

SOLVITUR

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Digital Technology
Ushers In New Age
of Informal Wills

Spotlight Continues
on Elder Financial
Abuse

Estate Planning
Across Borders

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SOLVITUR

From Latin, it means SOLVED.



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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Principal's Note



BRYAN MITCHELL | Managing Director

Welcome to the 5th edition of Solvitur, our official magazine which aims to inform, entertain and demystify the work we do at Mitchells Solicitors.

It's been a busy and rewarding few months since our last edition. We continued to extend our service to Sunshine Coast clients and, once again, our firm was recognised by Doyle's Guide for being State leaders in estate litigation and estate planning.

Congratulations are in order for two of our senior associates, Kate Muller and Kylee Ghodsi, who were awarded their Master of Laws (Wills and Estates) from the College of Law. Check out our Q&A with Kate on page 6.

Latest awards:

The influential Doyle's Guide recognised Bryan and the firm Mitchells Solicitors, being:



2019 - Leading Estate Litigation - Queensland



2019 - Leading - Wills, Estates & Succession Planning Lawyers - Queensland

On another note, I'm hugely privileged to be able to represent Mitchells 'out there'. In the last quarter, I presented papers in the Gold Coast, Adelaide, Sunshine Coast, Hong Kong and London.

My involvement with the global professional body STEP (which helps families experiencing very real problems) took a slightly different focus. After six years, I've stepped down as Chair of STEP Queensland and taken up an appointment as Vice Chair of the regional body known as STEP Australia.

Enjoy the read!

Our 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)



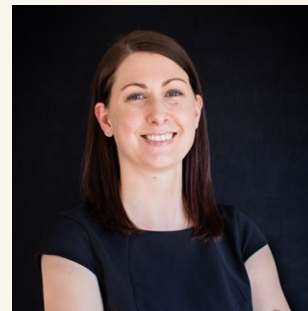
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GEORGIOU**

Solicitor



**KRISTEN
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Solicitor





Spotlight on *Kate Muller*

What inspires you most about practising in Wills, Estates and Succession?

I enjoy meeting different clients and am intrigued to hear their stories. Succession is a very personal area of law. It involves learning about people's private lives and circumstances, of how they cope and what they cope with, and often hearing their very sad tales of family disunity. I like helping people to feel they have made things easier for the next generation, particularly for families living with children with disabilities.

What would surprise outsiders most about this field of law?

People would be surprised to know how complex and detailed this area of law is. It's not a matter of simply writing a Will, but preparing an effective estate plan. Although estate litigation is booming, practitioners are generally very focused on collaborating to get a good result for everyone, not spending lots of money to fight it out.

How do you help to make your clients feel at ease?

I try to keep initial estate planning consultations light-hearted, without being flippant about the very serious topic we are discussing. Most people find talking about death very

confronting. And it is. But there can be some humour in it too, albeit quite dark humour. I also try to strike the right balance between imparting enough information they can understand, without overwhelming them.

Behind Mitchells' success is a dedicated and talented team. In this edition, we'd like to introduce you to Senior Associate Kate Muller, who's just completed further studies in a Master of Applied Law course (Wills & Estates). We'd like to congratulate Kate on being the top achiever in her course! Kate has been a lawyer for 16 years. Here, she shares her passion for Wills, Estates and Succession law – and how she manages a busy career along with being a mum of three boys.

What kind of 'human qualities' do you need to do what you do?

Compassion, a good bedside manner with clients, courtesy (especially when dealing with peers outside of the firm) and above all, the ability to listen.

What kinds of matters do you deal with on a day-to-day basis?

I practice primarily in estate planning, but have a broad range of administration and litigation matters. My calendar is generally full with client appointments. I liaise with accountants and financial planners to gather information for clients, and discuss how best to carry out their wishes. For company and trust structuring matters, I often incorporate companies and prepare trust deeds and loan agreements. I also manage a number of non-estate planning matters.

Your three boys are aged between 9 and 12. How do you manage to juggle a career with parenting?

With a great deal of difficulty and a great deal of champagne! My husband and I work well as a team. We don't sleep much and have no time for ourselves. Our children collectively participate in over 20 extra-curricular activities every week, we both work 5 days a week and we have no help. It's madness.

Any parting words about Mitchells?

It's a unique firm and I really enjoy my colleagues. It makes coming to work fun.

Digital Technology Ushers In New Age of Informal Wills

Can an unsent text message be treated as a formal Will?

That was the very question that played out in the Queensland Supreme Court back in 2017 when it set a precedent by answering ‘yes, it can’.

“The practise of Wills and estates is exciting and interesting because it always involves a human element, a very personal story, and at the same time incredibly complex law,” Mitchells Solicitors Managing Director Bryan Mitchell explained.

“The ruling was the first time, either in Australia or overseas, that an unsent text message was accepted by the courts as a valid Will. The decision was unexpected because the text message was unsent. Nonetheless, each case turns on its own facts.”

The case involved a tragic situation when a 55-year-old man took his own life. The next day, an unsent text message with the words “my will” and a smiley face was found on his phone.

In the message, the man stated that he wanted to leave his house and superannuation assets to his brother and nephew. He also included details of his bank account. Specifically, the text message read:

*“Dave Nic you and Jack keep all that I have house and superannuation, put my ashes in the back garden with Trish Julie will take her stuff only she’s ok gone back to her ex AGAIN I’m beaten. A bit of cash behind TV and a bit in the bank Cash card pin 3636
MRN190162Q
10/10/2016
My will”*

We seem to do everything on our phone these days. Even use them as a repository for our Wills, which can lead to all kinds of complications, as this intriguing court case reveals.







The deceased's wife, with whom he had a rocky relationship, argued the text message should not be treated as his final Will.

The hidden cost of informal Wills

Bryan said it was important to note that while the judge had made her decision by faithfully applying Section 18 of the Succession Act 1981 (Qld), people need not get too excited about the ruling because of the prohibitive cost of making a court application to validate the electronic Will.

"Informal Wills shouldn't be encouraged, because they are not a Will unless ordered by the court. In order to give an informal Will legal teeth, you need a court order, which means you need to bring an application, which means you need to retain lawyers and barristers and pay money," he said.

"In this particular case, it would have been better for the person who wrote the text message to have done a Will in writing on a piece of paper and witnessed by two people. By doing it the

way he chose to do it, great expense was put to the estate."

Unusual cases of Wills emerge in digital age

The case of the unsent text message is certainly not the first time the courts have had to grapple with unusual Will situations as a result of modern technology.

- In 2013, a DVD marked as "my will" was found to constitute a valid Will by the Queensland courts.
- In 2015, the NSW Supreme Court ruled a video Will was valid and displaced a written Will made just two days earlier.
- In April 2019, the Queensland Supreme Court accepted a video recording made by the deceased on an iPhone as a Will.

Bryan said the moral of the story was simple – cutting corners by thinking you can make an informal Will could "cost everyone a lot of time, money and anxiety".

"Until the law changes, and it recognises as being valid electronic Wills – subject to a whole tranche of security measures – these video recordings and unsent text messages are not in the first instance Wills," he said.

Have you got a proper Will?

According to a survey conducted by comparison site finder.com.au last year, 10 million Australians (or 52% of adults) don't have a Will. More than a third said they simply haven't gotten around to it yet, 14% said they don't have enough assets to justify it, and 4% said they don't want one.

Here at Mitchells Solicitors, we see the typically negative consequences of what happens when people don't have a proper Will in place. Usually, their estate is subject to state laws and distributed in a way that they hadn't intended, while their loved ones are not necessarily cared for in the way they would have wished.

Be prepared long before you need it. Get in touch with one of our specialist Wills lawyers to find out how we can help.



FEATURE STORY

Spotlight Continues on Elder Financial Abuse

You've recently presented at the 'Elder Financial Abuse – A Global Perspective' Conference in London. How effectively is Australia tackling the issue?

The Australian Law Reform Commission's Report no. 131 entitled 'Elder Abuse—A National Legal Response' identifies at a national level the alarming rate of financial elder abuse. It was observed in the report that Australians are living longer and healthier lives. Therefore, there is, quite reasonably, a

Despite growing public awareness, financial elder abuse continues to be an alarming issue in Australia. We continue our coverage of the issue with a Q & A with Managing Director Bryan Mitchell.

concern that the plight of older Australians will worsen without a national response.

The Report is significant in that it acknowledges that all Australians have rights, which do not diminish with age, to live dignified, self-determined lives, free from exploitation, violence and abuse. Further to that, it states within its terms of reference that our laws and legal frameworks should provide appropriate protections and safeguards for older Australians without interfering with their rights and preferences.

The World Health Organisation estimates that about one in

six people aged older than 60 will be victims of elder abuse each year. When it comes to elder financial abuse, there is growing awareness, yet why does the problem continue to go mostly under the radar?

It's my personal experience that older clients are reluctant to report the bad behaviour of their family. At most, the victims will seek a civil remedy of the return of property and/or funds. But rarely, or ever, will they 'dob in' to the police for criminal prosecution. This is assuming they even have capacity to comprehend what is going on.

It's very sad when someone lacks capacity, and there is abuse going on.

Why does financial elder abuse happen in the first place? Explain some of the driving factors behind the issue.

Elder financial abuse usually begins as the older person becomes more vulnerable. In a sense, they are more malleable and dependent. The abuse quite often begins with the abuser deluding themselves that they have the tacit consent of the adult in taking certain legal steps. In fact, what's happening is the older person will, to keep the peace, agree to any and all proposals. From that point in time, it usually gets worse.

Regrettably, it's my experience that financial elder abuse is nothing more than an expression of pure opportunism in the face of a very weak party. It has no boundaries with regard to gender, or to ethnic groups. Not only that, it's a problem that's



prevalent not just in Australia, but worldwide.

Can you share some instances of financial elder abuse, where family members have 'behaved badly'?

In April this year, for example, there was a high-profile case reported by the media in which three sons siphoned \$1.6 million from the estate of their dementia-affected elderly parents. While the State Administrative Tribunal found there were 'questionable transactions', no criminal charges have yet been laid.

There are many more situations similar to this one. Unfortunately,

many victims are totally dependent on their abusers for assistance, and trust them in good faith. But this trust is broken.

Countries such as the US have elder abuse laws and mandatory reporting of physical, mental and financial abuse, as well as neglect and false imprisonment. What kind of legal changes can be made in Australia?

The Australian Law Reform Commission has recommended the introduction of "adult safeguarding" legislation.

I'd like to eventually see the mandatory registration of Enduring Powers of Attorney,



as they are often used as a tool of abuse by opportunists. We should also consider criminal justice solutions to those who perpetrate personal and financial abuse against older persons, similar to California. Additionally, we should continue to run educational programs directed at solicitors and various health professionals, both at a state and national level.

What can older people or their loved ones do if they suspect financial elder abuse is occurring?

The best advice I can give to family members who are concerned that their ageing

parent will be taken advantage of as they become more vulnerable is to stay in touch regularly – and to provide ongoing support.

As we mentioned in the previous edition of Solvitur, there are certain qualities a competent Power of Attorney should have, which can reduce the chance of older people being exploited. These qualities include: honesty, financial smarts, the ability to follow wise advice and fair mindedness.

If financial elder abuse is suspected, there are a number of steps people can take. The first thing they might want to do is chat to an accredited specialist

in succession law, or report the abuse to the Office of the Public Guardian.

The Public Guardian has the power to investigate, urgently stop the abuse, and rescue the victim. It's an independent statutory office which has been set up to protect the rights and interests of adults who don't have the ability to make their own decisions.

For specialist legal advice on how to protect yourself and loved ones, contact me for a free, no obligation, 10-minute telephone consultation.





Estate Planning Across Borders

Estate planning is a complex field of law in its own right. But when clients have assets in different parts of the world, it becomes even more of a multi-faceted and fascinating web.

The business of estate planning for a client with assets in different countries is known as 'multi-jurisdictional Will making' in the world of law.

It's a niche area in the industry. But here at Mitchells Solicitors, our firm deals with quite a number of matters relating to multi-jurisdictional Will making.

The work is intricate, rewarding and interesting because we deal with different legal systems in different parts of the world. As you can imagine, it requires careful thinking to make sure that one Will does not affect another, and that the entire estate is dealt with in a unified and efficient way.

Typically, we work alongside allied professionals both here in Australia, and elsewhere. These professionals can include financial advisers, accountants and solicitors. This cross-border coordination explains why cases can take quite a number of months to complete.

Usually, clients with property or other assets in multiple jurisdictions are independently wealthy.

However, that is not always the case as people who once lived in a particular country still may keep

a modest amount of money in a bank account in another country. The existence of that asset in a foreign jurisdiction, no matter how small, means the Will must be compliant in that jurisdiction.

"Ultimately, our collective aim is for the Will maker to have complete and utter peace of mind."

One creative legal solution is to use a trust, which will continue to exist whether the Will maker is alive or not. The assets in the trust can be more seamlessly dealt with when the Will maker dies, without the need to seek a grant of Probate or proving a Will in multiple jurisdictions.

Because of the complexities of multi-jurisdictional Will making, and the fact that a Will will not be valid if not done right, it's essential to seek professional guidance.

ABOUT US

WHAT WE DO

Our areas of expertise



Estate Disputes

After someone's death, there may be conflict in the form of an estate battle or a challenged Will. Here are some of the common scenarios we see at Mitchells in the area of estate disputes:

- You are the wife, husband, de facto spouse, child or stepchild of the deceased and you have not been adequately provided for in the Will, or been completely left out of it.
- 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, vulnerable, unduly influenced or lost the mental capacity to make a Will.
- The Will is home made and doesn't make sense.
- You believe that the executor isn't doing the right thing.

There are approximately 13,000 lawyers in Queensland. Only 47 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.



Estate Planning

Estate planning involves the process of making or changing a Will, but it's much more complex than that and 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 – and your loved ones – with peace of mind after finalising your Will and other necessary arrangements. It's a way of making sure that after your death, your loved ones will be taken care of the way you wanted them to be.

Here are some things to consider:

- Because your Will can deal only with what you own when you die, 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 can't be dealt with under a Will. Although you may have a huge investment in superannuation, or have included a death benefit via a life insurance policy within your superannuation arrangements, your Will can't specify what happens to such entitlements upon your death.
- People may have private companies and trust arrangements set up for tax and other reasons. Be aware that your Will can't dictate what happens to a trust or to a company.
- There's 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.



Have any questions about estate planning? Get in touch with us for a free, 10-minute phone consultation with one of our expert lawyers.



Estate Administration

Did you know that estate executors have a number of obligations when it comes to administering an estate? They are obliged to:

- Gather in the estate. This means that the assets owned by the deceased person must be placed in the legal name of the executors on behalf of the estate.
- Pay all debts and expenses appointed through the Will, sometimes through selling assets.
- Distribute the estate in a correct and legal way.

Without legal advice, it can be challenging for an executor to be sure of their obligations.

An executor may discover that a deceased person failed to keep up to date with their taxes or wrongly made a claim on social security. In the case of the taxes, the executor is bound to discharge the obligations of the estate by paying all necessary dues. If the executor fails to do this, the executor will be personally liable.

In the case of the social security claim, the executor will need 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 because of undue influence or a deterioration in capacity.

Failure to administer an estate appropriately may result in the executor being personally liable for their oversights, so it should always be done in conjunction with sound legal advice.

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 seen as separated.

At Mitchells, we understand that the divorce process can be a traumatic event. We 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.

Since 2009, 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 start court proceedings relating to a property settlement.



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.
- Social security (the way assets are held, how much income you generate, and other factors all affect whether or not you have full or part entitlement to the pension).
- Establishing or amending trusts in order to plan for the next generation.
- Powers of Attorney and Advance Health Directives so that your wishes will be followed in the event you lose the capacity to make decisions about your financial situation and health care.
- Family disputes, QCAT applications and making arrangements for care.
- Elder abuse, particularly the financial abuse of an elder. Elder abuse occurs when finances are exploited or stolen. This can happen when Attorneys – under a Power of Attorney document – obtains 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 under duress of manipulation.

Property & Conveyancing

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

Our services include:

- Conducting all necessary searches and investigations.
- Drafting documents.
- Representing you in dealing with other parties and their legal representatives.
- Carefully checking all documents before you sign, drafting protective amendments and completing the transactions for you competently and promptly.
- Providing 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 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 greatly enhanced since nationally-recognised 'real estate watchdog' Tim O'Dwyer became a consultant here after 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 the expertise 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 out of hand.









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