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YOUR STRENGTH, YOUR SOLUTION, YOUR SIDE

WHEN YOU NEED
SOMEONE ON YOUR
SIDE

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SOLVITUR

From Latin, it means solved.

04

At Mitchells Solicitors, we love to solve problems.
When you need advice of the highest quality and integrity -
we're on your side.

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SOLVITUR

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SOLVITUR

PRINCIPAL'S NOTE



Bryan Mitchell
MANAGING DIRECTOR

Welcome to Solvitur, the official magazine of Mitchells Solicitors. This is our fourth edition, and we'd like to thank you for your enthusiastic response to our first issues.

Our firm has gone through some exciting changes in recent months. I am happy to welcome Danielle Little and Graham Stenton to the firm. Graham has been practicing law for over 37 years and his main focus here is looking after property transactions, including conveyancing. Danielle is experienced in wills and estates, with a focus on family provision, undue influence, capacity disputes, unconscionable conduct and trust disputes.

Here at Mitchells Solicitors, we offer the best quality advice by lawyers with the highest ethical standards.

That's why our motto is **your strength, your solution, your side.**

OUR

Meet our experienced lawyers,
youthful law clerks and
conscientious support staff.

TEAM

Our

WHO WE ARE

Team

We are a varied team of experienced lawyers, youthful law clerks, and conscientious support staff all with one common goal - to serve our clients to the best of our ability.



Bryan Mitchell, Managing Director
Accredited Specialist Succession Law (Qld)



David Graham
Senior Associate



Kylee Ghodsi
Senior Associate



Graham Stenton
Solicitor - Special Counsel



Kate Muller
Associate



Tim O'Dwyer
Consultant

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Naomi Wallace
Solicitor



Nathan Fawcett
Paralegal



Cindy Kinchin
Finance Manager



Katarina Rose
Legal Assistant



Shannon Radel
Legal Assistant



Eirini Georgiou
Legal Assistant

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Rebecca Holland
Receptionist



Julie Cave
Marketing & Communications



James Mitchell
Law Student



Sally Cree
Law Student

LATEST NEWS



Welcome to Graham Stenton, who adds a considerable wealth of knowledge and experience to our property law department. Graham has been practicing law for over 37 years, and has experience in managing his own law firm in Brisbane and the Gold Coast.



Naomi Wallace, who has been with our firm for five years, was admitted as a solicitor in January this year. She works in wills and estates, focusing on estate administration and litigation.

GIVE IT BACK!

*Feature**Story*

Elder financial abuse is a crime - and a recent QCAT case has been referred to Crown Law for possible future prosecution.

By Bryan Mitchell

Elder abuse is a form of mistreatment that results in loss or harm to an older person. The most common kind of elder abuse is financial abuse, where older people are unduly influenced, deceived or exploited out of their assets – and the most common kind of perpetrator is a close family member.

A total of \$56.7 million in property and savings was misappropriated from 139 elder abuse victims in Queensland in the 2013-14 financial year, the Royal Commission into Family Violence heard. Yet it is a vastly under reported issue, and the financial loss is likely to be much higher. It's also expected to increase as Australia's population ages.

The Case – Give it Back!

A recent case heard by the Queensland Civil and Administrative Tribunal (QCAT) heard a financial elder abuse case involving the misuse of a power of attorney.

The matter first came to QCAT's attention as a result of an investigation by the Public Guardian into the actions of the then Attorney of VMH. VMH had appointed her daughter, EH under an enduring power of attorney dated 24 February 2011, with the power for financial matters to begin when VMH lost capacity as certified by a medical practitioner.

The Public Guardian's report had indicated that VMH's property had been sold and more than \$130,000 was unaccounted for; and there were unpaid nursing home fees. The Public Guardian had been able to obtain certain information regarding what had happened to the funds from the proceeds of the sale of VMH's property, however they and the Public Trustee's enquiries had stalled because of their being unable to obtain further information from EH. EH was to attend the Public Trustee to provide further particulars but failed to attend the appointment on two separate occasions.

The Public Trustee's investigations revealed that the Attorney had not acted appropriately.

QCAT Member Joachim stated:

- An Attorney must not use an Attorney's funds for their own benefit unless there is an express intention under the terms of the Enduring Power of Attorney;
- An Attorney must avoid conflict transactions;
- An Attorney must keep records; and
- An Attorney must keep property separate.

GIVE IT BACK!

*Feature**Story*

Elder financial abuse is a crime - and a recent QCAT case has been referred to Crown Law for possible future prosecution.

The Public Trustee investigation showed a mixing of monies following the sale of the adult's property.

QCAT Member Joachim ordered:

"I have decided to refer EH to Crown Law based on her actions as Attorney in using her mother's funds for her own benefit, not keeping records, not avoiding conflict transactions and not keeping property separate – all of which, in my view, amounts to not acting honestly and with reasonable diligence."

The facts of the above case of VMH [2018] QCAT 14 are even worse than they appear in that there was an unexplained reverse mortgage taken out by the mother and no explanation as to what happened to the proceeds. The other daughter suspects that the perpetrator also gained access to those funds effectively leaving the mother, who is still alive and in a nursing home, without any visible means of support.

We don't know if the daughter is or will be perused by the Department of Public Prosecutions for what appears to be blatant stealing. The good news out of this story is that the Tribunal has referred it to Crown Law to at least investigate what further steps could or should occur rather than this form of abuse being lost as if it should never be examined by the criminal justice system. This appears to be a shift in policy and a welcome one.

What to look for in a Power of Attorney

There are certain qualities and skills a competent Power of Attorney should have, which could reduce the number of elderly, vulnerable persons being exploited.

Honest

The attorney must be an honest person. Someone with any history of dishonesty should not be appointed – even if the temptation is to believe that they'll 'do the right thing this time'.

Financially Wise

An attorney should be wise with money.

GIVE IT BACK!

*Feature**Story*

Elder financial abuse is a crime - and a recent QCAT case has been referred to Crown Law for possible future prosecution.

Seek Advice and Follow Wise Counsel

A person who prefers their own advice above anyone else's is usually the wrong person for the role of attorney.

Fair Minded

Someone who is fair minded in the way they deal with people around them is a great quality for an attorney.

These qualities are crucial because they'll be making financial decisions on your behalf – and choosing the wrong person can leave you in a vulnerable position.

When considering appointing a Power of Attorney, it's important that you seek specialist legal advice. A specialist will identify any potential issues in your choice of Attorney and make recommendations about how to protect yourself and your loved ones.

If you suspect financial elder abuse is occurring, it is vital you seek specialist legal advice urgently. Once money or assets start disappearing it can be difficult to get them back. A specialist is an expert in identifying the signs of elder financial abuse and taking steps to minimise the loss.

WHAT TO DO IF...? YOU'VE BEEN LEFT OUT OF A WILL

*Information**Guide*

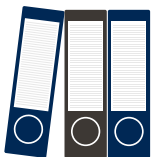
Everything you need to know about making a family provision claim if you've been left out of a will.



Strict time limits apply. In Queensland, you only have six months from the date of death to dispute a will.



Are you eligible to contest the will? Only certain people have grounds to contest a will, including a spouse, a child, a grandchild or a dependent (in limited circumstances).



Ascertain the date of death and obtain a copy of the will.



Get specialist legal advice. A contested will is either settled out of court, or if this isn't possible, will be decided by a judge in court

WHAT

WE

DO

Our Areas Of Expertise

WHAT WE DO, WE DO TO THE BEST OF OUR ABILITY

Estate Disputes

There are a number of reasons why there may be an estate battle or a will is challenged. These would include the following:

You are the wife or husband or de facto spouse of the deceased and you have not been adequately provided for or at all under the will.

You are a child or stepchild of the deceased and you have not been adequately provided for or at all under the will.

The estate of the deceased person is smaller than you remember it being.

Money or other assets have disappeared from the estate.

Prior to the deceased passing away, he or she made certain promises to you which don't appear to be in the Will.

You may have been cut out of a Will and at the time the Will was drafted, the deceased may have been incapacitated or very vulnerable.

The will is home made and doesn't make sense.

You believe that the executor isn't doing the right thing.

What are the grounds for contesting a will?

Reasons to contest a will include:

You have been left out of a will or are receiving less than you believe is fair

Assets have disappeared from the estate

The will doesn't make sense

You suspect the will maker has been unduly influenced

You believe the will maker has lost mental capacity to make a will

There are 13,000 lawyers in Queensland. **Only 45 are specialists in wills and estates, and Bryan Mitchell is one of them.** We offer a free, 10-minute phone consultation and every case receives the benefit of Bryan's expertise.

WHAT WE DO, WE DO TO THE BEST OF OUR ABILITY

Estate Planning

Making or changing a will, usually referred to as estate planning, addresses two basic questions:

What should happen to what I own when I die?

What if I lose my mental capacity before I die?

Our estate planning service will provide you with peace of mind after finalising your will and making any other necessary arrangements. We also ensure that following your death, those who will administer and benefit from your estate are more likely to enjoy a peaceful existence.

Because your will can deal only with what you own when you die, you should be aware of the significance of owning property jointly with someone else.

This means that jointly-owned property cannot be provided for in your will. The moment you die your interest in such property effectively disappears, and legally passes to your surviving co-owner or co-owners.

Superannuation cannot be dealt with under a will. Although you may have a substantial investment in superannuation, or have included a death benefit via a life insurance policy within your superannuation arrangements, your will cannot specify what happens to such entitlements upon your death.

People may have private companies and trusts arrangements set up for tax and other reasons. Be aware that your will cannot dictate what happens to a trust or to a company. Such entities should be provided for outside your will, but again within the context and certainty of sound estate planning.

There is no sense in making or changing a will which could increase the amount of tax payable to the government after you die. We look at ways to legitimately minimise tax. These may involve determining how assets are allocated to certain persons and using trusts.

In summary, our estate planning for clients will look at your entire circumstances to ensure peace of mind, peace of existence and minimal tax.

WHAT WE DO, WE DO TO THE BEST OF OUR ABILITY

Estate Administration

Executors of an estate have an obligation to engage in the due administration of the estate.

Enormous obligations are cast upon an executor to gather in the estate, pay all testamentary debts and expenses and to distribute the estate in a correct and legal way.

Commonly, an executor is unsure of his or her obligations without legal advice.

After a Grant of Probate is obtained, where required, the executor/s are bound to gather in the estate. This term means that the assets owned by the deceased person must be placed in the legal name of the executors on behalf of the estate..

As part of the administration of the estate, it may be necessary to sell assets so that all debts and estate expenses may be paid. In some cases, it is very unhelpful for assets to be sold as part of the administration of the estate and it may be more helpful for them to be kept intact and appropriated to beneficiaries as part of their inheritance.

An executor may discover that a deceased person failed to keep up to date with their taxes or erroneously made a claim on social security. In both of these examples the executor is bound to discharge the obligations of the estate in paying all taxes that ought to be paid. If the executor fails to do this, the executor will be personally liable. Similarly, with regard to social security that ought not have been claimed, it will be necessary for the executor to negotiate with the relevant government department concerning a refund of the overpaid social security or a release.

The administration of the estate may include defending a Family Provision claim or other estate litigation.

It may also mean enforcing the rights of the deceased, such as seeking to set aside gifts and other transfers that the deceased made due to undue influence or a deterioration in capacity.

The administration of an estate is often complex, and should always be done in conjunction with sound legal advice.

It's important to remember that failure to administer the estate appropriately may result in the executor being personally liable for their oversights.

WHAT WE DO, WE DO TO THE BEST OF OUR ABILITY

Family Law

Australia's divorce laws are based on a no-fault principle. Before a divorce can be granted, you need to satisfy the Court that you and your spouse have lived separately and apart for at least 12 months, and there is no reasonable likelihood of resuming married life. It is possible, however, to live together in the same home and still be regarded as separated.

At Mitchells Solicitors, we understand that the process of obtaining a divorce can be a traumatic event in your life. We are able to help our clients through this difficult time by handling this process with compassion and efficiency. We can also respond to your spouse's unwanted divorce application.

When proceeding with your divorce you will need to make separate arrangements to resolve any property matters and care arrangements for any children.

You have one year from the date of your divorce to make an Application to the Court for a property settlement. However, we recommend that all property matters between you and your partner be finalised as soon as possible following your separation.

De Facto Law

Generally the law defines a de facto relationship as one where the couple have been living together in a marriage-like relationship for at least 2 years. This includes same sex couples.

Since 2009, when the law changed, de facto property settlements have been dealt with in exactly the same way as property settlements for divorced or separated married couples.

If your de facto relationship breaks down, you have 2 years from the date of separation to commence Court proceedings relating to a property settlement.

WHAT WE DO, WE DO TO THE BEST OF OUR ABILITY

Elder Law

Elder Law is all about the law for older Australians and the unique circumstances they face.

We can advise you in all areas of elder law, including:

Making or amending a will, particularly if cognitive function is an issue. A solicitor assisting an older person in doing a Will should pre-empt accusations of lack of testamentary capacity and should document at interview level all the elements of testamentary capacity.

Social security. The way assets are held, how much income you generate and other factors all impact on whether or not there is a full entitlement to the pension or a part entitlement to the pension.

Establishing or amending trusts in order to plan for the next generations.

Powers of Attorney and Advance Health Directives so that your wishes will be followed in the event you lose capacity to make decisions about your financial situation and health care.

Family disputes, QCAT applications and making arrangements for care should all be carefully documented so that no party is disadvantaged.

Elder abuse, particularly the financial abuse of an elder. Elder abuse occurs when their finances are exploited or stolen. This can happen when attorneys under a Power of Attorney document obtain an early inheritance; someone uses an older person's credit cards and other resources for their own personal use and enjoyment, or when assets are given away by the older person to one child for reasons which the older person does not really grasp or is duped into believing is appropriate in the circumstances.

WHAT WE DO, WE DO TO THE BEST OF OUR ABILITY

Property & Conveyancing

Our comprehensive conveyancing services are intended to protect your interests and keep you out of trouble. We can also get you out of trouble by advising you before, during and after you enter into any binding contracts.

We will, on your behalf, undertake all necessary searches and investigations, draft documents and represent you in dealing with other parties and their legal representatives. We will carefully check all documents before you sign, draft appropriately protective amendments and complete the transactions for you competently and promptly. We also can, if you require, provide timely advice on any related stamp duties, taxation, superannuation, pension or other issues.

Be aware we do not cut corners and consequently do not do cut-price conveyancing. At the same time we usually require our conveyancing clients to engage us under a formal costs and services agreement and to make an initial deposit into our trust account towards our costs and outlays.

Our property and conveyancing services have been enhanced immensely since nationally-recognised 'real estate watchdog' Tim O'Dwyer became a consultant here on the merger of his long-established Logan City firm of O'Dwyer and Bradley with Mitchells in 2012 .

Unexpected problems can sometimes occur when you buy, sell, lease or own property on your own or with someone else. We have been there for many past clients and have the knowledge and experience to help resolve property disputes – whether by simple advice, some stern letters on your behalf, mediation or going to a tribunal or court.

We know the law, the rules and the ways that work to resolve such disputes as quickly and as inexpensively as possible. See us early before things (and costs) get irretrievably out of hand.

Feature

WHY BLENDED FAMILIES END UP IN COURT

Story

One of the most common reasons for an estate battle occurs when relationships between step-parents and step-children break down over the contents of a loved one's will.

Why Step Families End Up Contesting the Will

Short Marriage Term

Short-term marriages present a perfect, brief incubation period for brewing an estate battle. Often, the older male passes away first, and his long-term estate plan may have been short-circuited by undue influence in the period before his passing.

Wills, estate plans, transfers of property, and trusts that are hastily drawn up — with beneficiaries changed during a husband's last days — practically guarantee estate battles.

Favored Children

Favored children of any parent can be particularly problematic.

Continual behind-the-scenes efforts by a step-parent to advance the interests of their children over those of the willmaker's biological children won't escape the notice of other family members and will lead to mistrust and resentment.

Disputes Immediately After a Death

Disputes will frequently break out immediately upon a willmaker's death, even over funeral details.

Feature

WHY BLENDED FAMILIES END UP IN COURT

*Story**Dementia*

Most undue influence activities later challenged in court occur when the elder is in obvious cognitive decline. Bad actors can try to exploit the vulnerabilities of an elder with dementia – to unduly influence the elder to engage in an act that might on its face appear to be brazen, but which is meant to take control of a family fortune.

Subtle Hints of Wrongdoing

Sometimes hints of wrongdoing are subtle. Questions as to the existence or nonexistence of estate planning documents are shunted aside. Often, personal property disappears or is signed over into the wrong hands.

A Step Family Estate Battle

Auckland businesswoman Carol Fry was a widow of less than three months when she discovered her stepson was challenging his father's will. The ensuing legal battle took six years and cost her nearly \$400,000, but she says she had no option other than to fight the claims in court. "If he'd got what he wanted, I would have been bankrupt, and I would have been tossed out of my own home."

Carol Fry had bought and paid for her own home in Parnell in 1986, with no contribution from Laurie, before they married in 1989. It became the couple's home, and part of Laurie's estate. The couple set up their business, Unique Fabrics, in 1986, with start-up capital also provided by Carol.

Jason worked for the company in the early 1990s and, after a period overseas, became national sales manager in 2006. He said his father told him he would inherit half the company on his father's death, but Carol Fry said the plan was always for Jason to buy out Laurie's share.

Feature

WHY BLENDED FAMILIES END UP IN COURT

Story

Although Carol Fry won the case in the Family Court, it was overturned on appeal to the High Court, which ordered her to pay stepson Jason Fry \$175,000 to meet his father Laurie's moral duty to him. Laurie had left all his estate to Carol, on the understanding that his three children, and her own beneficiaries, would inherit on her death. The court ruled that because the relationship between Carol and Jason had irreparably broken down, it had little confidence she would provide for him.

Jason Fry said he felt he had no option but to pursue a legal claim after he'd worked for Unique Fabrics for 15 years, but found his father had left him nothing in his will. "I always knew it was a no-win situation, but I did it on principle. I had no other choice."

He says his father had promised he would inherit shares in the business. Under his stepmother's will, he might have inherited "in 20 or 30 years", but there was no guarantee she would not change it before she died.

It is important that if you are part of a blended family, you have considered options and solutions to prevent future disagreements. One good option is to utilise a testamentary discretionary trust, so that you have better control over how your assets will be divided. A testamentary discretionary trust is a type of trust created under a will, comes into existence only upon the administration of the deceased estate.

Another option is to create a Mutual Will Agreement which allows for your assets to be divided equally between all the children in your blended family. In the absence of Mutual Will Agreements nothing will stop the surviving spouse from changing their will and cutting their spouse's children out of their will or making sure that only their own children are provided for.

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minute phone consultation,
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