Mitchells
SOLICITORS

SOLVITUR

YOUR STRENGTH, YOUR SOLUTION, YOUR SIDE

WHEN YOU NEED SOMEONE ON YOUR SIDE

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SOLVITUR

From Latin, it means solved.

03

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

Level 1, 147 Beaudesert Rd, Moorooka Q 4105
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SOLVITUR

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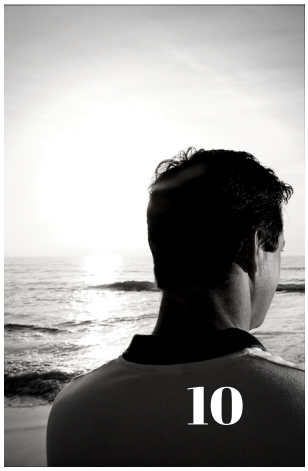

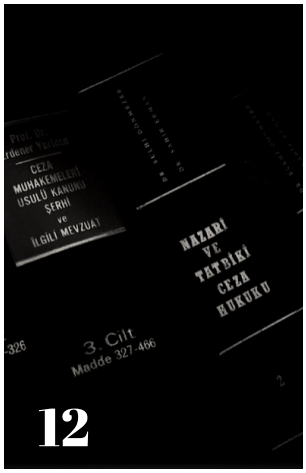

SOLVITUR

PRINCIPAL'S NOTE

Bryan Mitchell
PRINCIPAL

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

Recently, I celebrated the 25th anniversary of my admission as a solicitor, which reminds me that I've been in the law for 28 years. It seems like a long time, but the truth is that I still love the law, and I love serving our clients with the best possible legal advice.

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, Principal
Accredited Specialist Succession Law (Qld)

Tim O'Dwyer
Consultant

David Graham
Senior Associate

Kylee Ghodsi
Senior Associate

Adele Bentham
Associate

Kate Muller
Associate

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Monique Nguyen
Law Clerk

Naomi Wallace
Law Clerk

Cindy Kinchin
Accounts Manager

Rebekka Mitchell
Conveyancer

Katarina Rose
Legal Assistant

Leticia Collins
Workflow & Precedent Co-ordinator

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Shannon Radel
Legal Assistant

Rebecca Holland
Receptionist

Vic Bailey
Client Relations

Julie Cave
Digital Media & Communications

LATEST NEWS

Bryan is celebrating 25 years since his admission as a solicitor. He remains as committed to the practice of law as the day he was admitted as a baby-faced youngster! The upside for clients is that you get the benefits of 25 years of experience and knowledge when you engage Bryan. Please congratulate him next time you speak to him!

We are excited to welcome Adele Bentham back to the firm from maternity leave. Adele has come back to work part time as the head of our family law department.

Feature

HOW TO LOSE EVERYTHING

Story

When professionals like accountants or financial planners agree to act as executors on their client's estates, they're risking their business, their money and their reputation.

By Bryan Mitchell

It's common for service professionals like accountants and financial planners to be asked to serve as the executor on the estate of a client. Clients feel that their estate will be in the good hands of a professional and that any problem will be handled effectively. Because there is already a relationship of trust between the client and the professional, both parties feel comfortable in appointing a professional to act as executor.
Should accountants and financial planners act as executors?

Graham is an accountant and has been looking after his client, Olive, for over thirty years. He helped her particularly when her husband died and his business had to be sold. Olive has a healthy estate worth over $2 million when she dies, and because she has always trusted Graham, she has appointed him as her executor.
Graham knows Olive's family well, and doesn't believe there will be any disputes. Olive has a son, Will and a daughter, Amy who both get along well. Will is single and never married, and Amy is married with children.

Graham begins his task as executor and the instructions seem straight-forward. The residence in which Olive lived is to be sold, and everything split equally between Will and Amy. Then Will visits Graham and explains his situation.

He's been renting all his life, and he'd really like to move into the home in which he'd grown up. He asks Graham if he could receive the house, and his sister Amy receive all the other assets – cash, shares and other investments. She has no interest in the house, because she already owns a home.

Graham can see that this looks like a reasonable deal – the house is worth about a million, and the rest of the estate is worth about a million, so it seems fair.
He agrees, and this is how he finalizes the estate. Everything seems well until he receives a visit from Amy. There are several legitimate reasons for her concern: she didn't agree to the deal between Graham and Will, but even worse, she has a property valuation in her hand.

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The family home has been independently valued at $1.5 million, having increased in value significantly in the last few years. The shares she'd received hadn't enjoyed the same capital growth. The result for Amy is that her brother received a house worth $1.5 million, and her share of the estate is worth only about $800,000.
The will was clear, she tells Graham. We were to receive the estate in equal shares. Graham has two significant problems.

An executor has certain obligations when administering an estate.
Failure to administer the estate appropriately may result in the executor being personally liable for their oversights. In this case, Graham didn't administer the estate as he should have by not following the instructions of the will, and one beneficiary has suffered a loss of $700,000. Graham could be held responsible for this loss if the court finds that he did not perform his duties as required.
Can Graham afford to repay Amy the $700,000 she lost because of his deal with Will? Probably not. He would have to sell everything he owned, including his business and home, to settle the debt. There's also the costs of the litigation she commences against him, and the bad publicity he receives as a consequence of the legal proceedings.

Does his professional indemnity insurance cover his actions?
Couldn't Graham claim the $700,000 on his professional indemnity insurance? There's just one problem with that: he may not be covered. His professional indemnity insurer is presently arguing with him that his conduct as executor is not covered by his policy – as it has nothing to do with being an accountant. Now he's not only lost $700,000 of his own money because his insurance won't cover the loss (unless he can get a lawyer to sue his insurer), but he suffers a great loss to his reputation.
Graham has experienced financial loss and reputation loss in one fell swoop.

Feature

HOW TO LOSE EVERYTHING

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When professionals like accountants or financial planners agree to act as executors on their client's estates, they're risking their business, their money and their reputation.

What could Graham have done differently?

The most important thing Graham could have done differently was to recognize the limits of his expertise. Succession Law is a complex area of the law. Graham should have sought the advice of a specialist in Succession Law, and followed that advice carefully.
Solicitors who aren't Accredited Specialists in this area of the law themselves can be subject to litigation because a beneficiary has suffered a loss. Last year, a solicitor on the Gold Coast was sued for nearly $800,000 for giving negligent estate planning advice. The suit claimed that the solicitor failed to give proper advice that might have protected the estate from a claim from an estranged family member.

That's why receiving expert advice is critical.

The moral of this story is: always seek the advice of an Accredited Specialist in Succession Law (Wills & Estates). You'll save both your wallet and your reputation.

If you're not sure who to appoint as your executor, please get in contact with us today. We can advise you on all aspects of estate planning.

Information

HOW DO I... FINALISE MY PROPERTY SETTLEMENT?

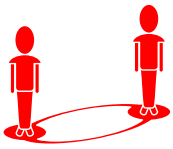
Guide

Everything you need to know about finalising your property settlement.

A property or divorce settlement can be reached at anytime following a separation. However, if an agreement can not be reached, the statutory time period to make an Application to the Court runs out:
For married couples, 1 year from the date of their divorce order;
For de facto couples, 2 years from the date of separation.

Compile a list of assets and liabilities, including your superannuation.

Get legal advice. With a thorough knowledge of the law, we know what a fair property settlement looks like.



If you can't agree, you may need to access Family Dispute Resolution, or mediation, before making an application to the 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 then 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 that 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 10,000 lawyers in Queensland. **Only 43 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 financies 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

A MODERN TALE OF NARCISSUS

Story

There was once a young man by the name of Narcissus. Upon seeing his own reflection in waters of a spring, he fell deeply in love with himself. So taken by this new found self-love, he lost the will to live. Well, so legend has it.

We may find it a bit odd that Narcissus should engage in this love affair with himself, but it would seem no-one could stop him. At least the present law would prevent Narcissus from entering into a valid contract with himself.

This is particularly important for professionals or individuals who are appointed the sole executor of an estate.

Leximed v Morgan

The Queensland Supreme Court decision of Leximed Pty Ltd v Morgan [2015] QSC 318, essentially involved a disagreement between two medical practitioners, Dr Morgan and Dr McCosker, concerning a business involving the provision of medico legal reports.

The legal structure was not an uncommon one. Firstly, a company was incorporated by the name of Leximed Pty Ltd. Both medical practitioners were the shareholders and directors of that company. The next step was the settlement of a trust for Dr McCosker known as the McCosker Trust with Leximed Pty Ltd as the trustee. Also, another trust was settled, for Dr Morgan, known as the Medicolegal Trust and Leximed Pty Ltd once again the trustee that trust.

The next step taken was the execution of a document described as a Partnership Agreement between Leximed Pty Ltd as trustee for the McCosker Trust and Leximed Pty Ltd as trustee for the Medicolegal Trust.

The legal proceedings involved the attempted enforcement of the Partnership Agreement.

Philip McMurdo J pointed out that a purported partnership agreement between the company Leximed Pty Ltd as trustee of one trust as one party and Leximed Pty Ltd as trustee of another trust as the other party, was no contract at all.

Feature A MODERN TALE OF NARCISSUS *Story*

More plainly his Honour stated:
At common law, there must be at least two parties to a contract.

Therefore, the attempt to enforce the Partnership Agreement failed.

Anomalies in the law

The above described law, as affirmed twice by the Queensland Court of Appeal and more recently in the Leximed case appears to be well settled law in Queensland but there have been some anomalies in the law beyond the borders of Queensland.

Rowley, Holmes & Co v Barber [1977] 1 WLR 371

This is an English case where an employee of a solicitor became the personal representative of his employer at the time of the solicitor's death.
Weight was given to Halsbury's Laws of England, 4th ed, vol 9, 1974 at 81 which stated:
Where a person has different capacities, he may have power to contract in his representative capacity with himself as an individual.

Therefore in that case it was held:
...the office of personal representative or administrator here could...give to the applicant sufficient separate legal personality to enable him to make an arrangement, an agreement, a contract, with himself in a different capacity.
A M Reberger & R G Reberger as Trustees of the Reberger Family Trust v Reberger [2012] NSWWCCPD 16
This is another Workers Compensation matter. Rodney Reberger argued he incurred an injury whilst employed by a particular trust.
When Rodney commenced "working for" the trust he was a trustee and his father was the other trustee. Prior to the time of the injury in question Rodney's father had purportedly resigned as trustee leaving Rodney as sole trustee.
There was insufficient evidence to support the resignation of Rodney's father as co-trustee and it appeared he continued to be a trustee.

Feature

A MODERN TALE OF NARCISSUS

Story

There was insufficient evidence to support the resignation of Rodney's father as co-trustee and it appeared he continued to be a trustee. Deputy President Kevin O'Grady, found that even at common law there would be a contract because Mr Reberger as trustee was in a different capacity.

Sole Practitioner/Sole Executor

The QCAT decision of LSC v Paul Ernest Bone concerned the appointment of Mr Bone as executor under the will of one of his clients. Mr Bone was a sole practitioner. His firm was not incorporated and nor was he in partnership with any other person.

The Tribunal turned its attention to various memoranda of accounts rendered by Mr Bone pursuant to a purported Costs Agreement. The Tribunal did not examine whether Mr Bone in his dual capacities could provide a valid notice to himself in compliance of section 308 of the Legal Profession Act 2007. In a sense, nothing turned on whether the Disclosure Notice under section 308 was valid or not because the purported Costs Agreement entered into pursuant to such notice between Mr Bone as solicitor and Mr Bone as executor was held to be void.

If Mr Bone was one of two or more other executors then section 50 of the Property Law Act would have caused the Costs Agreement to be valid. Further if Mr Bone's legal practice had been incorporated, the Costs Agreement, once again would have been valid.

Conclusion

The law is that A cannot enter into a contract with A even where A may have different capacities. This remains the law in Queensland and is more likely the law in Australia generally, despite some lower court decision to the contrary in New South Wales.

Regrettably for Narcissus it would still not be possible for him to enter in a contract with himself, even if he were to argue one party looks into the pool while the other is a beautiful reflection.

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minute phone consultation,
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