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Let's chat

Why (nearly) everyone should have a testamentary trust – February 2025

With:

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Information provided is general in nature; precise application depends on specific circumstances

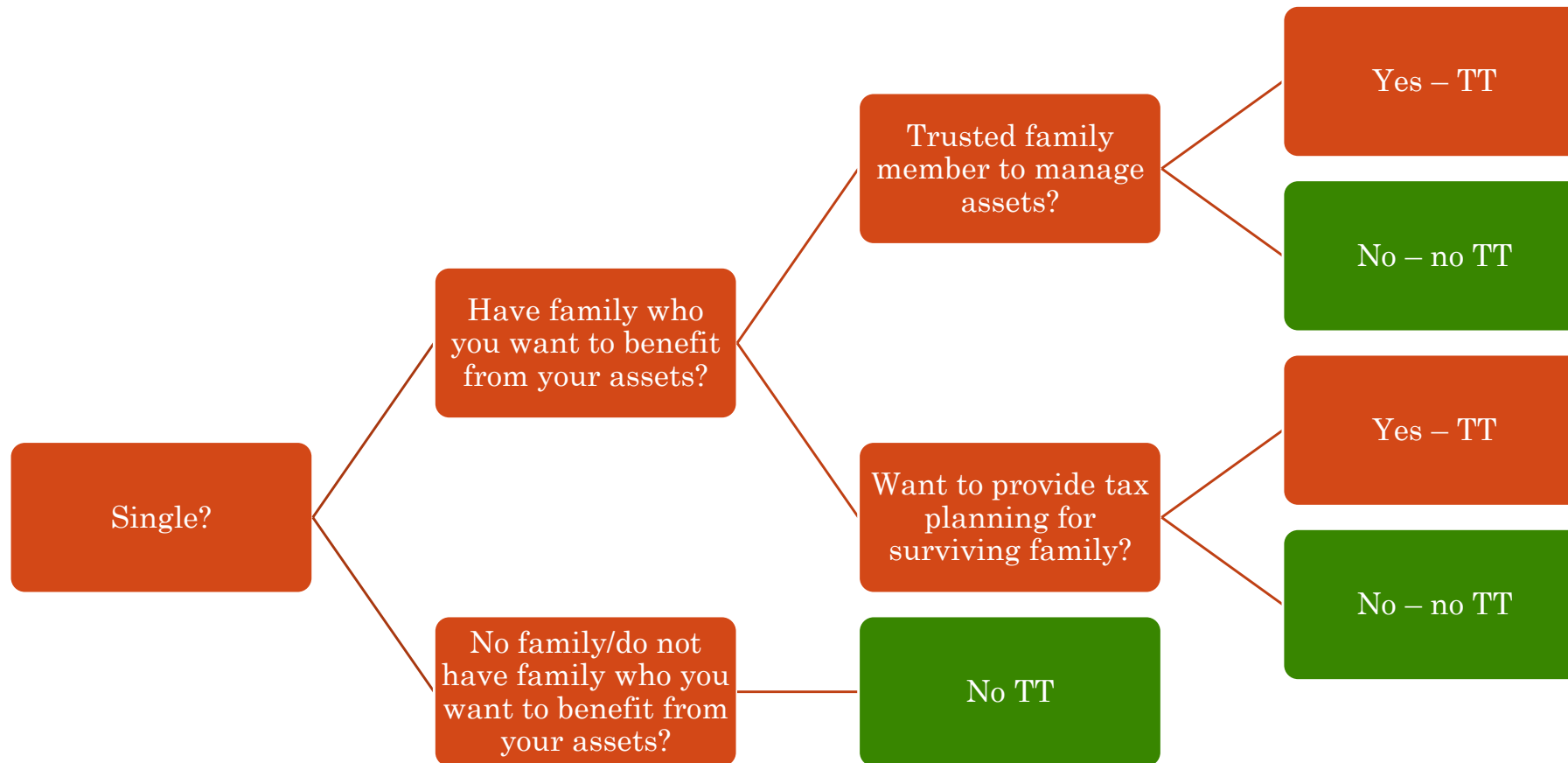


Flowchart – for the couples



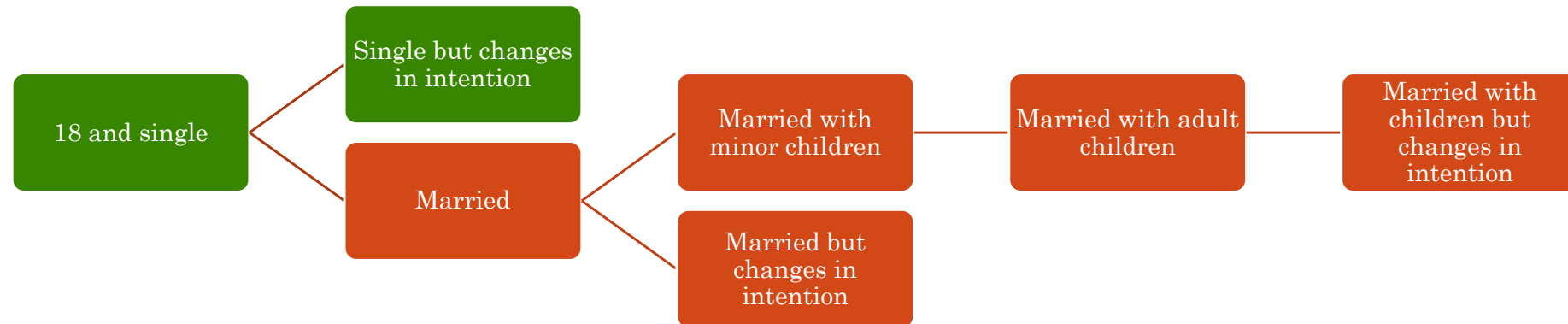


Flowchart – for the singles





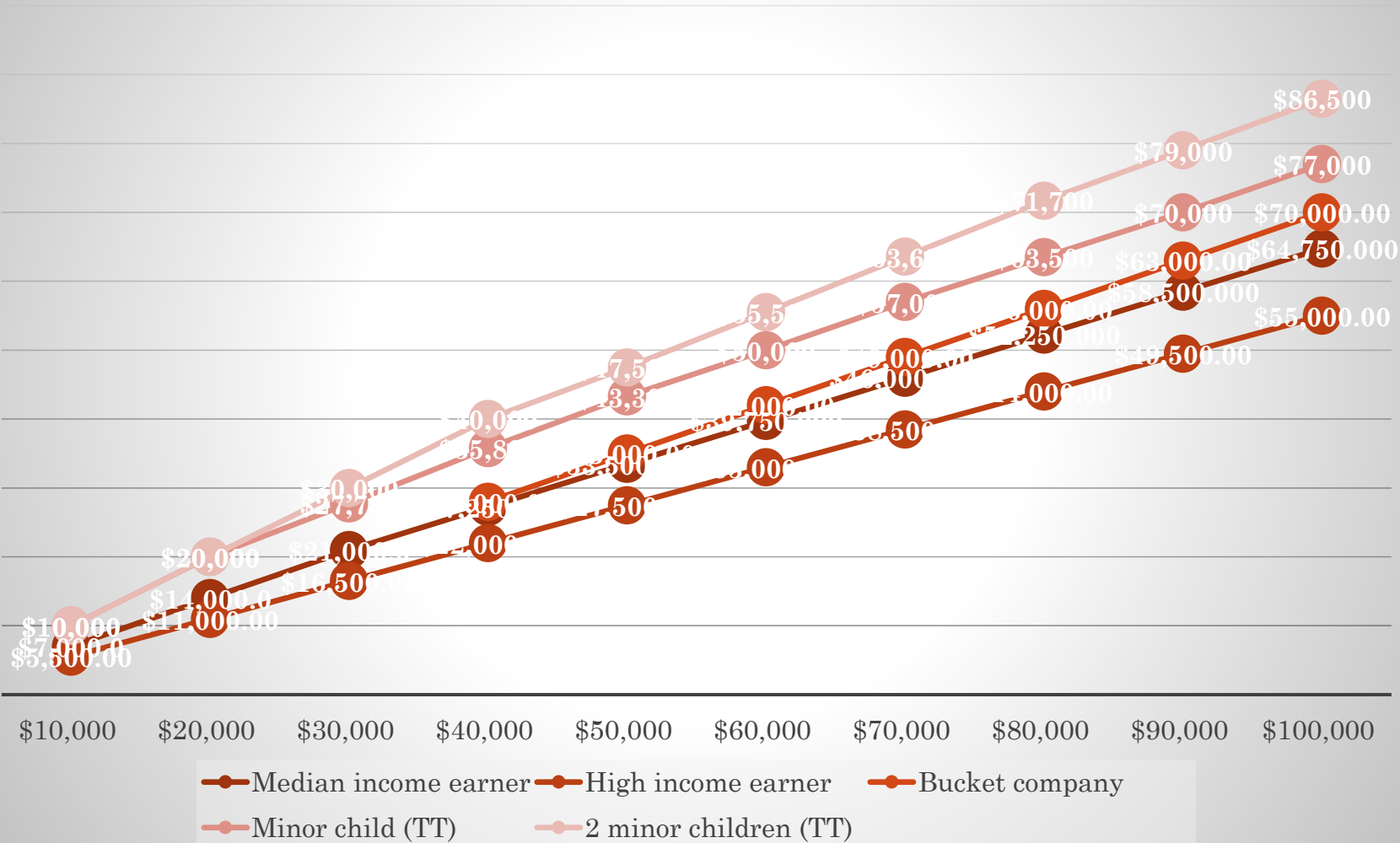
Frequency to see a lawyer



- Assumptions:
 - No family/relationship breakdowns



Income after tax



TT distributing to 2 minor children

TT distributing to 1 minor child

TT distributing to bucket company

Median income earner receiving income

High income earner receiving income

‘Protection’

- Assets held on trust
- Trust law obligations
- Consider fiduciary duties
- Structuring still important
- Successful case against relationship breakdowns relating to a testamentary trust

Bernard & Bernard [2019] FamCA 421

- Whether the assets of the 'Mr Bernard Family Will Trust' forms part of the matrimonial pool?
- [1]...*The husband contends this trust does form part of the matrimonial pool for division and is only a financial resource and is to be taken into account as that species of property when the Court makes property adjustment*
- Mr Bernard's father passed away in 2012 and is survived by his two children: Mr Bernard (Son) and Ms C Bernard (Daughter).

Bernard & Bernard [2019]

FamCA 421

- [22]...*The will made provision for the creation of 2 Trusts, the Mr Bernard Family Will Trust, “the Mr Bernard trust” and the Ms C Bernard Family Will Trust, “the Ms C Bernard trust”. In the Bernard Trust Mr Bernard the primary beneficiary is Mr Bernard, the appointer Mr B, the trustee is Ms C Bernard, his sister, and the provisions of the schedule to the Will apply to the Trust. This structure and the provisions are mirrored in the Ms C Bernard Trust and Mr Bernard is the trustee of his sister’s Trust.*
- Noted that Son and Daughter trusts have conducted business together in a partnership for profit.
- [30] *I note that the wife falls within a class of beneficiary under the Mr Bernard trust.*

Bernard & Bernard [2019]

FamCA 421

- [31] *The purpose of the trusts is set out at clause 5. It is to provide financial assistance for the maintenance, education and benefit in the life of any one of the primary beneficiaries or the children, grandchildren or great grandchildren of the primary beneficiary. The parties' son, Mr G, has received a distribution from the trust for his benefit.*
- [32] *Secondly, to provide capital for advancement in life of the primary beneficiary, the children, grandchildren and great grandchildren of the primary beneficiary.*
- Will Trust terms included the general income and capital provisions which resulted in the wife claiming that (at [40]): *'if there is not a distribution, payment, application to set aside the whole of the income for a financial year then that income must be set aside for the benefit of the primary beneficiary'*

Bernard & Bernard [2019]

FamCA 421

- Interestingly, the trustees of the trust entered into an ensuring resolution that continues into the future that *‘the undistributed accumulated income is being held pursuant to the resolution of 2 July 2015 for the specified use set out in the resolution.’*
- The following comments should be noted following a brief overview of *Spry*.
- [60] *The description of the Spry trust is not a description of the Mr Bernard or Ms C Bernard Trust.*
- [62] *The first is, the husband is not the settlor of the trust, as was Dr Spry. The trust was settled by the husband’s father.*
- [63] *The husband is not a trustee of the trust, unlike Dr Spry, who was a trustee of his own trust effectively. The husband is a trustee of his sister’s trust, and his sister is a trustee of his trust. This is entirely opposite the Dr Spry’s trust.*

Bernard & Bernard [2019]

FamCA 421

- [64] *The husband has no power to appoint and remove trustees, as Dr Spry had in the trust he had set up.*
- [65] *The husband is a discretionary beneficiary, although a primary beneficiary, and does not hold any other entitlement. Any entitlement he holds is as trustee of his sister's trust, the Ms C Bernard Trust. Dr Spry, however, was sole trustee and had the legal title to the property in the trust.*
- [66] *In the matter before me, the husband does not have legal title to any asset of the trust, nor does he have any power to appoint a trustee or appoint the assets of the fund to a beneficiary. He is a mere beneficiary, albeit described as a primary beneficiary. The husband is dependent upon the trustee of his trust to distribute income, accumulate income, and the trustee has complete discretion in determining any distributions made by the trust. That is clear from the trust deed before me.*

Bernard & Bernard [2019]

FamCA 421

- [69] *The husband has no proprietary interest in the assets of his trust. He has no control over the trustee directly or indirectly, pursuant to the trust deed.*
- [70] *The husband has no power to apply any of the assets or income of the trust of which he is a beneficiary. He has that power in the Ms C Bernard trust of which he is not a beneficiary*
- [72] *The assets in the Mr Bernard trust were never matrimonial property as was the case in Dr Spry's trust. The current assets of this trust were not acquired during the marriage as they are in the main inheritances from the husband's father's estate although I accept the parties did not separate until 3 years after probate was granted.*

Bernard & Bernard [2019]

FamCA 421

- [74] ...*That in running the Q partnership, in running a joint business, that each Mr Bernard and Ms C Bernard have the same obligations, rights and duties as trustees to each other and as beneficiaries, and as partners to each other under the New South Wales Partnership Act 1892. This he wife asserts results in both Mr Bernard and Ms C Bernard having effective control of the assets in their trusts and therefore those assets are matrimonial property of the husband.*
- [75] *I fail to see how the assets of a trust are managed can change the nature of a trust at law and I do not see these practical matters create control for Mr Bernard over the assets in his trust. That power rests with his sister Ms C Bernard as it does for Mr Bernard with the Ms C Bernard trust.*

Bernard & Bernard [2019]

FamCA 421

- [82] *There is absolutely no evidence to support a finding that Mr Bernard or Ms C Bernard has ever purported to control or deal with the assets in their trusts. The evidence is that they have faithfully carried out their late father's testamentary wishes to the letter.*
- [84] *...Ms C Bernard and Mr Bernard have been scrupulous in their company dealings, in their promulgation of resolutions, to ensure accumulation of funds to carry out the renovations of the property, holding of meetings and in the filing of tax returns and their distinct roles as trustee and beneficiary. I rarely see a family law matter where tax returns and disclosure is so up-to-date and thorough, as has been in this matter.*

Best practice

- Trustee with independent person
- Primary Beneficiary should be appropriately named
- Appointor also ideally with independent person
- Trust (in the trustee) over control
 - Practical and appropriate (?)
 - Require special terms (?)
- Does not prevent a family provision application, but weight benefits of a testamentary trust over any restructuring (having considered the NSW notional estate rules)

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