chairmanship, Mr Gray. The purpose of the draft order is to implement a new, more progressive banded structure of fees for the grant of representation, commonly known as a grant of probate, which will come into force in April. The banded fees relate to the value of the estate. Let me outline how I intend to structure my remarks. I will talk about what the probate is, what the old regime was, what the new structure will be and the reasons we are bringing it in, and then I will deal with some concerns that have been raised.

Probate is an important service that provides valuable support to those who are bereaved. It is administered by Her Majesty's Courts and Tribunals Service. It helps to ensure that the estate of a deceased person is passed on to the rightful beneficiaries. Under the old scheme, there was a charge of £155 for grant applications made by solicitors and a charge of £215 for those made by individuals. Those were flat fees that applied to estates worth more than £5,000, and they were set at cost recovery levels.

The new structure is different. It is a banded, fairer structure for probate fees and it no longer applies a flat fee. The threshold at which the new fees become payable will be raised from £5,000 to £50,000. That will exempt approximately 25,000 additional estates per year from paying fees altogether. Overall, more than half of estates will pay nothing, because they are either exempt or do not require a grant of probate. Of those that do pay, around 60% will pay fees of £250, which is comparable to the current fee for individual applications. Moreover, the new model means that revised fees will never amount to more than 0.5% of the value of the estate.

The previous Government initially announced plans to introduce enhanced probate fees from February 2017, following a public consultation. The relevant draft affirmative statutory instrument was laid in Parliament, and the order was debated and passed by a Commons Delegated Legislation Committee in April. The announcement of a general election, however, meant that there was not time for the order to be debated and considered for approval in both Houses.

The Government have looked closely at the various criticisms that were made of the previous order. The top band has now been reduced from £20,000 under the previous proposal to £6,000 under this order. The new banded fees structure does not amend the underlying

policy rationale and will retain the same progressive banded structure as the earlier proposal, in which the fee payable relates to the value of the estate.

Susan Elan Jones (Clwyd South) (Lab): I know that the Government are taking the issue of charities and legacies very seriously in the light of research from the Office for Civil Society. Does the Minister agree that there are serious concerns in the voluntary sector? I was reading a submission from the Institute of Fundraising only this morning. When a charity such as Cancer Research UK fears that the changes could cost it £600 million per year, it highlights the real concerns of organisations in the voluntary sector. Does she agree that we should consider having further discussions, as the Institute of Fundraising has suggested?

Lucy Frazer: Of course, the charity sector plays a vital role in supporting those in need. The order will not affect the amount paid out to charities when there is a fixed request rather than a percentage, but I understand the hon. Lady's concerns.

Catherine West (Hornsey and Wood Green) (Lab): Does the Minister agree that the important issue of probate deserves fuller debate, in the main Chamber and in Government time?

Lucy Frazer: As I mentioned, the changes that the Government are making were considered previously in Committee and were well documented in the press, and points on the matter have been put to me in the Chamber. We have the power to pass the legislation by way of statutory instrument, and that is how we are doing so.

It is important to have a fair and functioning justice system. I will touch on the service that HMCTS provides. The decisions that are made in courts and tribunals convict the guilty, protect the innocent and help ordinary people take back their lives. The Government are committed to providing a world-class courts and tribunals system that supports vulnerable people. We are investing £1 billion to modernise and upgrade the courts system but, as is obvious, an effective and efficient justice system requires proper funding and it has long been the case that users of our courts contribute towards the costs, reducing the burden on taxpayers. We believe that remains relevant and reasonable.

By asking those who use the courts to pay more, where they can afford to do so, we are able to fund areas where we charge no fees to vulnerable victims and users. That includes, for example, domestic violence protection orders, non-molestation orders and cases before the first-tier tribunal concerning mental health, where applicants do not have to pay a fee at all. In 2017-18, the running costs of HMCTS were £1.8 billion, but we recovered only £710 million of that—less than 40%—in fee income. That position is unsustainable, and it is right that we look to users of the service to contribute more. We anticipate that the new fees will bring in additional income of £145 million in the next financial year, helping to fund our courts and tribunals by reducing the burden on the taxpayer.

Matt Western (Warwick and Leamington) (Lab): I can see a lot of positives in what is proposed. However, given the funding gap between the actual costs of running the service and what is earned, as the Minister has

described, is there not an enormous opportunity to charge even more for estates worth over £2 million? The cap seems to be unnecessarily low.

Lucy Frazer: That is an interesting point. The figure was higher the last time the proposal was before Parliament—£20,000 for the top fee, rather than the current proposal of £6,000—but the response was that it was too much, and we agree. The £6,000 is more proportionate. It still brings in an income of £145 million, which is essential to fund the Courts Service. Parliament has understood the importance and value of our justice system, and the financial pressures on HMCTS, which is why in the Anti-social Behaviour, Crime and Policing Act 2014 it empowered the Lord Chancellor to charge enhanced fees.

I wish to deal with some of the concerns expressed by the JCSI and the SLSC. They reported the draft statutory instrument for doubtful vires and unexpected use of powers. They felt that the new fees amounted to a tax and questioned whether the imposition of such levels of fees was anticipated when the primary power was approved. We disagree with those Committees.

The new fees come under the category of “enhanced” fees. As Members are aware, Parliament has expressly given power to the Lord Chancellor to set certain court and tribunal fees above the cost of providing the service, under section 180 of the 2014 Act. The Act gives the Lord Chancellor the explicit authority to impose enhanced fees in order to

“prescribe a fee of an amount which is intended to exceed the cost of anything in respect of which the fee is charged.”

That is what the draft order seeks to do.

In doing so, the Lord Chancellor must have regard to, among other factors, the financial position of the courts and tribunals for which he or she is responsible, including, in particular, any costs incurred by those courts and tribunals that are not met by the existing fee income. The Act is also clear that any income from the fees must be used to finance an efficient and effective system of courts and tribunals. Those provisions clearly demonstrate Parliament’s intention that the Lord Chancellor should be able to set fees above cost in one part of the system in order to subsidise other parts, in order to maintain effective operation of the system as a whole.

The JCSI went on to argue that the basic premise of the fee is that it should be directly related to the cost of the service. We do not accept that. The specific legislative provision in section 180 of the 2014 Act breaks the link between the cost of the service and the fee that may be charged. That was clearly the intention of Parliament. The proposals in the draft order are consistent with the primary power and with the assurances given to Parliament when the Bill was considered. This is not the first time the Government have sought to introduce enhanced fees, or fees that relate to the value of the issues at stake—it has been done for certain civil money claims, for example. We therefore do not consider the draft order to be an unexpected use of the section 180 power.

The SLSC further argued that—

The Chair: Order. I am sorry to interrupt the Minister, but I wonder whether, for the sake of my own knowledge, she would kindly spell out those abbreviations, as I have no idea what the SLSC is. Perhaps she could explain that to the Committee.

Lucy Frazer: I do apologise, Mr Gray. The JCSI is the Joint Committee on Statutory Instruments, and the SLSC is the Secondary Legislation Scrutiny Committee in the House of Lords. I am grateful for that intervention—acronyms boggle us all.

The SLSC also suggested that, as a result of the anticipated reduction in running costs following reform of the probate service, the fees are disproportionate. We disagree, as the fee is not tied to the cost to the service under the enhanced fee powers.

The reforms aim to make the probate service more efficient. Users will experience a better system, which has benefited from significant investment by the taxpayer. It is right that both the efficiency savings and the additional income are used to cross-subsidise other areas, with vulnerable users and victims not charged a fee at all. We are clear that this is an application fee for a specific purpose—to obtain a grant of representation to deal with a person’s estate—and that it is distinct from general taxation. The primary power states that any income generated by these enhanced fees must be used to fund an efficient and effective courts system. Charging fees is justified as a way of funding our courts system in order to provide access to justice, which the Government are committed to maintaining.

Finally, I will deal with access to justice and affordability. When considering the fundamental principle of access to courts, we need to be careful that nobody finds themselves unable to apply for a grant of probate because of the fee. The fees will never be unaffordable; the probate fee and any reasonable expenses are recoverable from the estate and determined by the value of that estate, so the executor will not be permanently out of pocket, and any difficulty paying the fee will, by definition, be one of cash flow. We believe that in most cases the executor will be able to access funds in the estate to pay the fee, including, for example, bank accounts and savings belonging to the estate. Data from Her Majesty’s Revenue and Customs indicate that the average estate is around 25% cash, whereas the fee will never be more than 0.5% of the value of the estate.

We have been working with UK Finance, the Building Societies Association and the Money Advice Service. The industry has set out bereavement principles to encourage its members to support the bereaved and allow necessary payments to be made from the deceased’s account to cover expenses, including probate fees, where possible.

Furthermore, when an executor is not initially successful in accessing funds from a bank or building society, the probate service is willing to write to the relevant institution to provide reassurance that assets are needed to pay the fee. Other avenues of funding will also be available, including a personal or executor’s loan. In cases where people are unable to take advantage of any of those options, they can apply for a limited grant of probate to provide them with partial access to specific funds of the estate, for the sole purpose of paying the fee. That application will not attract an additional fee.

Catherine West: I thank the Minister for generously giving way a second time. Does she accept that, despite a consultation and discussions with the voluntary sector, she has not really outlined how she is taking on board,

[Catherine West]

and responding to, the Joint Committee's objections? Could she give us more of an idea of how she is responding to those objections?

Lucy Frazer: The points that the Joint Committee has made are legal ones. It claims that the Lord Chancellor does not have the power to make this provision, but we say that he absolutely does. A specific provision in section 180 of the 2014 Act states that the Lord Chancellor has the power to charge fees in excess of the cost of the service. Moreover, the Lord Chancellor has a statutory duty to provide a fully functioning, efficient and fair Courts Service. That power and duty combined mean that he has not only the power to charge enhanced fees but, I suggest, a duty to do so when there are sufficient funds to run a fair and efficient Courts Service. Under the combined provisions, the Lord Chancellor has the duty to bring in the statutory instrument. In the House of Lords debate, in which there was not unanimity, two distinguished Members—Lord Pannick was one, and Lord Thomas may have been the other—made clear their view that the power could be exercised by the Lord Chancellor.

Catherine West: The Minister is being extremely generous in giving way. Will she confirm how many situations there have been in which the Joint Committee has had serious concerns but the Government have pressed on nevertheless? Is this a precedent?

Lucy Frazer: I cannot give the hon. Lady an answer to a question that ranges beyond this SI, but the matter has been through the House of Lords. A fatal motion was tabled on the back of the Joint Committee's report, but it did not pass, so the House of Commons is proceeding with the order.

We are confident that the fees will never be unaffordable, and that it would be wrong to exempt certain estates from fees purely on the basis of cash flow, leaving the taxpayer to pick up the tab. That is why the order also removes probate fees from the statutory Help with Fees remission scheme, because in normal circumstances fee remissions will not be necessary or justified. However, there is a safety net for the rare cases that do not fall into any of the categories mentioned previously. We have retained the Lord Chancellor's power to offer a fee remission in exceptional circumstances where the executor has exhausted all other options to pay the fee and would suffer undue hardship as a result.

We intend to publish guidance on ways to pay probate fees, outlining all the options for financial support more clearly to those who are applying. We continue to work with external stakeholders to ensure that the guidance is effective, and we will publish it before any fees are changed. We have the power and the duty to ensure that the Courts Service runs effectively and efficiently, we have introduced a progressive system to ensure that the burden will be spread fairly, and we have taken an additional 25,000 people out of liability for the fee. I commend the draft order to the Committee.

11.47 pm

Gloria De Piero (Ashfield) (Lab): It is a pleasure to serve under your chairmanship, Mr Gray. There is fierce opposition to these proposed changes, from legal

experts, charities and legislative bodies. The Government plan a probate fee hike from the current flat fee of £215—or £155 if the application is made by a solicitor—to a sliding range between £250 and £6,000, depending on the value of the estate. The changes encompass fee increases to a level that is nearly 28 times what some people currently pay. The House of Lords Secondary Legislation Scrutiny Committee, the Joint Committee on Statutory Instruments and the Law Society, among many others, have joined a chorus of condemnation of the proposals.

Apart from the staggering increase in costs, the proposed fees have no bearing on the actual cost of the service provided. The services involved in a grant of probate are fundamentally the same, regardless of the value of the estate. The proposals are clearly disproportionate and excessive, but they also make a mockery of the long-standing principle that fees for a public service should recover the cost of providing it, and no more. I am frankly shocked that more Conservative Members are not fighting to maintain that fiscal convention.

Combined with the Government's conviction that funds raised through the changes can be reinvested elsewhere in the struggling justice system, the proposals represent what the Law Society identifies as "a tax on grieving families".

The Secondary Legislation Scrutiny Committee has likewise suggested:

"To charge a fee so far above the actual cost of the service arguably amounts to a 'stealth tax'".

It is true that Government cuts have left the justice system in crisis. Prisons are overcrowded, the probation service is overstretched, courts are closing and people across the country are excluded from access to justice because of devastating cuts to legal aid. It is also true that time and time again the Opposition have called for the investment and resources that the justice system needs to operate properly. It is unacceptable that, through these changes, the Government intend to place the burden of covering those costs on the shoulders of vulnerable, grieving people.

Catherine West: My hon. Friend is making an excellent speech. Does she agree that all these problems began when the Ministry of Justice was led by someone known commonly in the press as "failing Grayling"—

The Chair: Order. Not only should the hon. Lady not refer to a Member of Parliament by his own name, but to use such an expression is not appropriate in a Committee of this sort. The Committee must focus only on the SI before us, not on other, more peripheral matters.

Catherine West: I do apologise, Mr Gray. Does my hon. Friend nevertheless agree that the wrecking of our prisons and all the other terrible things that have happened since 2010 go back to the cuts to legal aid and to our justice system, and that grieving families will pay the price?

The Chair: In the context of this SI only, please.

Gloria De Piero: My hon. Friend is right and we have been warning about those very things, but our warnings appear often to have fallen on deaf ears. What is more, the fact that these fees amount in practice to a tax raises serious questions over whether the changes exceed the authority of the Lord Chancellor. The power to impose taxes lies with Parliament, yet in the eyes of the Secondary Legislation Scrutiny Committee,

“cross-subsidised charges are normally classified as taxes.”

This order thus constitutes a misuse of the fee-levying power. The Joint Committee on Statutory Instruments has likewise asserted that there is

“real doubt as to whether the Lord Chancellor may use a power to prescribe non-contentious probate fees for the purpose of funding services which executors do not seek to use”.

There are clearly concerns about both the nature of the proposals and their practical effect.

The charity sector has also warned of losses—a point my hon. Friend the Member for Clwyd South made—to the tune of nearly £10 million a year. Cancer Research UK has cautioned that the stealth tax will diminish donations made in wills. What assurances can the Minister provide to the charity sector that any changes will not have an adverse financial impact on charities? Can she confirm whether these increases in fees break convention? I have read the 2014 Act and conclude that it says something quite different.

Does the Minister acknowledge that grieving individuals will be footing the bill for cuts made elsewhere in the justice system, even in service areas that they do not use? Can she provide an estimate of the numbers of people affected by this change each year, and to what overall value? Does she recognise the concerns raised by a huge number of legal experts, parliamentary bodies, the public, the media and the charity sector that these charges amount to little more than a stealth tax on grieving people?

11.52 am

Michael Tomlinson (Mid Dorset and North Poole) (Con): It is a pleasure to serve under your chairmanship, Mr Gray. Before I raise a number of questions with the Minister, may I say something positive? I am grateful to her for listening. In the previous iteration, she and I had exchanges about concerns regarding the level of fees, and I agree with her assessment that £6,000 is more proportionate than the original proposal of £20,000. I also welcome the fact that the very smallest estates will be taken out of paying any fee whatsoever, and that even for those estates of between £50,000 and £300,000 it is only a very modest increase indeed.

I welcome those parts of the regulations, but I would be grateful if the Minister could answer a series of questions that have been raised with me, which echo points that she made in her opening speech. First, I would like her to address head-on the criticism that this is simply an additional tax imposed for a simple clerical process and that the existing fees already cover the cost of that process. There has been a suggestion, as she herself has said, that these fees will help reduce other court costs, but concerns have been raised with me that they will simply go back to the Treasury as general taxation, rather than being what we might call a hypothecated tax that would assist in the other areas she has mentioned. I would be grateful if she would address that point.

Secondly, does the Minister agree that this would effectively be double taxation—taxation on the estate in the first place, and taxation in the form of this additional probate fee? Has she considered that this may lead to complicated avoidance schemes for those with the means to pay, who will simply seek to avoid paying the fee in the first place? I would be grateful for her thoughts

on that. Finally, could she address head-on the concern that has been raised with me that the fee is effectively double taxation? Has she considered linking the fee to the net value of the estates? I would be grateful if she addressed those points.

11.55 am

Lucy Frazer: I am grateful to my hon. Friend the Member for Mid Dorset and North Poole and the hon. Member for Ashfield for their thoughtful submissions. I am grateful for the engagement I have had with my hon. Friend and for our discussions about this important area. The Ministry of Justice acknowledges that this fee will affect people—often those who have properties valued in excess of a certain amount—and we have not taken this decision lightly. I am grateful for the points he has made today and during the course of our consideration on how to go forward with this issue.

What we are proposing is an enhanced fee, not a tax. It is not charged by the Treasury and will not be collected as general taxation; it will be ring-fenced for the courts. In fact, we are raising this money because it is our obligation to ensure that we have a fair and efficient Courts Service. My hon. Friend is right to identify that people try to evade various taxes or to manage their affairs—in a legitimate way—to ensure that they do not pay certain amounts to the Treasury. We will of course always tackle illegitimate attempts to do that, but that is not a reason not to take action or bring measures forward. We have identified this measure as suitable to ensure that our Courts Service is properly funded, and we think it is fair and proportionate, which is why we are bringing it forward.

On shared assets, it is interesting that couples—whether married, in a civil partnership or otherwise—are free to choose how to hold their property. Paying probate fees on property held by couples as joint tenants—the most common form of property ownership between couples—would not be required.

I will deal with several points raised by the hon. Member for Ashfield. She suggested that it is inappropriate to charge a progressive fee in circumstances in which the cost does not necessarily relate to the fee charged. I recently read an interesting article—in *The Law Society Gazette*, I think—that suggested that solicitors actually charge progressive fees for their services in relation to the estate, which may or may not vary according to the work they do. That is a third-party article and I do not rely on it, but it is interesting to consider.

I am quite surprised that the Opposition oppose a progressive fee, with those who can afford to do so paying more. I thought that was at the heart of the Opposition’s way forward on taxation. They regularly suggest that we should pay more income tax if we earn more money. We are putting forward a proposal that allows people to take on a burden where it is fair to do so.

Catherine West: Will the Minister give way?

Lucy Frazer: I will just finish these points. The hon. Member for Ashfield suggested that the justice system needed more money. Mr Gray, you were right to point out that this debate is on a particular SI. However, our justice system does need more money, and we are putting

[Lucy Frazer]

forward a reasonable, progressive, proportionate way of ensuring that it has that money. For those reasons, I commend the draft instrument to the Committee.

Question put.

The Committee divided: Ayes 9, Noes 8.

Division No. 1]

AYES

Foster, Kevin
Frazer, Lucy
Goodwill, Mr Robert
Harrison, Trudy
Heaton-Jones, Peter

Huddleston, Nigel
Milling, Amanda
Throup, Maggie
Tomlinson, Michael

NOES

De Piero, Gloria
Foxcroft, Vicky
Jones, Graham P.
Jones, Susan Elan

West, Catherine
Western, Matt
Williams, Dr Paul
Zeichner, Daniel

Question accordingly agreed to.

Resolved,

That the Committee has considered the draft Non-Contentious Probate (Fees) Order 2018.

12 noon

Committee rose.