

# Trusts and estates cases: can statistics help to identify trends?—spotlight on probate and estates cases

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## Abstract

What can figures for cases in the High Court in England and Wales tell us about future trusts and estates litigation? Where are the growth areas in litigation in the Chancery Division? Is there a move towards cases settling out of Court? Could statistics that are available in a wider context shed light on possible trends in litigation?

## Introduction

Each year the Ministry of Justice (MoJ) publishes statistics relating to cases passing through the courts in England and Wales. This article examines first statistics available for cases in the Chancery Division in recent years to see if it is possible to identify trends in the volume and types of cases being pursued in that Division, and secondly statistical information published by the Office for National Statistics (ONS) and HM Revenue and Customs (HMRC) on aspects of our society that might be relevant to such trends.

Information obtained for the purposes of this article from the MoJ, ONS, and HMRC is licensed under the Open Government licence version 3.0. The comments on that information are not those

of a qualified statistician, but merely the observations of an interested lay person faced with the available information.

## Cases in the Chancery Division

Statistics in relation to civil cases are published by the MoJ in the ‘Civil justice statistics quarterly’, and Table 3.14 of ‘The Appellate Courts tables: 2014’ in that publication contains the number of claims and originating proceedings issued in the Chancery Division in London by nature of proceedings.

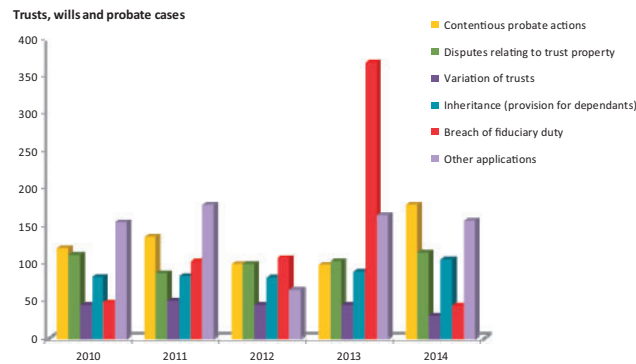
The table below shows the number of claims and proceedings categorized as ‘Trusts, wills and probate’ in Table 3.14 in the period 2010–14, broken down into various sub-categories. The ‘Trusts, wills and probate’ section of Table 3.14 in fact has more sub-categories than the table below (for example, ‘Charities’ and ‘Lloyds estates’), but those sub-categories contain only a small number of cases, or in some years no cases at all, and so for the purposes of this article the numbers of cases in those smaller sub-categories have been included in ‘Other applications’.

Furthermore, although Table 3.14 provides figures going back to 2002, the notes to Table 3.14 explain that with effect from 2010 the Chancery Division improved the way that all claims are recorded and

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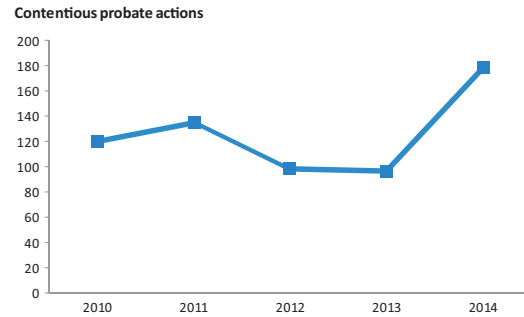
introduced a number of new categories for the nature of proceedings, with the result that figures for 2010 are not directly comparable with those for previous years. In examining the figures for the various sub-categories of cases in the ‘Trusts, wills and probate’ section of Table 3.14, therefore, this article considers only the 5-year period 2010–14 (the figures for 2015 being incomplete at the time of writing).

| Trusts, wills and probate                      | 2010       | 2011       | 2012       | 2013       | 2014       |
|--|------------|------------|------------|------------|------------|
| Contentious probate actions                    | 120        | 135        | 98         | 97         | 178        |
| Disputes relating to trust property            | 111        | 86         | 98         | 102        | 114        |
| Variation of trusts                            | 43         | 50         | 43         | 43         | 29         |
| Inheritance (provision for dependants)         | 81         | 82         | 80         | 88         | 104        |
| Breach of fiduciary duty                       | 47         | 102        | 107        | 368        | 42         |
| Other applications concerning wills and trusts | 154        | 178        | 64         | 163        | 156        |
| <b>Total</b>                                   | <b>556</b> | <b>633</b> | <b>490</b> | <b>861</b> | <b>623</b> |

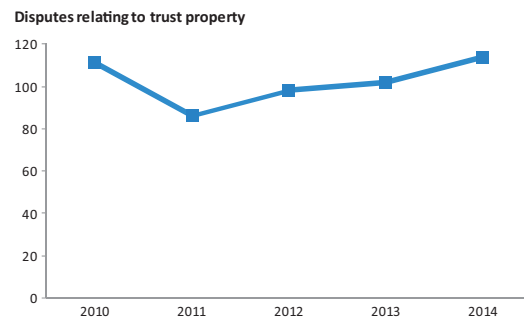


The bar chart shows that ‘Other applications’ represent a significant proportion—approximately one-quarter—of the trusts, probate, and wills cases in the London Chancery Division, but that category is of no use in identifying trends. This article therefore concentrates on the data in the five main categories of trusts, wills, and probate cases in Table 3.14. If those figures are plotted on a graph in each case, then we

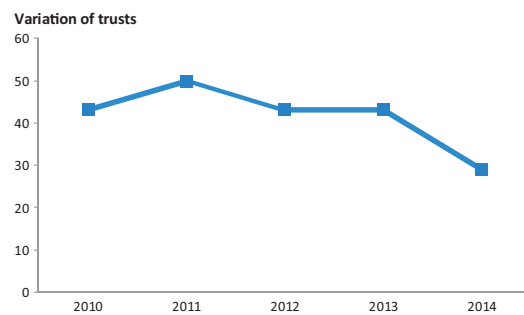
can see if there are any trends in the number of cases over the last 5 years.



The figures for contentious probate actions in the period 2010–14 are fairly volatile although there appears to be a general upward trend.

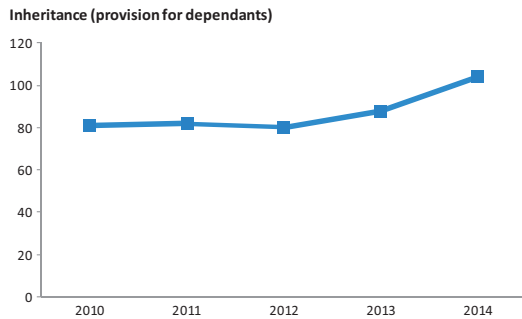


Disputes relating to trusts property showed a fall in the number of cases in 2011, but there is now also a general upward trend in this category of case.

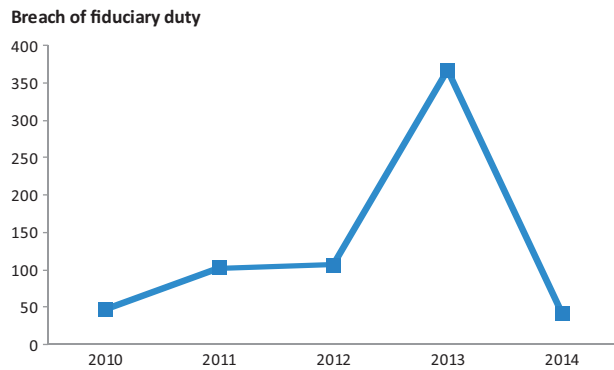


The figures for variation of trust applications show a fall in the number of cases in 2014, which is what one might expect after the flurry of activity in trustees and beneficiaries seeking to extend perpetuity and accumulation periods following the introduction of the

new 125-year period in the Perpetuities and Accumulations Act 2009.



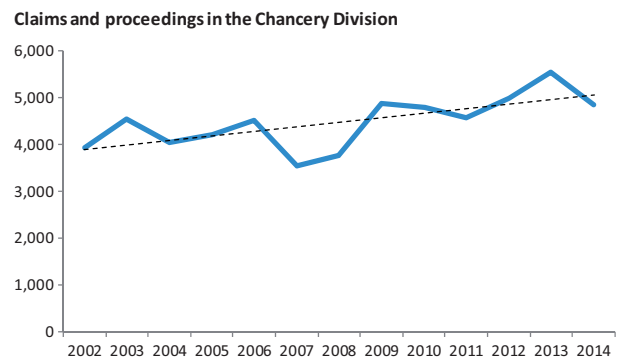
The number of inheritance (provision for dependants) applications (1975 Act cases) has been quite steady over the period 2010–14, although the number of applications in 2014 was 24% higher than the average number of applications over the previous 4 years. It is not possible to say if this is the start of an upward trend in this type of case, but it is a noteworthy increase.



It is a matter for speculation as to why there should have been a spike in 2013 in applications in the category 'breach of fiduciary duty' (at 368 cases, more than twice the number of cases in 2012 and over 8 times the number in 2014). It might be a result of a change in the way that the statistics are recorded, but on the other hand there was also an increase in the total number of claims and originating processes in

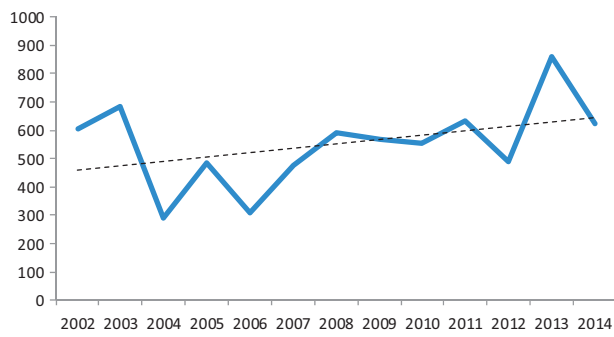
the Chancery Division in 2013 (see below), which could itself be a result of an unusually high number of cases of breach of fiduciary duty. Whatever the reason for the marked increase in this type of case in 2013, the figure for 2014 shows a return to the level of applications in 2010 and there is no general upward trend in this type of case.

As mentioned above, Table 3.14 contains figures going back to 2002, and although the Chancery Division changed the way that claims were recorded in 2010, it is difficult to see how that can have affected the recording of the overall number of cases issued in the London Chancery Division. During the period 2002–14, the number of cases originating in the London Chancery Division increased (from 3924 in 2002 to 4843 in 2014), but these figures of course include not only trusts, wills, and probate cases, but the whole range of claims in the London Chancery Division, including land and property, business and industry, intellectual property, contract, professional negligence, and other miscellaneous cases.



The graph above shows an upward trend (29%) in the overall number of claims and proceedings issued in the London Chancery Division over the last 13 years, with a significant dip in claims in 2007 and 2008, which can surely be attributed to the global economic recession.

Trusts, wills and probate cases

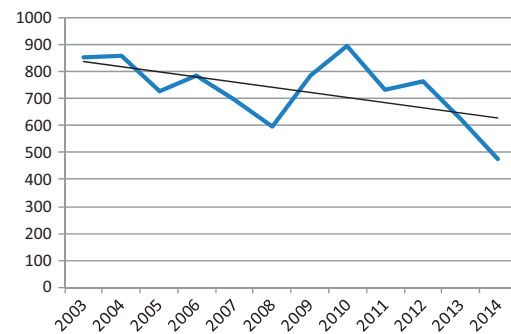


The number of trusts, wills, and probate cases, when plotted on the graph above, shows greater volatility in the number of cases over time, and a greater upward trend (41%) than for Chancery cases overall. It is also interesting that the number of trusts, wills, and probate cases does not appear to have been affected by the recession. General Elections during this period were in 2005 and 2010, but there does appear to be any noteworthy correlation between those two events and any increase or decrease in the number of trusts, wills, and probate cases.

Another interesting source of information in the MoJ's Appellate Courts tables is Table 3.15 as it provides data for (i) the total cases received for hearing in

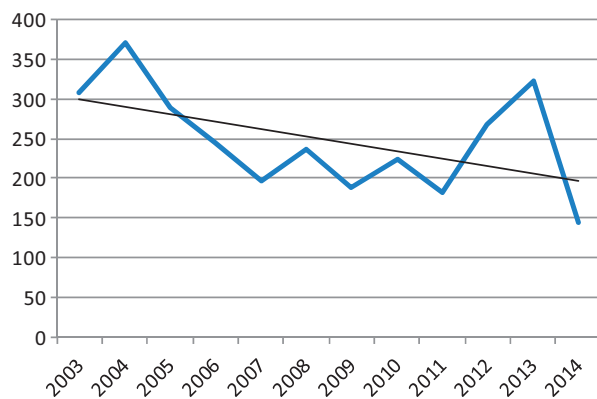
the London Chancery Division each year, (ii) the number of cases disposed of 'after trial or hearing', and (iii) the number of cases 'otherwise' disposed of (which is explained as meaning 'settled out of court'). This article examines cases shown in Table 3.15 as received for hearing in the Trial List, rather than the General List or the Interim Hearing List, to see if there is a trend towards settlement of cases due for trial.

Cases received for hearing



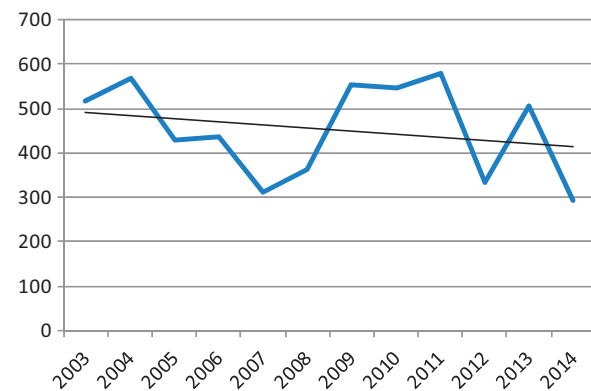
This graph shows a marked downward trend (25%) in the number of cases listed for hearing since 2003, which is something that we, as lawyers practising in this area, might have suspected was the case, but the evidence is indeed in Table 3.15.

Disposed of after trial or hearing



There are similar downward trends, of course, in the number of cases disposed of after trial and after settling, but the rate at which the number of cases that are contested is falling (34%) is twice the rate at which the number of cases which settle is falling (16%), which shows a marked trend towards cases settling over the last decade which, again, we might

Otherwise disposed of



have suspected was the case from our own experience.

The MoJ statistics on cases in the London Chancery Division therefore show the following:

- There is an upward trend in the number of cases issued in the London Chancery Division.

- There is also an upward trend in the number of trusts, wills, and probate cases issued in the London Chancery Division.
- There has been an upward trend in the number of contentious probate cases and disputes over trust property over the last 5 years and a marked increase in the number of 1975 Act cases in the last 2 years.
- Despite the upward trend in the cases issued in the London Chancery Division, there is a downward trend in the number of cases listed for trial in that Division, and of those cases that are listed, there is a greater trend towards cases settling.

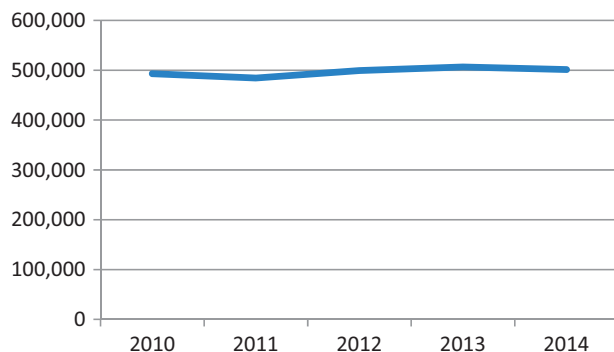
## Social issues

It is useful to examine the statistics on the following social issues to see if there is an explanation for the upward trend in contentious probate cases and the recent increase in 1975 Act cases:

- Is the number of deaths in England and Wales increasing?
- Is the number of people dying intestate increasing?
- Is the incidence of mental illness increasing?
- Has there been any change in the structure of the family unit?
- Is estate size increasing?

## Registered deaths in England and Wales

Registered deaths in England and Wales



The ONS provides figures for the number of registered deaths in England and Wales each year, and there is no significant trend either upwards or downwards.



Figures from the Probate Service provided by the MoJ (Family Court Statistics Quarterly, April–June 2015, Table 20) show the number of grants of probate and letters of administration in England and Wales on an annual basis. These figures show that as far as estates where a grant of representation is obtained are concerned, there is no discernible trend either upwards or downwards in the proportion of people dying intestate.

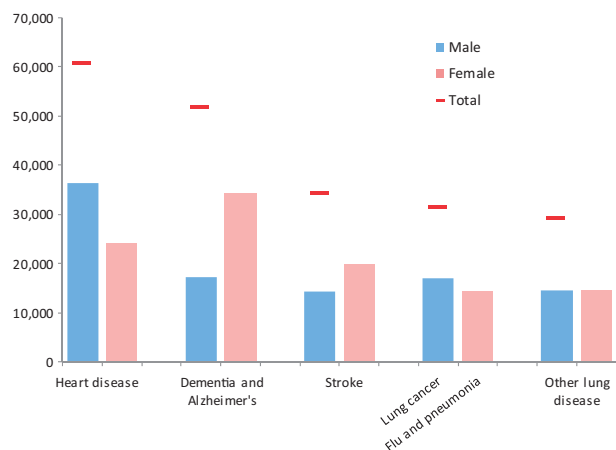
It is perhaps worth noting that in the period 2010–14 the number of contested probate cases originating in the London Chancery Division represented a tiny proportion—between 0.4% and 0.7%—of the number of grants of representation in England and Wales.

So statistics relating to numbers of deaths and grants of representation in England and Wales do not show any trends that might interest trusts and estates lawyers.

## Mental illness

The ONS provides data on causes of death in its bulletin ‘Mortality Statistics: Deaths Registered in England and Wales (Series DR), 2014 Release’. The following graph shows the number of deaths in England and Wales for men and women from the top leading causes of death in 2014.

Major causes of death in 2014



The ONS provides the following further information about these figures in its bulletin:

- Dementia and Alzheimer's disease has been the second leading cause of death since 2011 in England and Wales, rising from 3.2% in 2001 to 7.8% in 2011 and 10.3% of deaths in 2014.
- The number of deaths attributable to these top 2 leading causes of death differs significantly for men and women. For every 100 women who died of heart diseases, 150 men died. But, for every 100 women dying from dementia and Alzheimer's disease, 50 men died.
- The likelihood of developing dementia and Alzheimer's disease increases with age. As female life expectancy is greater than male life expectancy, women are more likely to survive to older ages, where they are at increased risk of developing dementia and Alzheimer's disease.

The ONS makes the point that some of the rise in deaths from dementia and Alzheimer's since 2001 is due to an update to the coding framework used for cause of death and a better understanding of dementia, which is likely to have led to a rise in increased reporting of dementia as a cause of death on death certificates. This is because although dementia can be fatal and the sole cause of death, it also impairs the

ability to cope with infections and other physical problems, so that it is often a contributing factor in death.

The Alzheimer's Society estimates that there are 800,000 people in the UK with a form of dementia and that more than half of those have Alzheimer's disease. They also estimate that that number will rise to 1.7 million by 2051 (source: press release issued on 5 December 2013).

The apparent increase in people suffering from dementia and Alzheimer's disease is something that trusts and estates lawyers should have in mind as it is likely to lead to an increase in the number of contested probate cases that centre on the capacity to make gifts and testamentary capacity. An increase in mental illness in the elderly is also likely to lead to an increase in the number of cases of undue influence as elderly relatives become, or are perceived as being, more vulnerable to pressure.

The issue of testamentary capacity has been in the spotlight in recent years as there has been comment on whether there is any real difference between the test for testamentary capacity and the test for capacity in the Mental Capacity Act 2005, although that issue was resolved by the decision in *Walker v Bodmin*<sup>1</sup>. The Law Commission has indicated that the issue of testamentary capacity will form part of its review of wills (which is expected to take 3 years and likely to start soon) as mental capacity 'presents a growing problem'.

## The family unit

In November 2015 the ONS released a statistical bulletin on 'Families and Households, 2015', and one of the main points highlighted in that bulletin is that the cohabiting couple family continues to be the fastest growing family type in the UK, reaching 3.2 million cohabiting couple families in 2015. The number of cohabiting couple families grew by 29.7% between 2005 and 2015, compared with a growth of 12.1% for lone parent families and 1.9% growth for married

1. [2014] EWHC 71 (Ch).

(opposite and same sex) or civil partner couple families. However, despite an increase in all three types of family over the last decade, married couple (opposite and same sex) or civil partner families are still the most common family type in the UK, both with and without dependent children.

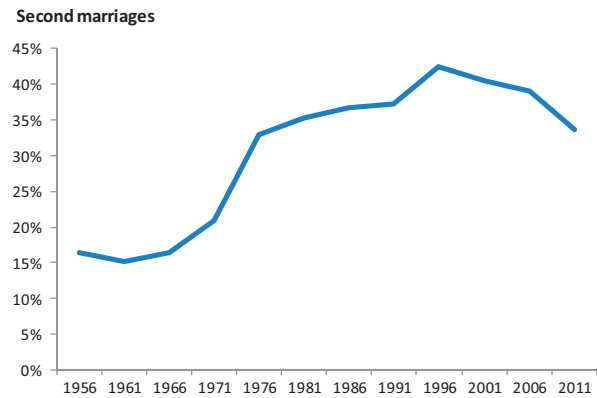
This growth in cohabiting couple families might account for some of the increase in contentious probate cases and 1975 Act cases, particularly as there has been no accompanying increasing trend towards dying with a will in place in estates where a grant of representation is needed, and in view of the common misconception that cohabiting couples have rights in relation to one another's property. According to the ONS, 51% of respondents to the British Social Attitudes Survey in 2008 thought that unmarried couples who live together for some time probably or definitely had a 'common law marriage', which gave them the same legal rights as married couples.

If the Cohabitation Rights Bill 2015 is enacted in due course,<sup>2</sup> it will provide protection for people who live together as a couple on the death of one of them: if the surviving cohabitant is a 'qualifying cohabitant', they will be entitled to the same rights as a surviving spouse or civil partner under the intestacy rules, and also to reasonable provision in 1975 Act cases (rather than just provision for their maintenance as at present). However, these protections may well contribute to a rise in the number of contested probate and 1975 Act cases as the entitlement of a qualifying cohabitant to reasonable provision in 1975 Act cases could act as an increased incentive for a surviving cohabitant to bring such a claim.

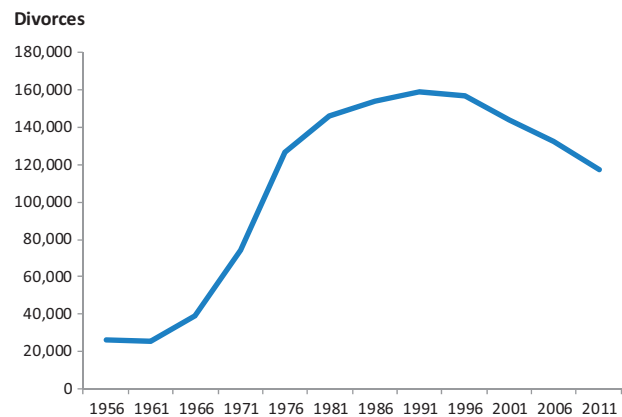
Another possible explanation for the increase in contentious probate cases and 1975 Act cases might be if there is an upward trend in the number of second marriages as these can often lead to tensions within families, which flare up after the death of a family member.

The ONS provides statistics on the number of marriages each year and also previous marital status on marriage. The graph below shows the change over the

last 60 years in the proportion of marriages where the marriage is a second marriage for either or both parties.



There was clearly an upward trend in second marriages for either party until 1996 after which there is now a downward trend. One possible explanation for this downward trend might be the increase in the number of cohabiting couples as mentioned above, but another possible explanation could be that the number of divorces has fallen since 1996.



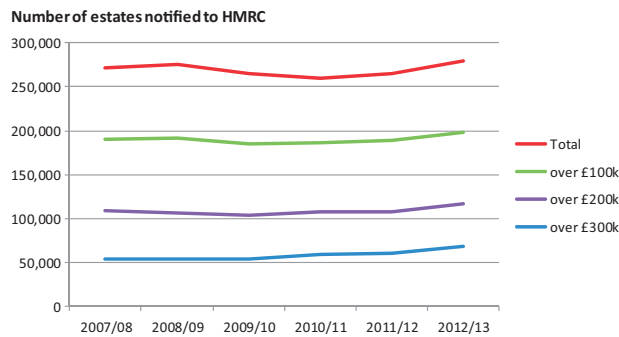
The correlation between the number of divorces, the number of cohabiting couples, and the proportion of marriages that are second marriages is complex and would probably justify a statistical paper on its own. From a brief examination of the figures, however, it seems unlikely that the incidence of second marriages and divorces are contributing factors in the upward trend in contentious probate cases and the recent increase in 1975 Act cases.

2. The Bill had its first reading in the House of Lords on 4 June 2015 and so is still in the early stages of passing through Parliament.



## Estate size

A trend towards increased estate size might explain an increase in contentious probate cases and 1975 Act cases as there would be greater incentive to litigate about larger estates.



The above information (published by HMRC) shows an upward trend in the number of estates notified to HMRC for inheritance tax purposes in the period 2010–13—which might be expected following recovery from a global recession—but there is no marked spike in the size of estates reported to HMRC, which would account for a recent increase in contentious probate cases and 1975 Act cases, and it might be more accurate to say that the growth in estate size is consistent with such increase rather than causative of it.

## Conclusion

Statistics is a complex and challenging branch of mathematics, and it is beyond the scope of this article to draw hard and fast conclusions from any of the statistics examined in it. From the point of view of trusts and estates litigators, however, the following observations can be made.

In the London Chancery Division, there was an upward trend in contentious probate claims in the period 2010–14 and an increase in the number of 1975 Act claims in the last 2 years. There is, however,

an overall downward trend in cases listed for trial, and of the cases that are listed for trial or hearing, there is a trend towards cases settling.

*In the London Chancery Division, there was an upward trend in contentious probate claims in the period 2010–14*

A contributing factor in the growth in contentious probate cases could be the increase in people with dementia and Alzheimer's disease as people live longer and become more likely to develop these illnesses. Although the Law Commission is to address the issue of testamentary capacity in its forthcoming review of the law relating to wills, any changes to the law are perhaps unlikely to have any impact on the number of cases that centre on the issue of testamentary capacity as the dispute is more often than not one of fact rather than law.

Another contributing factor to the growth in litigation in relation to estates could be the increase in the number of cohabiting couples, particularly in view of the widespread belief that cohabitation comes with legal rights. The death of a cohabiting partner could result in frustrated expectations and a sense of injustice, which are common factors in litigation. Although the Cohabitation Rights Bill 2015 might provide some comfort to cohabiting couples in cases of intestacy, it is unlikely to lead to a reduction in the number of 1975 Act cases.

*Although the Cohabitation Rights Bill 2015 might provide some comfort to cohabiting couples in cases of intestacy, it is unlikely to lead to a reduction in the number of 1975 Act cases*

As far as trusts and estates litigators are concerned, therefore, it seems likely that we will continue to see an increase in contested probate and 1975 Act cases in the foreseeable future.



*Judith Bryant specializes in advisory and litigation work in trusts, wills, administration of estates, charities, Court of Protection matters, family provision, trusts in divorces, and related professional liability matters. She is consistently recommended in directories, most recently as ‘a very good, analytical barrister’ and ‘a bright and very capable junior’. E-mail: [jbryant@wilberforce.co.uk](mailto:jbryant@wilberforce.co.uk); [www.wilberforce.co.uk](http://www.wilberforce.co.uk)*

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