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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.

02

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

PRINCIPAL'S NOTE



Bryan Mitchell
PRINCIPAL

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

I hope you had a relaxing break over Christmas and the New Year.

In 2017, I will celebrate 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



Phillipa Kingswell
Senior Associate
Accredited Specialist Family Law (Qld)



Kylee Ghodsi
Senior Associate



Kate Muller
Associate

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Adele Bentham
Associate



Monique Nguyen
Law Clerk



Naomi Wallace
Law Clerk



Cindy Kinchin
Accounts Manager



Rebekka Mitchell
Conveyancer



Katarina Rose
Legal Assistant

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Leticia Collins
Workflow & Precedent Co-ordinator



Shannon Radel
Legal Assistant



Sophie Rodrick
Receptionist



Vic Bailey
Client Relations



Julie Cave
Digital Media & Communications

LATEST NEWS



Please join us in congratulating Adele Bentham and her husband on the birth of their first child, a daughter named Hazel Margaret, born in January. Both mother and baby are doing very well. Adele is now on maternity leave.



We're pleased to welcome Phillipa Kingswell to our team as a Senior Associate. Phillipa is an Accredited Specialist in Family Law and has practiced in family law exclusively since 2007. She brings sixteen years of legal experience with her and is passionate about helping families solve their legal issues so that they can move on. When not at work, Phillipa enjoys growing vegetables at her country property.

*Feature**Story*

THE CASE OF THE HATEFUL EXECUTORS

When appointing executors of your estate, it's common to divide the responsibilities among several siblings. But what if they don't get along? The result is often chaos.

By Bryan Mitchell

It is quite common when considering who to appoint as executors of an estate, for parents to decide to appoint their adult children as joint executors. The parents think that by doing so, the outcome will be as fair as possible.

But what if the adult children don't get along or don't agree? As in past executor horror stories, will makers think that even though their adult children don't get along now, their grief will unite them and the arguments will be forgotten.

Unfortunately, this is very rarely the case.

John died at the age of 91. He'd survived his wife by ten years, and he decided to make all three of his adult children co-executors of his will. He was hopeful that, despite some long-held grievances between his children, that his death will provide them with an opportunity to restore their relationships with each other.

Douglas, Marcia and Liza arrive at the funeral and are civil to each other throughout the ceremony (although Liza doesn't like the choice of flowers and Marcia dislikes the hymns chosen). It doesn't take long for the three adult children to remember why they barely speak, and spend most of their time at the wake complaining bitterly about each other and trying to drum up support for their own cause. A casual watcher might even notice that three distinct camps are starting to gather, which are crystallised by the end of the wake.

The first item that must be ticked off is to find the original will. John has left his will with his longtime lawyer, whom he has known and trusted for years. Douglas announces that he doesn't like the lawyer and won't work with her. Now the three must find a lawyer they can all agree on to get the will probated.

Douglas, Marcia and Liza try for several months to agree on a lawyer to retain, and can't find one. Douglas won't hire anyone under the age of 40 (too young), Marcia won't hire anyone but a woman (too male) and Liza won't hire anyone unless they have a 'good vibe'.

*Feature**Story*

THE CASE OF THE HATEFUL EXECUTORS

When appointing executors of your estate, it's common to divide the responsibilities among several siblings. But what if they don't get along? The result is often chaos.

Finally, after six months of arguments, the three decide to hire their own lawyers.

A casual watcher might note that instead of there being one legal bill to administer the estate, there are now three. The estate administration costs are likely to be three times more than they need to be.

Now the three lawyers must try to agree on behalf of Douglas, Marcia and Liza. The first issue is the contents of John's home. John was a war veteran and proudly wore his own father's war medals every Anzac Day. Douglas wants the war medals - he's the only son. But Liza argues that Douglas was never in the army, and the medals should really go to her husband, who fought in Vietnam. Marcia desperately wants her father's wedding ring, but Douglas and Liza object. If she gets the wedding ring, what will they get that could be equal in sentimental value?

The arguments drag on along with the months. Small agreements are reached, but the legal fees are mounting.

In fact, they've almost agreed on how to divide the contents of the house when it occurs to Douglas's lawyer: if the three can't agree on items of very little value, how will they agree on the major decisions, like selling the house, appointing a real estate agent, and dividing the proceeds?

Douglas's lawyer, who has a great deal more grey hair since agreeing to represent Douglas, suggests to the three that since they struggle to reach agreement on just about anything, they should formally agree to disagree. He suggests the appointment of an independent administrator in order to finalise the estate. In these circumstances, the independent administrator is usually the public trustee or an accredited specialist in succession law.

A list is circulated of possible candidates. Douglas won't hire anyone under the age of 40, Marcia won't hire any of the male lawyers, and Liza doesn't like the vibe of the public trustee. Finally, after several more weeks, agreement is reached, and they make an application to court to appoint the independent administrator.

*Feature**Story*

THE CASE OF THE HATEFUL EXECUTORS

When appointing executors of your estate, it's common to divide the responsibilities among several siblings. But what if they don't get along? The result is often chaos.

The court appoints the independent administrator, an accredited specialist. She will now begin working on administering the estate and charging for her work - something that should have been commenced two years ago.

A casual observer would note that this is quite a simple estate - getting a house ready to sale and selling it. Imagine the costs if it were a more complex estate.

Instead of the legal fees being \$4,000-\$6,000, the estate's total legal fees are now over \$100,000 because the willmaker thought that three people who don't get on, will get on just because he's dead.

In cases like these, it's far better for Douglas, Marcia and Liza to hate the independent administrator than each other. The independent administrator will continue on with their job despite the hate, because they they know what they're doing, they don't have favourites, they're professional, they know the law, and they'll save the estate money in the long run.

Ultimately, the moral of this story is to take into account the personalities and circumstances of those you wish to appoint as executors of your will. Sometimes, the fairest choice is to take it out of their hands completely and appoint someone independent such an Accredited Specialist in Wills & Estates or a Trustee Company.

Information

HOW DO I... GET AN ESTATE PLAN?

Guide

Everything you need to know about getting your estate planning in order.



Make your initial appointment.



We will email you a list of things to bring to your first appointment.



Your first appointment will go for 1 - 2 hours. We will discuss your desired outcomes, your family, your assets, and your wishes. We will give you advice regarding taxation, litigation and asset protection.



We may need to speak to your accountant, financial planner, risk advisor or super advisor if your situation is complex.



Once final resolutions are made on what you wish to be done, we provide you with a quote. We then meet with you two to three weeks later to review draft documents and finalise them.

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 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 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

YOU MUST HAVE A SOUND MIND TO WRITE A WILL

Story

What does it mean when we say that you must have sound mind in order to make a will? What does having a sound mind look like, and who decides?

According to the Australian Institute of Health and Welfare, the number of people aged 65 and over has more than tripled over fifty years, rising to 3.4 million in 2014. There has also been a ninefold increase in the number of people aged 85 and over, to 456,600 in 2014. Based on population projections by the Australian Bureau of Statistics, there will be 9.6 million people aged 65 and over and 1.9 million people aged 85 and over by 2064. Although the last few decades have seen an increase in medical technologies, it is not enough to keep up with our wearying minds and bodies. With longer life often comes increased ill health as we get into our later years. Along with issues such as hearing loss and arthritis, dementia also becomes more common with age, and the issue of whether you have a sound mind, comes into question.

Signs of dementia can include confusion, loss of memory, having trouble with everyday tasks, changes in mood, being repetitive, apathy and a failing sense of direction

Dementia is not one specific disease, but rather refers to a collection of symptoms to do with the ongoing decline of the brain and its ability to function. There are different types of dementia, but they generally affect cognitive ability, capacity for everyday tasks and behaviour (including aspects of a person's personality changing).

The most common form of dementia is Alzheimer's disease. About half of all dementia cases are because of Alzheimers. There are around 165,000 Australians living with the Alzheimer's disease and this is expected to almost triple by 2050. Around 70% of people with Alzheimer's will require supported or permanent residential care as their disease progresses. Those with Alzheimer's find it increasingly difficult to make complex decisions initially, and eventually even basic decisions. Although there are many caring families who ensure that a loved one's wishes are met, there are those that are not so inclined and manipulate already fragile minds.

Feature

YOU MUST HAVE A SOUND MIND TO WRITE A WILL

Story

Dementia sufferers are at greater risk of being financially exploited.

Pamela Moore was found to have “taken advantage” of her husband’s Alzheimer’s by the High Court in the UK. These are the words used by Judge Simon Monty QC in his High Court ruling. He said that Mrs Moore “took advantage” of her husband’s Alzheimer’s in a bid to prevent their son from claiming his promised £10 million inheritance. The farmer’s wife had tried to smear her son’s reputation by accusing him of violent harassment and prevent him from taking over the family farm from his father, Roger.

But Judge Simon Monty QC said Stephen had worked since childhood on the 650-acre farm in Stapleford, near Salisbury, which has been in the Moore family for generations. And the judge accepted that, before Alzheimer’s disease robbed him of his sharp mind, Stephen’s father had repeatedly promised him “it will be all yours one day”. Handing 48-year-old Stephen the entire farm, including its substantial farm house, the judge said he was entitled to rely on the assurances given to him by his father.

Mr Moore changed his will in 2012, disinheriting Stephen of the farm, but the judge said that, by then, he was “playing very little part in events”. But Judge Monty said: “It was always Roger’s intention that Stephen would inherit the farm and the business, and that intention was shared by Pamela. “These intentions were expressed as promises to Stephen. Particularly after 2009, Pamela took advantage of Roger’s mental decline, which in my view does her no credit.” Mrs Moore, the judge added, had “unfairly portrayed Stephen as a violent and difficult son who made her and Roger’s life a misery.” She simply “refused to accept” that Roger’s “unchanging intention”, while he had all his mental faculties, was “to see Stephen at the helm”. The judge concluded: “This is a just and equitable outcome. It honours what Roger always intended.”

*Feature**Story*

YOU MUST HAVE A SOUND MIND TO WRITE A WILL

What is sound mind?

But intention needs to be clear before mental decline begins to make sure that your estate planning wishes are maintained. When writing a will you need to be considered of 'sound mind' or more sound mind, testamentary capacity, making a will, estate planning technically, that you have testamentary capacity. Australia adopted the test for will-making capacity as laid down in 1870 case of *Banks v Goodfellow* and our modern day interpretation is still derived from these points. According to the test, to have sufficient capacity a testator (will-maker) must:

1. understand the nature and effect of a will
2. understand the nature and extent of their property
3. comprehend and appreciate the claims to which they ought to give effect
4. be suffering from no disorder of the mind or insane delusion that would result in an unwanted disposition.

Who Decides Whether You Have Sound Mind?

When it comes to cases of determining testamentary capacity, doctor's reports are taken into consideration by the court. A specialist in medicine for older people, or a neurologist might be required to assess someone to determine the extent of any cognitive decline. Whom you choose as your lawyer in such a situation will also make a difference. A specialist in wills and estates will make thorough notes of each appointment and is trained to identify any lapses in capacity. A specialist will also be able to identify any manipulation or attempts at elder abuse by family members fairly quickly, which may save the older person and the estate the grief of losing assets and initiating a court battle. Ultimately, testamentary capacity will be decided on a case-by-case basis, as cognitive decline affects individuals differently.

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minute phone consultation,
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