

SOLVITUR

YOUR STRENGTH, YOUR SOLUTION, YOUR SIDE



Mitchells
SOLICITORS

**Are All Your
Children
Really Equal?**

**Beware of
Promises from
Little Old Ladies**

**What You Need to
Know About Asset
Protection**

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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 6th edition of Solvitur after a whirlwind 2020 and first quarter of 2021! As always, our hope is that this magazine will inform, educate and demystify the work we do here at Mitchells Solicitors.

Firstly, I'd like to pay tribute to the team's flexibility and determination during COVID. Like many others, we transitioned to remote working at the height of the crisis, and the practice of virtual court appearances became more widespread. This year, we've adopted a hybrid culture of work-in-office and work-from-home as "the new usual".

One of my biggest learnings from the past year is that you can't fight a battle alone, and that I

Latest awards:

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



2020 Leading – Wills, Estates & Succession Planning Law Firms – Queensland (One of the First Tier firms in Estate Planning)



2020 Leading – Wills & Estates Litigation Lawyers – Queensland



2020 Recommended – Wills & Estates Litigation Lawyers – Australia

am blessed to lead a wonderful team of gifted, hardworking and resilient individuals. We were also fortunate that despite the unpredictable events of last year, Mitchells was busier than ever.

Thanks to the Zoom phenomenon, we saw an increase of clients from much further afield, from Singapore to South Africa. Another one of our great 2020 success stories was Mehera Saunders joining our team and establishing a full-time office at Maroochydore. Our firm was also recognised again by our peers in Doyle's Guide as leaders in the areas of estate litigation and estate planning in Queensland and nationally.

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)



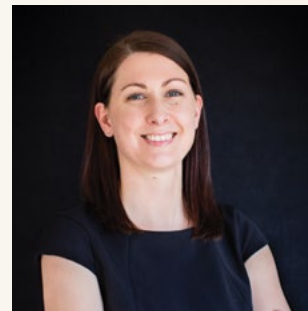
**MEHERA
SAUNDERS**

Special Counsel &
Accredited Specialist
in Succession Law
(Qld)



**KYLEE
GHODSI**

Senior Associate



**KATE
MULLER**

Senior Associate



**GRAHAM
STENTON**

Consultant



**TIM
O'DWYER**

Consultant



**NAOMI
WILLIAMS**

Solicitor



**PETE
GALEA**

Solicitor



**EIRINI
GEORGIOU**

Solicitor



**KRISTEN
MITCHELL-
SCOTT**

Solicitor



Spotlight on *Naomi Williams*

Mentoring young legal talent has long been a Mitchells tradition. Meet solicitor Naomi Williams, who joined us after a stint as a work experience law student back in 2013. She's now become an invaluable member of the team, working on diverse and “insanely complicated” cases in Estate planning, administration and litigation. Equipped with a Bachelor of Laws and Bachelor of Arts, Graduate Diploma of Legal Practice (College of Law) and grant of admission to the Supreme Court of Queensland, Naomi has genuine empathy for her clients and an innate capacity to solve problems.

Describe the highlights of your journey at Mitchells so far.

I guess you could say I've grown up at Mitchells. I found here a supportive environment to learn and ask silly questions as a young law student, and I stayed because the people became like family. I've celebrated some of my biggest milestones with my colleagues here, from graduating my university degrees, to having my first appearances in court, to getting married. I'll never forget the colourful balloon-filled office I was greeted with after my admission as a Solicitor!

How has in-house mentoring helped you become the lawyer you are today?

When I started as a work experience student, I expected my first lesson to be in making coffee. To my surprise, day one actually involved attending in-office training by one of Australia's leading succession law barristers. The training and mentorship hasn't stopped since. Bryan's passion for succession law and learning is infectious and

I've been privileged to work with incredible minds in the field.

Equally valuable has been the supervision and collaboration with senior lawyers, who always have an open door, who practice law with integrity and skill, and who genuinely care for their clients and colleagues. I try to model myself on them and there is always more learning to be done. I did also learn how to make coffee. I'm thankful every day for that invaluable skill!

What do you find most fascinating about working in Wills, Estates and succession?

Death affects everyone and it's never easy. We respond to many clients who are in the midst of grief or seeking advice on confronting questions. It's an opportunity to make that person's experience a little bit easier. The complexity of family dynamics means that no two matters are the same. Listening and understanding is an absolute necessity in order to achieve outcomes for our clients. But more than that, it is a real privilege to be entrusted with people's stories and unique experiences of life.

What do your clients typically say about you? How would they describe your approach and style?

I really value relationship and trust with my clients. The world of Wills and Estates can be incredibly complex, confusing and confronting. I want my clients to know that their solicitor really understands where they're coming from, and to trust that the advice they receive is in their best interests. My style involves a balance of compassion, and open and frank discussion.

Complete this sentence: “My idea of paradise is...”

...camping with my husband, preferably on Stradbroke Island, with access to coffee and a good book.

Are All Your Children Really Equal?

When it comes to Wills and Estates, the team at Mitchells Solicitors has seen it all. But when an Estate is not distributed equally among adult children, things can really get heated.

Despite the usual family jokes about the favourite child, when it comes to Estate planning, parents will usually go to great lengths to ensure all their children are treated equally in their will.

But what happens when one child has been given more financially during your lifetime than the others—it might be an equal distribution of your Estate, but is it fair?

In a NSW Supreme Court case in 2015, a father died leaving an Estate worth around \$16 million with his two sons and his four daughters surviving him.

In his will, the father gave a house (worth about \$1.7 million to \$1.9 million) and \$50,000 to one son, and the rest of his Estate to the other son. The four daughters received nothing other than a note from their father in

the Will which said, “I have been instrumental in them being well provided for in my lifetime even to the extent of three home units each in the year 2006”.

The daughters had been given three home units by their father, but these hadn’t come out of his own personal estate but out of a family discretionary trust. In addition, the value of the units split between the four daughters was \$352,500 each. In short, they received much less than the millions left to their two brothers.

Two of the daughters made a Family Provision Claim for more money from the Estate. But this was rejected by the court, which said it was not satisfied that adequate provision for the proper maintenance, education or advancement in life of the daughters HAD NOT been made by the will of their father and that

the father did provide significantly for his daughters during his life through private schooling, helping pay for their children's education, and assisting with property loans.

This case demonstrates that in Family Provision Applications, the court throws out the concept of equality between siblings to consider specific matters such as gender, character, material circumstances, financial resources and financial needs.

Mitchells Solicitors Managing Director Bryan Mitchell said although children could lodge a Family Provision claim on the basis they had not been 'adequately provided for', Will makers were not obliged



to share their Estate equally between their children.

“There are many reasons an Estate may be unequally distributed, from strained relationships between a parent and a particular child, to the appearance of a new player in the scene such as a spouse. Sometimes a child may move in to care for their older parent and then deliberately poison their parent's mind against the others,” he said.

“There are many heartbreaking stories that occur when children are excluded from a Will, or their share is drastically reduced. These sorts of fights very rarely lead to any form of forgiveness and reconciliation.”

Bryan explained that Family Provision law emerged at the turn of the century in New Zealand to respond to the problem of men failing to provide for their wives and children in their Will. In other words, they were “bad Wills”. The new law quickly spread across the Tasman to Australia.

“Today, this legal remedy has evolved with the times to allow step children or a spouse to make a claim for

adequate provision, among other changes,” he stated.

“Criticism is sometimes levelled at Family Provision law for empowering adult children to exercise their rights even if they are not in real need, which causes unnecessary expense and family fragmentation. On the other hand, the law can represent the only hope for individuals to receive a belated inheritance from their parent.”

Drafting Wills can be a complex affair. Don't fancy your Estate being used up in court fees by a child who feels wronged? We advise Will makers to keep records of lifetime financial support made to each of your children and including this with your Will, along with a written explanation of your decision. Get in touch with one of our specialist lawyers on 07 3373 3363 for advice.



Beware of Promises from Little Old Ladies



By Mehera Saunders

Years ago, I had a client who came across as being kind-hearted and a bit naïve. She had an elderly spinster aunt who didn't have many friends and was all alone in the world.

This elderly and rapidly ageing aunt persuaded my client to give up her job and devote her time as a full time 'on call servant' assisting her aunt with every command, driving her around, cleaning her house, making her meals, and putting up with her difficult personality.

My client would have done some of this anyway, out of a sense of family duty, but she stopped working so that she would always be available because the aunt had requested her to do so, promising that in return she would be looked after in the aunt's will.

Fast forward a few years, and the elderly aunt has died. My client by this stage is worn out and exhausted, emotionally and physically, from fulfilling her side of the bargain. Imagine her shock when it is revealed that the will leaves the estate amongst nearly a dozen different charities, and that there is no mention of my client.

My client had no appetite, emotional energy or funds for litigation.

As an appeal to the humanity of all involved, she instructed me to write a letter to the executor outlining the situation and asking whether the charities might each consider authorising a \$10,000 'gift' to our client from their respective portions. When combined, this would have yielded her a sum of money that might modestly compensate for her loss of wages and time spent, and would have left substantial and attractive balances remaining for each of the charities. It seemed like a reasonable proposal.

If only my poor client had gotten something in writing to record this agreement. Point being that "little old ladies" can be dangerous, whether deliberately or not.

Elder abuse is a theme we've spotlighted in recent editions. Here, Mehera Saunders, Special Counsel at our Sunshine Coast office, turns the issue on its head by revealing that abuse can go the other way. In short, the granny down the road may not be exactly who she seems.

PROM

The Case of the Magnificent Water Views

Here's another case to consider. This one involves the story of an elderly lady and her neighbours, on a very nice street, in a very expensive suburb with magnificent water views. Unfortunately, the Judge was not able to go and see the water views, even though they were an integral part of the story.

Here is a quote from paragraph 5 of the Judgement.

“The three relevant properties (i.e., No’s 66-70) extend down to Sydney Harbour. Relevantly, the deceased’s upstairs unit at No 68 has views of Sydney Harbour, which views (on the evidence before me) the deceased was keen to retain. I did not accede to an

application during the course of the hearing for a view of the properties in order to see that water view for myself – not least because of what I perceived would be the difficulties in conducting a physical view during the course of what was a virtual hearing in the midst of the current COVID-19 pandemic (see T 249) (and it was not suggested that judicial notice could not be taken of the generally perceived advantage, at least in the context of the real estate market, of Sydney Harbour water views).”

The case is *Moore v Aubusson* [2020] NSWSC 1466 and judgement was delivered in Sydney on 23 October 2020. The properties in question are 66, 68 and 70 Louisa Road, Birchgrove NSW. You can look up the

street up on Google Images and speculate about the views.

The plaintiffs (whom I refer to as ‘the neighbours’) bought number 70, a property which one witness described as “charmless”, and which the neighbours described as ‘the worst property in the best street’. They bought this property with plans to substantially improve it and then sell.

Enter the elderly lady next next door. This lady was no slouch. She had not only participated actively in what one witness indicated was the neighbourhood hobby of lodging objections to each other’s development applications, but the Judge saw fit to mention that in respect of another redevelopment happening at number 72 on the same street, she had apparently been **“ordered off the site after**

ISES



attempting to enter the site to check its compliance with the approved plans herself” (*excerpt of paragraph 6 of the judgement*).

The lady is alleged by the neighbours to have been most upset about their development plans and to have obtained a twofold promise from them to the effect that (1) they would not proceed with any plans that would obscure her water view while she was alive, and (2) that they would look after her for the rest of her life and receive her estate in return. I bet you’re not surprised to learn that there was no reflection of this alleged promise in writing anywhere, or in her Will.

What ensued was a lengthy trial, conducted virtually, in which witnesses of all descriptions

were called and an incredible amount of sometimes conflicting evidence was put before the court, along with very detailed submissions about concepts of contract and equity.

The Judge didn’t seem overly enthusiastic about the evidence given by the neighbours (although he didn’t categorically dismiss their evidence). But in the end, he felt there was enough evidence given by disinterested witnesses to persuade him to conclude that there had been a promise of sorts. The practical outcome of the Judge’s decision was that the neighbours received the properties, ie 66 and 68, but not the lady’s whole estate.

Obviously it would have been much cheaper for an agreement, and any later variations of it, to have been recorded in writing. But

we know how often this doesn’t happen, and that unfortunately, and confusingly, the absence of a written agreement does not of itself prove the absence of an agreement.

So what were the executors to do in this instance? They have no way of knowing whether the agreement did or did not exist, and they have to find out what their obligations are in respect of distributing the estate. So in this case the matter went through a lengthy trial and a judicial determination.

I do not know what the costs outcome was, but I can say categorically, that this recent judgement only confirms one thing – it would have been far more effective and affordable to seek professional legal assistance early on.

What You Need to Know About Asset Protection

Mention asset protection and chances are a financial advisor will pop into mind. But the reality is, it might be a legal eagle you actually need. That's because a lawyer can protect the personal assets of individuals and businesses by limiting exposure to law claims.

With effective asset protection structuring advice, you can be supported in life – and death. Protections can also be put in place for any businesses you're involved in.

Mitchells Managing Director Bryan Mitchell says asset protection naturally goes hand in hand with Estate planning, but it's an aspect that can easily be overlooked by the general public.

“Estate planning is much more than the transfer of wealth through Wills. It's also about how to avoid losing it by making sure the right asset gets to the right person at the right time,” he stated.

“If there is Estate litigation, the intention of a Will maker is undermined and their wealth is depleted.

Back in the day, wealth preservation amounted to stashing your money under your mattress. Today, asset protection has become a sophisticated aspect of legal management, as Mitchells Managing Director Bryan Mitchell explains.

Asset protection involves structuring someone's affairs, such as by the use of trusts and companies, to minimise exposure to Estate litigation. Asset protection involves making sure there is a smooth transfer of wealth outside the reach of the courts.”

When it comes to protecting personal assets, there are many

potential risks. Examples include bankruptcy or relationship failure, loss of capacity and of course, Estate litigation.

There are also multiple exposure points for business asset protection. These include failing to separate business assets from personal wealth, the loss of all business assets (insolvency) and the exposure of business interests (for example through legal actions or financial difficulties).

“Things go wrong in business all the time, unexpected things. It would be terrible if a claim against a business you have an interest in impacted you personally and exposed your personal wealth,” Bryan said.

Asset protection can also involve looking at ways to structure a business so that moving parts of the business are better protected. These 'moving parts' can include intellectual property, expensive equipment, employees who contribute their labour and business premises.

As a solicitor who's well versed with the asset protection space,



Bryan has seen some dramatic changes over the past decade or so. He's convinced people are more willing to embark on litigation if they do not believe they are not looked after under a Will.

“Another change, which seemed to happen very suddenly during COVID, was the ability to form certain documents in a valid way through electronic means. It's hard to believe that last year, we helped a client to form a valid Will via Zoom while he was miles away, propped up in bed with just his laptop,” he reflected.

“Another conversation that's gaining momentum is how to protect digital assets such as cryptocurrencies. Can crypto be considered property? It's more than likely that it is, but it's a very fragile form of property.

If your private key to access your crypto is lost, there is no locksmith out there who can cut you a new one. And so apart from its fragile nature, like any other form of property, it needs to be protected in the way that it is owned.”

Determined to close the knowledge gap on asset protection, Bryan has launched a webinar series on the topic. The first of the series delves into the nitty gritty of business asset protection, examining issues like common mistakes in business structuring, how to make contractual agreements watertight, and ways to keep assets out of the name of high-risk individuals.

Bryan said most asset protection clients arrived at Mitchells through referrals from a diverse

network of partners that included accountants, solicitors and financial advisors.

“Over the years, we've been trusted to help their clients with Estate or asset protection issues, and we treasure these referrals. If a client is referred to us, we have processes to make sure that the person's client remains their client. This is in line with our 'old-fashioned' values of courtesy and honesty,” he said.

The team at Mitchells Solicitors is committed to excellence. For specialist legal advice on Estate planning or asset protection for yourself, your loved ones and your business, contact us for a free, no obligation, 10-minute phone consultation.

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 13,000 lawyers in Queensland. Only 45 are specialists in Wills and Estates, and Mitchells Solicitors has two of them, Bryan Mitchell and Mehera Saunders. We offer a free, 10-minute phone consultation and every case receives the benefit of specialist 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?*

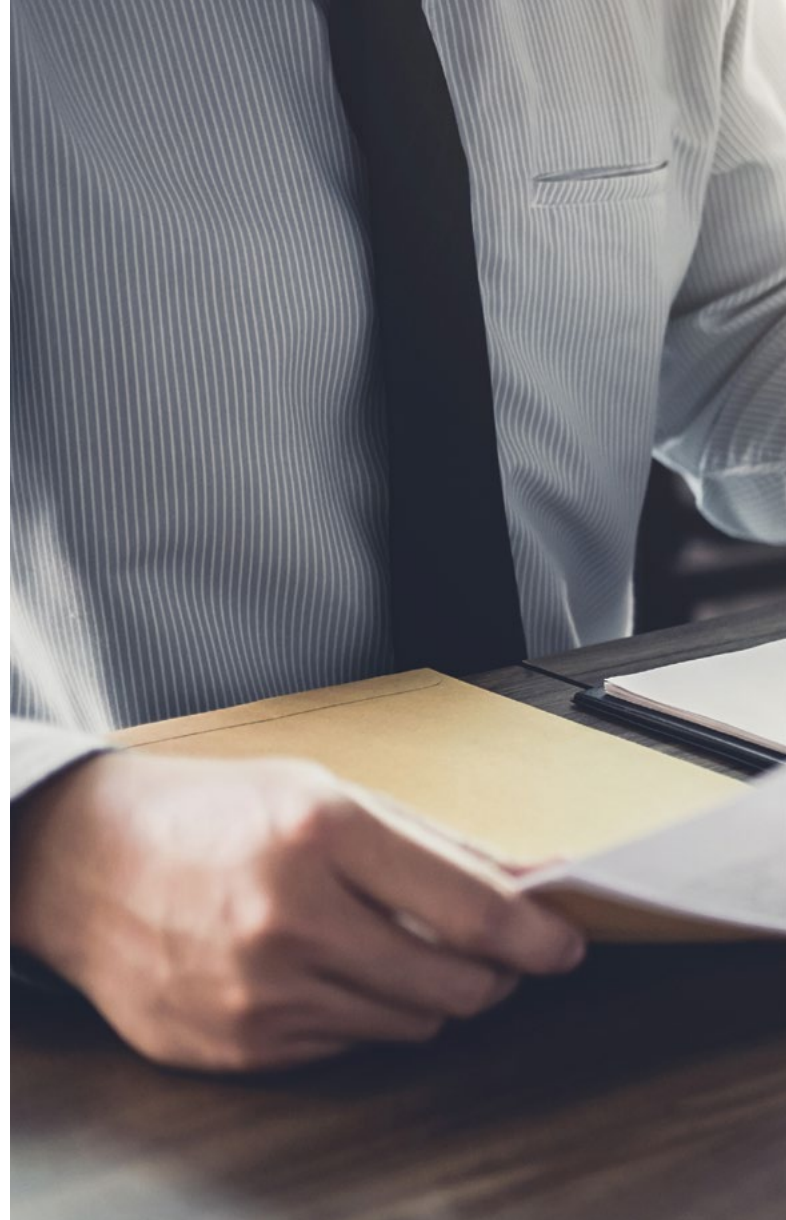
What if I lose my mental capacity before I die?

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.***



Asset Protection

There are many things that can go wrong in life, including the loss of assets built up over many years of hard work and sacrifice. Wealth can be lost in various ways including:

- Divorce
- Bankruptcy
- Losing capacity

With poor or limited Estate planning and asset protection advice, it can be lost in death by avoidable Estate litigation.

Asset protection is all about legal structuring advice (how to own things) to make sure personal wealth and business assets are much better protected both in life and in death.



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 generations.
- 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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