

Probate fees – a stealth tax for charities?

A significant increase to probate fees is in the pipeline.



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Leticia Jennings and Sophie Cass explain how charities will be affected

In November 2018 the Ministry of Justice announced plans to increase the court fees payable when obtaining a grant of representation during the probate process. This may sound familiar: the idea was previously floated in early 2017, to robust and vocal opposition from many different fronts, before being quietly shelved ahead of the snap general election.

The new proposed fees are not as high as the previous proposals – if approved, the top end of the scale will be £6,000, compared with the eye-watering £20,000 envisaged in 2017. However, the proposed increase remains a concern, particularly for charities.

What are probate fees?

Save in very limited circumstances, a grant of representation is required from the probate court to allow the executors or administrators to access the assets and administer the estate of a deceased person. Currently, the application fee to obtain a grant

of representation is a flat rate of £155 (or £215 for individuals applying directly, not through a solicitor). Under the new proposals, this low-level fixed fee will be replaced by a sliding scale of fees up to almost 28 times higher than the existing fees, based on the value of the estate. No fee will be payable for estates worth less than £50,000.

The work of the probate court to issue a grant of representation is the same whether the estate is worth £10,000 or £10 million. The Ministry of Justice's own impact assessment has acknowledged that the existing fees cover all of the probate court's costs. The proposed fee increase is wholly designed and intended to cross-subsidise other areas of the court service's work and bears no relation to the costs of obtaining probate.

Stealth tax?

Unsurprisingly, several commentators have referred to the proposed new fees as a 'stealth' tax, particularly for charities. At the moment, there is no inheritance tax payable on legacies left to charities, but there is

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no such exemption from probate fees. Under the new proposals, estates left entirely to charity will incur the much-increased fees, so reducing the amount of money charities will receive. If an estate cannot afford to pay the increased probate fee – which must be paid upfront before the executors can access estate assets – it often falls to charities to fund the fee, or risk the executors having to take out a loan, with the estate bearing the interest payments.

Much has been made of the fact that the applicable probate fee would total no more than an average of 0.5% of an estate; but very little has been made of the fact that this will have a significant impact on the size of the residuary estate available for distribution – often to charities.

The Institute of Legacy Management has estimated that the knock-on effect for charities will be an annual loss of a staggering £10 million across the sector. It appears to us that the proposed new fees would amount to a taxation of inheritance left to charities – the very opposite of what the current inheritance tax regime, with its specific tax exemptions for charities, is intended to achieve.

The report of the House of Lords Secondary Legislation Scrutiny Committee found that the proposals do not conform with normal requirements about managing public money as set out in standard guidance for government departments. The report also pointedly reminded the Ministry of Justice that during the original fee increase proposals, the Joint Committee on Statutory Instruments questioned whether the Ministry of Justice even had the power to bring in such changes via secondary legislation.

The House of Lords did ultimately vote in favour of the statutory instrument increasing the fees, but added an amendment expressing regret at the increase.

What happens next?

The changes are due to be implemented by secondary legislation, which means that there is little in the way of parliamentary scrutiny or debate, such as you would normally expect for legislation that will have such a substantial financial impact. This is a particular concern given the sector and wider public interest in the issue, as well as criticism from within parliament.

At the time of writing, the House of Commons Delegated Legislation Committee has approved the progression of the legislation to the House of Commons (by nine votes to eight). If the measure is passed, the fee increases are expected to be implemented in April 2019.

Find out more

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