Mitchells
SOLICITORS

SOLVITUR

YOUR STRENGTH, YOUR SOLUTION, YOUR SIDE

BRISBANE CITY | MOOROOKA

SOLVITUR

From Latin, it means solved.

01

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
Level 18, 123 Eagle St, Brisbane Q 4000 *By appointment only*
07 3373 3633

mitchellsol.com.au

SOLVITUR

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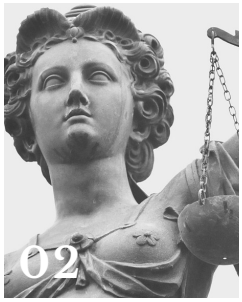
About Us



What We Do

mitchellsol.com.au

SOLVITUR

PRINCIPAL'S NOTE

Bryan Mitchell
PRINCIPAL

Welcome to Solvitur, the official magazine of Mitchells Solicitors.

Despite the catalogue of lawyer jokes often thrown my way, I have to be honest. I love practicing the law. I love the area of law in which I specialise even more so.
Succession Law (or wills and estates) is complicated and requires an intellectual vigour that I enjoy immensely. In this area of the law, legal problems are like a puzzle that needs solving and then communicated so that all parties understand.

The benefit in this for clients is that they receive the highest quality advice from practitioners that must continue their legal education to stay up to date.

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 HISTORY

Where we've come from
and why you are
an integral part of where
we're going.

Our WHERE WE CAME FROM *Story*

We are a firm with a long history, stretching back more than forty years.
Yet we're also a thoroughly modern firm.
Our clients benefit from our experience and expertise.

In 2006, the firm merged with the law firm Wyman & Co Solicitors, which commenced trading over 50 years ago. More recently, the firm merged with the practice of O'Dwyer & Bradley, the Principal of which is Mr Tim O'Dwyer and who remains a consultant at this firm. O'Dwyer & Bradley's history goes back over 40 years and Tim O'Dwyer is well-known as a property lawyer, consumer advocate and real estate watchdog.

The Principal of the firm, Bryan Mitchell, went to a local high school, studied at the University of Queensland, and grew up in the area.

The modern firm of Mitchells Solicitors remains thankful to its clients who continue to seek advice and services from it. The firm has expertise in particular areas of law, most significantly in the areas of wills, trusts, estate disputes and litigation, family law, elder law, the law for disabled children and adults, and property and conveyancing.

When you need the very best advice, friendly and thorough service and someone on your side, call Mitchells Solicitors.

OUR VALUES

Excellence in our knowledge and practice of law

Honesty

Strength

That's why our motto is Your Solution, Your Strength, Your Side.

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

Cheryl Bentley
Senior Associate

Kylee Ghodsi
Senior Associate

Adele Bentham
Associate

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Kate Muller
Solicitor

Monique Nguyen
Law Clerk

Naomi Wallace
Law Clerk

Cindy Kinchin
Accounts Manager

Rebekka Mitchell
Conveyancer

Katarina Rose
Legal Assistant

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Shannon Radel
Legal Assistant

Leticia Collins
Legal Assistant

Sophie Rodrick
Receptionist

Vic Bailey
Client Relations

Julie Cave
Digital Media & Communications

Feature

Story

THE CASE OF THE STRUMPET

Upon the death of an older person, especially if the older person lived alone or was estranged from members of the family, it's not unusual for a paramour to suddenly appear to make a claim on the will.

By Bryan Mitchell

Often the family members haven't met the paramour and there may not even be evidence of a relationship. Sound absurd?
This kind of situation can and does happen – the sudden discovery of a new will. It's often up to the court to decide if the new will was made in suspicious circumstances and whether to declare it valid.

If a will is to be valid then there are the requirements as set out in statute:
a formally compliant will being in writing, signed by the willmaker in the presence of two witnesses; or
a non compliant will but found by the court to be a document intended by deceased to be a will;
and the common law requirements of a valid will which include:
* the willmaker has sound mind memory and understand;
* the willmaker intended the document to be a will;
* the contents of the will have the knowledge and approval of the willmaker; and
* the will must not be one secured as a result of undue influence or fraud.
Where the preparation or execution of the will was surrounded by suspicious circumstances the presumption of knowledge and approval cannot be relied upon.

What if there are suspicions about the will?
The party who raises suspicion must call evidence which raises a real or tangible suspicion as to the validity of a will.
Examples of Suspicious Circumstances
Common examples of suspicious circumstances include:
* The person who prepared the will benefits under the will.
* Where the origin of the will is dubious (as in the case of Stooge v. Strumpet)
* Where the willmaker was enfeebled, blind or illiterate at the time of execution
* Where the will maker has a cognitive impairment;
* whether there has been a significant change in testamentary bounty Eg: As with Stooge, his inheritance has suddenly shrunk from $5 million to $50

Feature

THE CASE OF THE STRUMPET

Story

Upon the death of an older person, especially if the older person lived alone or was estranged from members of the family, it's not unusual for a paramour to suddenly appear to make a claim on the will.

Origin of the will is dubious

A real life example of Stooge v Strumpet occurred in New South Wales in the case of *Alan John Hyland as executor of the estate of the Late John Walter Popham Luscombe v Laura Healey [2013] NSWSC 1513.*

Herbert Walter Luscombe was a retired bank manager. On 27 July 2006, at the age of 98, he made a will. Under the will he left everything to his nephew, John Luscombe and appointed him as executor. Three years later, in 2009 Mr Luscombe died. Probate was granted over an estate worth over $3 million.

In July 2009 John's solicitor received a letter sent on behalf of the defendant, Ms Healey. That letter alleged that Mr Luscombe had made a will on 28 October 2006. This appointed Ms Healey as executrix and left all of Mr Luscombe's estate to her, with the exception of a $200,000 legacy to John.

Ms Healey claimed that she had befriended Mr Luscombe in about 1992 when he was 84 and she was 58. Her evidence was that for the next seventeen years she was a regular visitor to Mr Luscombe's home and that their friendship extended to sexual intercourse.

But John had never heard of Ms Healey.

Ms Healey never attended school and was unable to read or write. Ms Healey said that she first met Mr Luscombe in about 1992, when she was visiting her late father in a nursing home in Homebush, close to Mr Luscombe's home. Ms Healey's evidence was that one day she met Mr Luscombe at a shop which was opposite the nursing home. Mr Luscombe stopped to talk to her. He asked her where she was from and what she was doing there. Ms Healey says she told Mr Luscombe something about her life. At the end of that first conversation they agreed to meet at the shop again the next day.

In about 1995 they started a sexual relationship. They would only ever meet at his home and they never left the house. They never spoke on the telephone to each other. No one ever saw them together. She would arrive unannounced and drive back home if Mr Luscombe was not there.

Feature

Story

THE CASE OF THE STRUMPET

Upon the death of an older person, especially if the older person lived alone or was estranged from members of the family, it's not unusual for a paramour to suddenly appear to make a claim on the will.

The first matter which should arouse suspicions is the almost complete change in Mr Luscombe's testamentary bounty only three months after the July Will.
Second, the features of the terms of the October Document itself were suspicious:
the odd handwritten dating of the October Document;
the misspelling of Mr Luscombe's middle name;
the use of Ms Healey's sister-in-law as the substitutionary beneficiary;
the reference to John;
the way in which Mr Luscombe wrote his name; and
the absence of a provision for cremation.
Third, the preparation and execution of the October Document was suspicious. The use of a solicitor different to the one who had prepared the July Will and who had no apparent prior connection with Mr Luscombe or anyone else other than one of the attesting witnesses was unusual. There were questions about whether the solicitor named as having prepared the will, Mr Harley, in fact prepared the October Document.
His honour found:
Having considered all of the evidence I am not satisfied that the October Document is Mr Luscombe's last will and testament made as a free and capable testator. This is because Ms Healey has failed to establish affirmatively to my satisfaction that Mr Luscombe knew what he was doing when he executed the October Document. She has failed to do so because she has been unable to dispel the suspicions which I have considered above.

If a client finds themselves in such a predicament or there are any concerns about the validity of a will, seek legal advice immediately.

Information *Guide*

HOW DO I... GET A DIVORCE?

Everything you need to know about separation and divorce.

Ascertain the date of separation

Compile a list of assets, liabilities, and superannuation

How will you co-parent the children?

We can help you with:
A divorce settlement that is just and equitable
A divorce settlement that is legally binding, and therefore enforceable
A parenting agreement that is in the best interests of your children
A parenting agreement that is legally enforceable
A parenting agreement that includes the fine details,
such as where birthdays will be spent, or what medical treatments are allowed
A settlement as quickly and easily as possible, without unnecessary conflict

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:

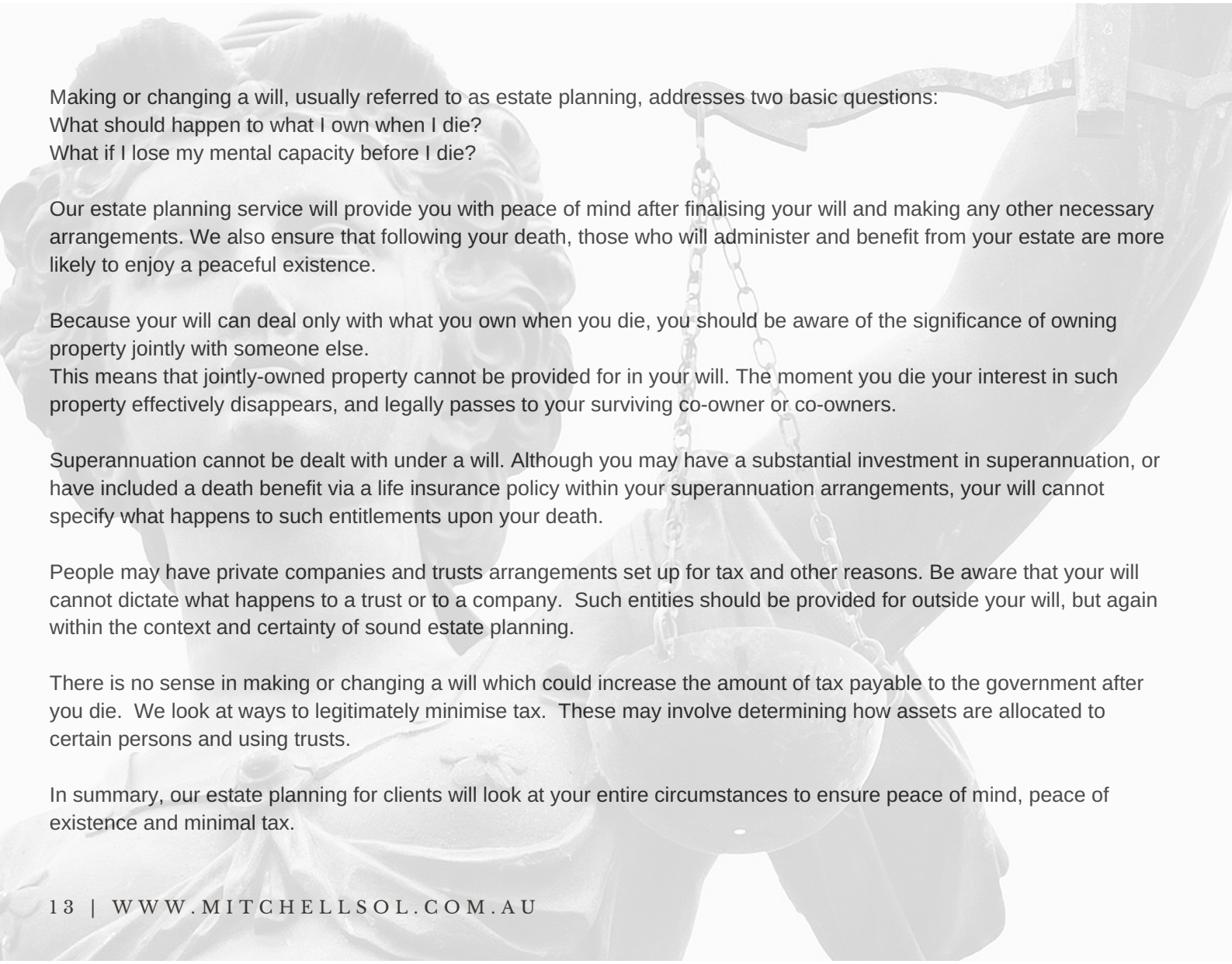
You are the wife or husband or de facto spouse of the deceased and you have not been adequately provided for or at all under the will.
You are a child or stepchild of the deceased and you have not been adequately provided for or at all under the will.
The estate of the deceased person is smaller then 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.

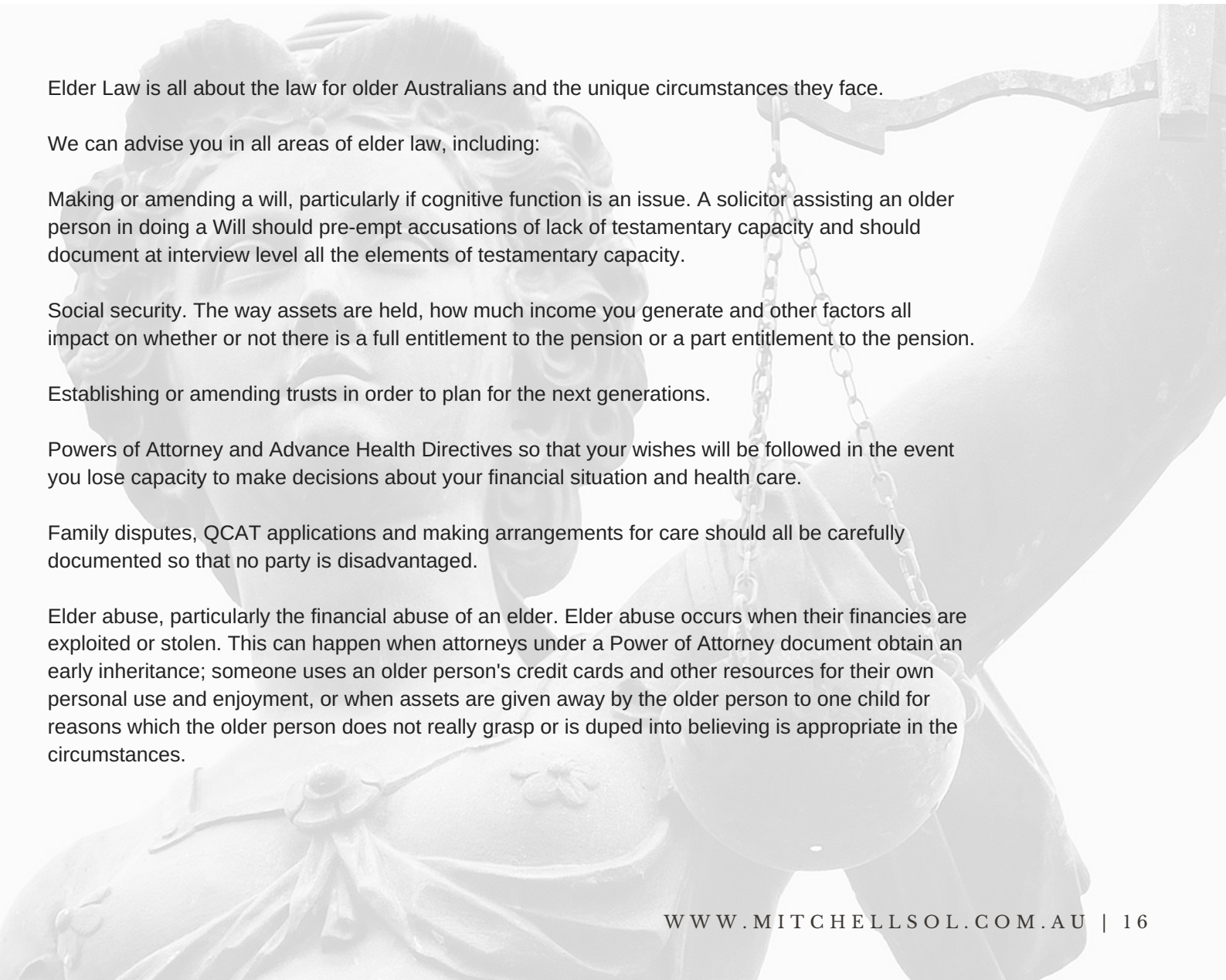
De Facto Law
Generally the law defines a de facto relationship as one where the couple have been living together in a marriage-like relationship for at least 2 years. This includes same sex couples.

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.

THE MILLIONAIRE WHO DIED WITH NO WILL

Feature Story

By Julie Cave

A multi-millionaire dies with two marriages under his belt, five children and no children. Little wonder it erupted into chaos.

Lawrence Inlow was a successful businessman with a degree in law. After graduating from the Indiana University School of Law, he helped to found a provincial insurance company, Conseco, in 1982. It went public only three years later and by 1997, the company was worth more than five times its value at public offering. Mr Inlow was worth over $100 million dollars by 1997, in the position of Chief Counsel of Conseco, Inc. However, the same year, he was struck by the rotor blade of a helicopter in which he took regular work trips and instantly killed at the age of 46. An estate battle over his $100 million fortune erupted immediately.

Despite Mr Inlow's success in business and his law degree, he had made one fatal error: he had died without a will.

As a result, his estate had to distributed under the Indiana laws of intestacy. This means that regardless of what Mr Inlow would have wanted, and regardless of what his family wanted, his estate would be distributed according to a default scheme. Under the intestate laws of that jurisdiction, the surviving spouse receives one-half of the estate if the deceased is survived by at least one child, or by a grandchild of at least one pre-deceased child. If there are no children but the deceased's parents are still alive, the spouse receives three-quarters of the estate. If there are no children or parents, the spouse receives all of the estate. If the surviving spouse is the second spouse, and she had no children with the deceased, she gets only one-quarter of the estate.

Mr Inlow's estate was not simple, because he had been married twice and had five children from the two marriages. His surviving spouse, Anita, had a child with him. His four adult children had been born to his first wife.

Feature Story

THE MILLIONAIRE WHO DIED WITH NO WILL

The two main issues of dying without a will

The first issue was that the court had to appoint an executor. Without a will, nobody knows who the deceased wanted to administer his estate, and so in this case, the court appointed a lawyer to handle the estate.

The lawyer met with all parties and a proposal was made that Anita would be given a distribution of $18 million, and that Anita would be responsible for paying any income tax on the $18 million. Thereafter however, the lawyer decided that the estate would pay the tax, rather than Anita.

This decision led to the first round of litigation. The four children from Mr Inlow's first marriage brought an action against Anita for the payment of the income tax, and then the full distribution of $18 million. The court decided that Anita was entitled to the $18 million, and that the lawyer who'd been appointed to administer the estate had acted within his authority to decide that the estate would pay the income tax. The lawyer resigned from the position of administering the will and was replaced with the Fifth Third Bank.

The second issue was the funeral. Mr Inlow was given an ornate funeral, and the total cost of the funeral, burial and mausoleum added up to over $284,000. Initially, the costs were paid by Anita, but she sought and received reimbursement from the estate for these costs. However, the bank (the new administrator of the estate) and the four children launched an action seeking that the funeral costs be taken from Mr Inlow's wrongful death settlement proceeds. The estate had received almost $885,000 for the accident which claimed Mr Inlow's life. Anita objected to the action, and the case ended up in the Indiana Supreme Court. The four adult children won this round of litigation, and the court ordered the estate to recover the funeral expenses from the wrongful death fund.

THE MILLIONAIRE WHO DIED WITH NO WILL

Feature Story

By Julie Cave

The moral of this story

Had Mr Inlow executed a will, the litigation on both fronts could have been avoided. He could have made it known how his $100 million fortune was to be divided between his adult children and his current spouse. He could have indicated how his funeral expenses ought to be managed. He could have identified who he wanted to be the executor of his estate. He could have established directions about how any tax should be paid and who would be responsible for it. Instead, his family endured two bouts of litigation and hundreds of thousands of dollars in fees so that the court could make a decision for them.

Make sure you have a will
Identify a trusted person to be the executor
Think about how you would like to leave your assets and to whom
Understand that being part of a blended family makes the situation even more complex
Think about what-if scenarios – what if one of your beneficiaries goes through a divorce or goes bankrupt?

It is best to seek specialist legal advice because this area of the law is complex. We offer a free, 10-minute phone consultation.

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minute phone consultation,
phone 07 3373 3633