



NON-CONTENTIOUS PROBATE - MANDATING ONLINE PROFESSIONAL APPLICATIONS

Issued 10 September 2020

ICAEW welcomes the opportunity to comment on the Non-Contentious Probate - Mandating online professional applications published by the Ministry of Justice on 10 August 2020, a copy of which is available from this [link](#).

The ability to apply for probate online is a welcome development but we question whether it is practical to mandate that all professional applications by probate professionals including ICAEW accredited probate practitioners should be online. We can think of no other instance where such an approach has been taken. The poor take-up of online applications to date suggests there is some resistance to applying online and the Ministry of Justice needs to fully understand why this is so before making it mandatory.

If the decision is taken to mandate online professional applications then this needs to be well publicised and introduced over a sufficient period of time to ensure that all probate professionals are able to comply and all consumers are aware (and comfortable) that applications made by probate professional must be made online.

In April 2020, the President of the Family Division issued Practice Guidance enabling statements of truth (which can be submitted electronically) to be used as an alternative to affidavits. We understand that consideration is being given to this being made a permanent change via amendment to the non-contentious probate rules. We would urge that this change is made permanent.

This ICAEW response of 10 September 2020 has been prepared by representatives of the Business Law Committee, together with ICAEW accredited probate practitioners and members of the Tax Faculty. The Business Law Committee which includes representatives from public practice and the business community is responsible for ICAEW policy on business law issues and related submissions to legislators, regulators and other external bodies.

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We note that the consultation period run for one month, over August and during the COVID 19 pandemic when many professionals have faced severe constraints on their ability to work at full capacity. This has limited our own process for preparing a response and may prevent the Ministry of Justice's ability to draw valid conclusions from the consultation exercise. We refer you to the government's guidance regarding consultations

<https://www.gov.uk/government/publications/consultation-principles-guidance>.

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KEY POINTS

1. The ability to apply for probate online is a welcome development but we question whether it is practical to mandate that all applications by probate professionals including ICAEW accredited probate practitioners should be online. We can think of no other instance where such an approach has been taken.
2. Lockdown has increased the need for many of our members to work remotely and one would expect that this would have led to an increase in online applications. Yet the evidence suggests that this has not been the case. We urge the MoJ and HMCTS to fully explore why this is the case before mandating online professional applications.
3. The consultation notes that *‘A significant development in terms of making a range of probate application processes accessible online came in April 2020 when the President of the Family Division issued Practice Guidance¹ enabling statements of truth (which can be submitted electronically) to be used as an alternative to affidavits. Although this was a measure designed to assist professional users during the coronavirus pandemic, with access to offices, papers and clients extremely difficult for many practitioners, consideration is being given to this being made a permanent change via amendment to the non-contentious probate rules.’* As our members have reported that this measure has significantly increased their willingness to apply online we would suggest that this change is made permanent before mandating online applications by professionals. We also note that this change has had a knock-on effect of increasing consumer choice and competition in the market both of which are developments that are welcomed and encouraged by the Competition and Markets Authority, the Legal Services Board and Professor Stephen Mayson (see, for example his *Independent Review of Legal Services Regulation*).
4. If the decision is taken to mandate online professional applications then this needs to be well publicised and introduced over a sufficient period of time to ensure that all probate professionals are able to comply and consumers are comfortable with a purely online process.

ANSWERS TO SPECIFIC QUESTIONS

Question 1

Do you agree that HMCTS should implement mandating of professional user applications? Please give reasons for your answer.

5. We welcome the fact that online probate applications are available and agree that it is a positive step forward for all users. The view of our members who have adopted online applications has been favourable but even so we question whether mandating it for all professional user applications is practical or even advisable. We note that in this regard HMRC has made many digital services mandatory in the last few years – Making Tax Digital for VAT, the Trust Registration Service and Capital Gains Tax (CGT) 30-day reporting on UK residential property come to mind - but in every case the requirement applies to taxpayers as well as advisers and there is always a digital exclusion exemption following the decision in *LH Bishop Electrical Co Ltd & Others v HMRC Commissioners* [2013] [UKFTT 522 \(TC\)](#).
6. We also note that according to the Ministry of Justice even during lockdown the take up has been relatively low. The reasons for this need to be fully understood before HMCTS implements mandatory online applications.
7. Some of our members have pointed out that although they are aware that they can make online applications they have chosen not to do so because of the following concerns:
 - Will the ability to contact human officers in the HMCTS be lost or made more difficult?

Whilst there is merit in trying to establish an automated system that can deal with all issues, there will be times when this is not possible. Even though the proposed mandating will be limited to non-contentious probate applications and that exceptions will be in place for more complicated cases, there may well be instances when an automated system will be unable to answer or resolve a particular issue.

- How will HMCTS ensure that there is sufficient security for such sensitive data?

These concerns need to be addressed before mandating online professional applications

8. Making online professional applications mandatory, may in the short-term, exclude more traditional practitioners, and disadvantage their clients, or cause difficulties for those not yet using on-line processes. Although we accept that this will only apply in a very few cases, it could have a detrimental effect on consumer choice and competition.
9. Consumers (clients) also need to be comfortable that non-contentious applications made by probate professionals on their behalf will have to be submitted online.

Question 2

Do you agree with the advantages identified for professional users from the online probate system?

10. Yes. Our members have found that the online system enables them to offer a streamlined and efficient offering to their clients. In particular the new tracking system saves a significant amount of time that has previously been spent trying to contact the relevant probate office and establish the progress of the application.
11. We also note that allowing all probate professionals (as opposed to just solicitors) to apply online has had a positive effect on consumer choice and competition in the market.

Question 3

Are there disadvantages with the online probate system? Please give details.

12. Of our members who have now used the online system, none have reported any disadvantages with the system so far. However both those who have and who have yet to use it were concerned that a purely digital system does have some disadvantages. In particular:
 - a. If the system does not allow any contact with HMCTS staff under any circumstances this may lead to frustration and dissatisfaction
 - b. Users must have faith in the system's security.

Question 4

Do you have any comments on the advantages to HMCTS of the online service? Do you consider there are disadvantages (please give details)?

13. We have nothing to add.

Question 5

Do you disagree with any of the exceptions HMCTS proposes to make?

14. No. Although we understand why these situations have been classified as exceptions we think it is imperative that any such exceptions are removed over time to avoid unnecessary confusion.

Question 6

Are there any other exceptions which you believe should be made to the mandating of professional user applications?

15. No

Question 7

Do you consider that any of proposals will have a disproportionate impact on individuals with protected characteristics? Are there any potential modifications that we should consider to mitigate this impact? Please give reasons for your answer.

16. We agree that as these reforms are confined to professional users rather than the public, it is fair to assume that modern practitioners and businesses will have access to equipment enabling them to submit online applications. We note, however that some practitioners (albeit very few) may still be reluctant to apply online. If this is likely to apply to professionals with protected characteristics (such as age or disability) then consideration must be given to the impact of such discrimination against the objectives pursued by the reforms and consider the potential for modifications to mitigate the impact.
17. We agree that because different considerations would and do apply to probate applications being made by non-professional users it is right that a paper-based system of applications will remain for non-professional users.