

GOLDEN STATE POOLED TRUST DISABILITY LAW WORKSHOP

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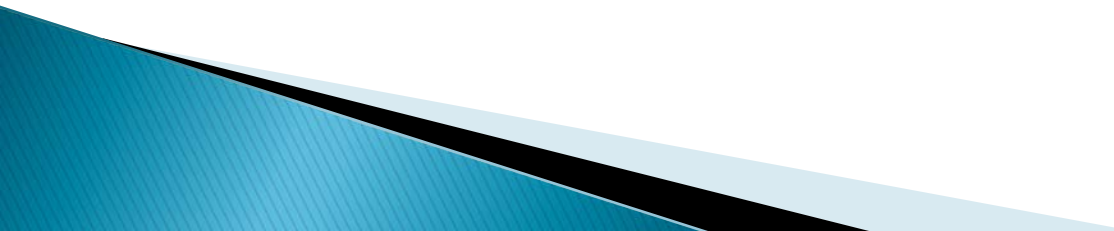
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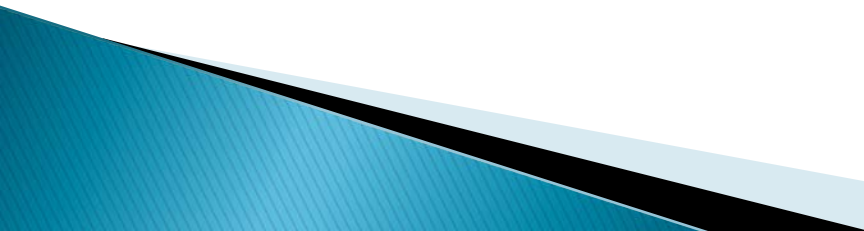
FAMILY LAW & PUBLIC BENEFITS

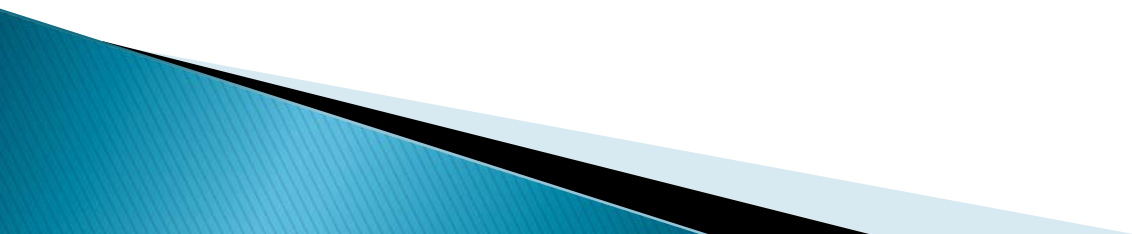
- ▶ I. Brief Review of Public Benefits & SNT's

 - ▶ II. Disabled Child
 - Minor Child
 - Adult Child


 - ▶ III. Disabled Spouse
 - Chronic Disability
 - Long-term nursing care
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Disability & Divorce

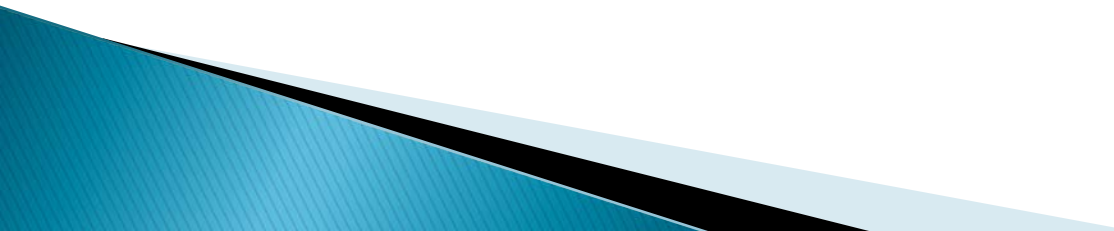
- ▶ Dealing with a disability in a family, whether it's a child or a spouse, increases the likelihood of the marriage ending in divorce.
 - ▶ Incidence of disability is increasing.
 - ▶ Be informed about the impact divorce has on public benefits, estate planning and caregiving of children & adults with disabilities.
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Disability & Divorce

- ▶ Judges & family law attorneys often lack even a rudimentary understanding of SNT law or may be familiar only with third party SNT's used in estate planning for a disabled child. As special needs attorneys, we have an educational role to play with both judges & family law attorneys.
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Review of Basics

- ▶ What are public benefits?
 - ▶ What is the difference between “needs based” and “entitlement” programs?
 - ▶ What are the resource limits?
 - ▶ What is income?
 - ▶ What are first-party, third party and pooled trusts?
- 

Public Benefits Programs

Entitlements

Social Security (SSDI)

for disabled child if disability began before age 22
available when parent is eligible
assets do not affect, but may reduce SSI income

Medicare

for people over 65 years
under 65 years if receiving Social Security Disability Insurance (SSDI) for 2+ years

Needs Based

Supplemental Security Income (SSI)

aged, blind, and disabled people
little or no income
resources limited to \$2,000
for food and shelter
federal program, run by states

Medi-Cal

Medicaid in California
federal rules
if eligible for SSI, automatically get Medi-Cal

IHSS (In-Home Support Services)

Section 8 Housing

SSI – Resource Limit

- Limit of countable resources for single person: \$2,000
- Non-countable resources:
 - Home (owner-occupied) – \$750,000
 - Household goods
 - Life Insurance – up to \$1,500 face value
 - Burial Plot
 - Burial Fund – \$1,500 or Irrevocable Fund up to “reasonable” amount
 - Motor Vehicle

SSI – Income Limit

- Definition: “Income is anything an individual receives in cash or in kind that can be used to meet his/her needs for food or shelter.” (POMS SI 00810.005.A.1.)
- Two types of SSI Income:
 - Unearned (e.g., interest, dividends, rents received, alimony & support): reduces benefits dollar-for-dollar after first \$20
 - Earned (wages or net self-employment income): reduces benefits one dollar for every two dollars earned after first \$65

SSI – Distribution of Income

– ISM – Effect on Beneficiary's SSI:
Dollar-for-dollar reduction, BUT
UP TO A MAXIMUM:

- reduced by one-third of FBR
- For 2010, FBR = \$674, so $1/3$ reduction = \$225 + \$20
- \$245 maximum reduction in SSI monthly benefit from ISM

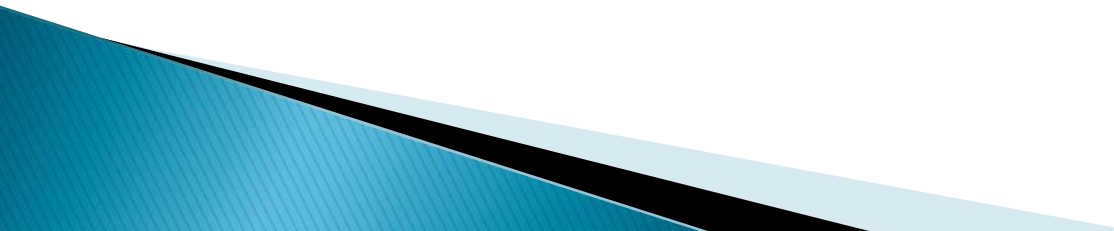
Two Basic Types of SNTs

- ▶ **1. Third-Party SNT** (“Common Law Trust”)
 - Funded with assets of someone other than disabled beneficiary or beneficiary’s spouse (“estate-planning SNT”)
 - No “Payback” requirement: At beneficiary’s death, assets remaining in trust go to whoever Settlor selected (e.g., beneficiary’s siblings, charity) rather than DHS.
 - Simpler to administer than Self-Settled SNT because, with no “payback,” less scrutiny by DHS.

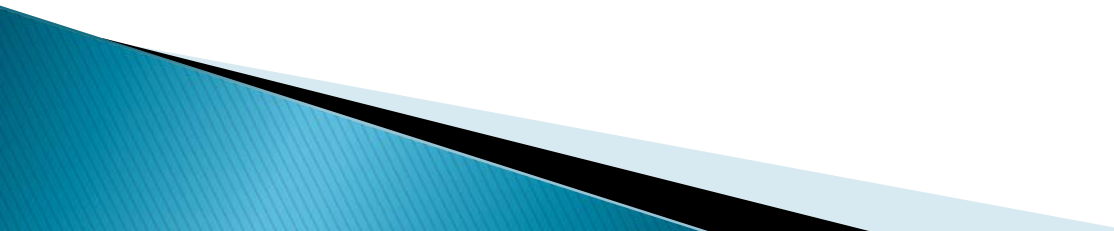
Two Basic Types of SNTs

- ▶ 2. Self-Settled SNT - Funded with assets of disabled individual. Also called self-settled, first party, payback, OBRA-93 or d4A Trust:
 - Created for disabled beneficiary under age 65
 - for “sole benefit” of disabled beneficiary
 - “payback” requirement - all amounts remaining in the trust at beneficiary’s death are paid to the State (up to amount of total Medicaid benefits paid to individual)
 - 42 U.S.C. §1396p(d)(4)(A)(iv).

Pooled Special Needs Trusts

- ▶ 42 U.S.C. §1396p(d)(4)(C)
 - ▶ Non-profit organization
 - ▶ First party and third party
 - ▶ Distribution on death – depends on type of special needs trust
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Pooled Special Needs Trusts

- ▶ Can be established by the *individual*, if competent, when there is no parent, grandparent or legal guardian
 - ▶ Can be used for a person *over 65 years (CA) even if in a nursing home*
 - ▶ Provides a neutral trustee for the SNT
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Divorce & Pooled SNT's

- ▶ SNT for disabled child when parents divorce

first party

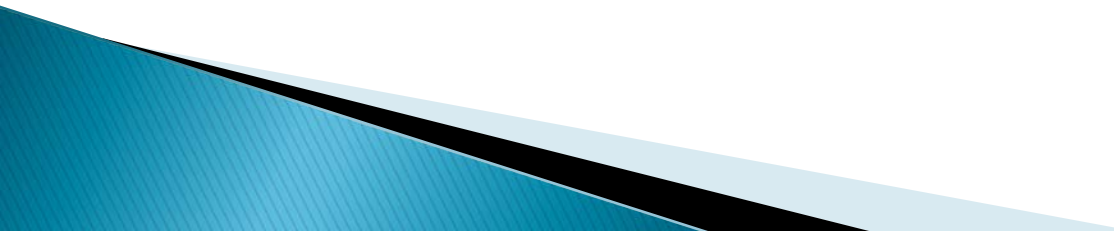
third party

- ▶ SNT for disabled spouse

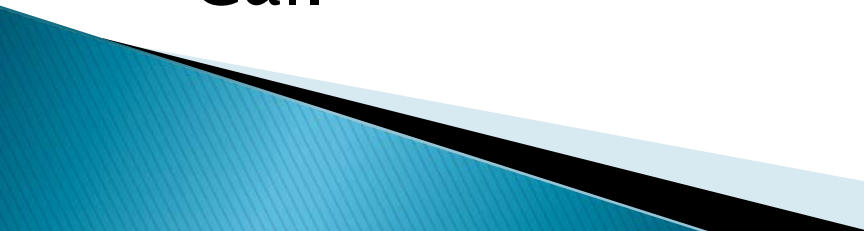
first party

third party

Children with Special Needs

- ▶ Common Law & CA Law: Parents have a duty to support their minor children. (Fam C Sec 3900)
 - ▶ Adult child entitled to support while full time student until completion of 12th grade or attains age 19 years, whichever is first.
 - ▶ Parents have a duty to support *incapacitated* adult child (Fam C Sec 3910)
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Child Support

- ▶ Each state has guidelines which provide a formula for determining the amount.
 - ▶ For a child with a disability, child support orders can have a negative impact on the eligibility for public benefits.
 - ▶ The most important benefits are SSI & Medi-Cal.
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Child Support

- ▶ Child under age 18: 1 / 3 of amount of child support that is received in the form of food or shelter from absent parent is excluded from income. SI 00830.420.

Child Support

The following chart illustrates the calculation of the monthly SSI benefit for a minor child with disabilities when \$645 monthly child support is received. The net benefit to the child is only \$264.

Child Support

▶ Step One:

- ▶ Monthly Countable Income
- ▶ \$645 Child support
- ▶ \$215 (1/3 of payment)
- ▶ \$ 20 Disregard
- ▶ \$410 Countable Income of Child

Step Two:

Monthly SSI Benefit

\$674 SSI Federal benefit rate

\$410 (Countable income child)

\$264 Child's SSI Monthly Benefit

\$909 Total monthly income

Child Support

- ▶ If payments were paid into a snt, child would have:
- ▶ \$674 in SSI + \$645 from third party snt=
\$1,319 to use for benefit of child

Child Support

- ▶ Adult Child with Disabilities:
- ▶ Total amount of child support counts as unearned income. So adult child receiving \$645 in monthly support will receive \$9 in SSI.
- ▶ \$674
- ▶ -\$645
- ▶ -\$ 20
- ▶ \$ 9

Court-Ordered SNT

- ▶ If the court orders the non-custodial parent to pay a monthly amount for the special needs of the disabled child, and orders that the payments be made payable directly to the trustee of a SNT or pooled trust, the payments will not be considered income to the child.

Assignment of Child Support

- ▶ An irrevocable assignment of child support to the SNT will maximize the impact of any non-assignable benefits for basic needs.
- ▶ Certain benefits are "non-assignable by law" (TANF, SSD, SSI, RRR, VA, W/C, FERS, CSRS, ERISA LTD and the like). These will constitute income to the beneficiary no matter what. SI 01120.201 J.1.
- ▶ SSD benefits are non-assignable to protect disabled Social Security beneficiaries from unscrupulous

Court-Ordered SNT

- ▶ It may be a problem to convince a judge to sign an order irrevocably assigning child support to a first party SNT.
- ▶ Attorney must show that the assignment would enhance the child's standard of living.
- ▶ The order should irrevocably assign only the *payment* of support to a first party SNT, but leave all other factors open for later court modification.
- ▶ Court won't approve if it looks like an attempt to contract away child support.

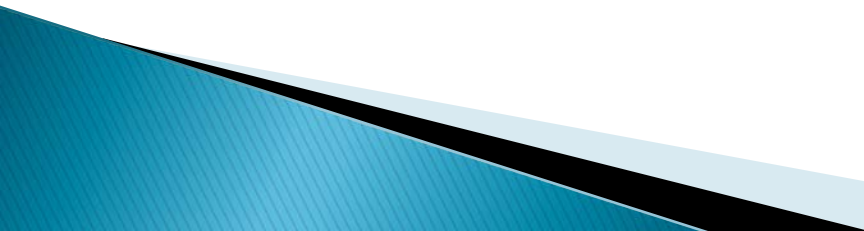
Direct Payment for Items

- ▶ Payments made by the non-custodial parent for the benefit of the disabled child will not count as income to the child so long as payment is made to a third party (not to the child) and is not for basic food and shelter costs. If payments are made for food and shelter, the value of the support is limited to the presumed maximum value (about \$225 in 2010),

Agreement to Fund 3P SNT

- ▶ If parents can agree, they can set up a discretionary third-party trust for the benefit of the disabled child. The non-custodial parent can agree to make monthly payments (but NOT child support) to the trust. In this case there would most likely be no child support order in the domestic relations case. The terms of the trust can permit payment of all sorts of non-shelter/food expenses--including van, therapy, caretakers, etc.

Third Party SNT

- ▶ Voluntary agreement
 - ▶ Separate from court-ordered support
 - ▶ Not subject to payback provisions
 - ▶ Don't characterize contributions as "support"
 - ▶
 - ▶ Court enforcement not available
- 

Effect of Existing SNT

- ▶ If an SNT was established prior to divorce proceedings between the parents (for example, to hold the proceeds of a personal injury settlement for a birth injury), the availability of SNT funds may become an issue when calculating child support payments during the divorce proceedings. The child support guideline statute appears to only consider the parents' income unless special circumstances (Fam C Section 4055 – 4064).

Can SNT *Pay* Child Support?

- ▶ “Sole benefit” includes “payments of any sort from the corpus or income of the trust that are paid to another person or entity so that the SNT beneficiary derives some benefit from the payment (SI 01120.201F1). Arguably, the SNT beneficiary would derive some benefit if his or her children or former spouse were living as comfortably as possible. There is also the benefit of not being found in contempt of court for failure to make support payments if the payments were calculated based on trust income.

What is Marriage?

- ▶ SSI treats as married if

Living in the same household & are married under the laws of their state

Holding themselves out as H & W in the community in which they live; or

SSA has already decided that either one is entitled, as the spouse of the other, to SS insurance benefits

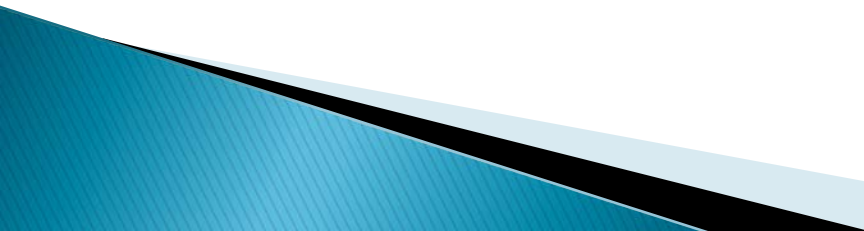
What is Marriage?

- ▶ Medi-Cal's definition of marriage:
 - CA does not recognize common law marriage
 - But gives full faith & credit to common law marriage valid in another state
 - What about a registered domestic spouse?

Alimony or Spousal Support

- ▶ Social Security defines alimony or spousal support as “an allowance for support made by a court from the funds of one spouse to the other spouse in connection with a suit for separation or divorce (SI 00830.418). This type of payment would normally be categorized as “unearned income” which would reduce the SSI benefit dollar for dollar.

Alimony or Spousal Support

- ▶ Possible alternatives:
 - ▶ Payments directly to third parties for food or shelter expenses (PMV rule max 1 / 3 reduction)
 - ▶ Even better, make payments directly to third parties for goods or services that do not constitute food or shelter – no reduction
- 

Special Need Trust

Disabled spouse under age of 65 and receiving SSI, or who may need to apply for SSI and/or Medi-Cal in the near future:


All or part of that person's share of the property division and alimony payments may be ordered made to the trustee of an (d)(4)(A) trust to hold the assets and use them for the benefit of the disabled spouse.

But beware of retirement assets.

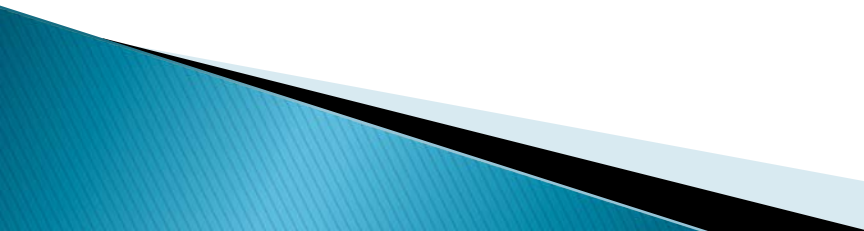


Special Needs Trust

- ▶ **Advantages:**

- ▶ The trust may provide a way for a more responsible person to manage the money so that it will be conserved and used to maximum effect for the disabled person, lasting for his/her lifetime.
 - ▶ The beneficiary need not be incompetent or even mentally impaired. These trusts are also useful for beneficiaries with physical disabilities.
 - ▶ Federal law specifically recognizes the first party or "payback" SNT as a legitimate receptacle for the disabled individual's assets and for their conservation to supplement rather than replace government benefits. This helps meet one goal in divorce, to preserve to the extent possible the dependent party's standard of living.
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Federal Law

- ▶ Such transfers are not penalized as a transfer without consideration so no penalty period.
 - ▶ If the trust is appropriately constructed and restrictive, the assets are sheltered for the future benefit of the disabled party.
 - ▶ The disabled party can qualify for SSI and Medi-Cal without regard to the assets in the trust.
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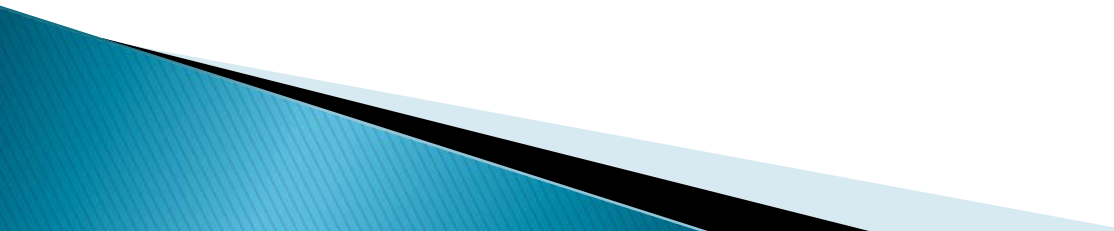
Federal Law

- ▶ The (d)(4)(A) trust can only be established by a parent, grandparent, legal guardian or court. The court in a divorce action thus may order such a trust to be established.
- ▶ The (d)(4)(C) trust can be established by the *disabled individual* as well as the parent, grandparent, legal guardian or court. Regardless of who “creates” the trust, the divorce court should be entering the order for transfer of assets to the trust.

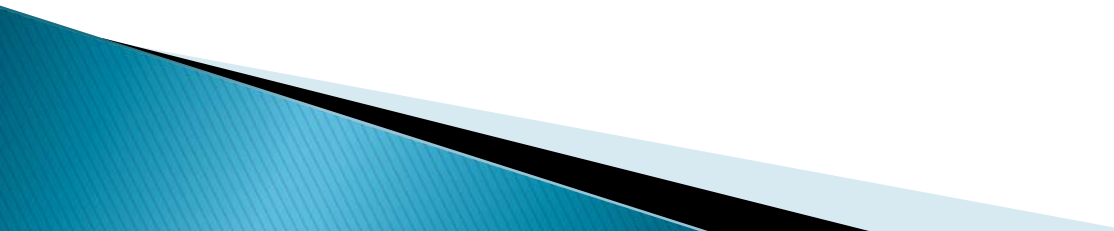
Federal Law

- ▶ If the disabled party is **65 or older**, a “(d)(4)(C)” trust must be used. Transfers to the pooled (d)(4)(C) trust are not be treated as transfers without consideration for the 65+ year old (in CA). So, again, no penalty period.

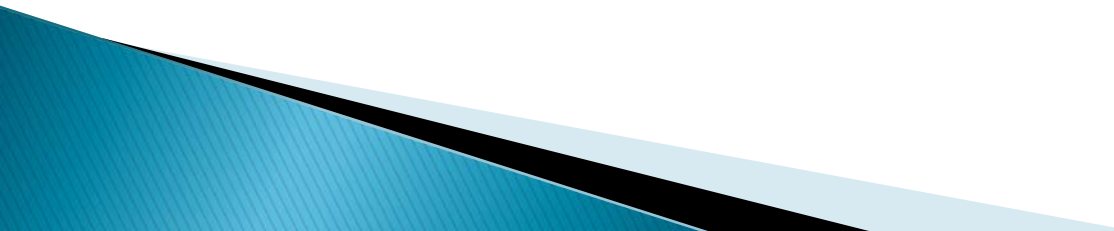
What About the House?

- ▶ House – exempt asset
 - ▶ It may be desirable for the SNT if there is enough income to support it & if the person will not need long-term care
 - ▶ Social Security doesn't reduce the SSI & beneficiary can live there rent free
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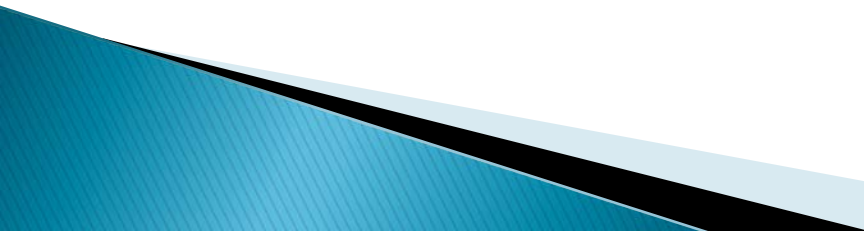
What About a Third Party SNT?

- ▶ Can a spouse without a disability establish a third party SNT for the spouse with a disability after the divorce decree becomes final?
 - ▶ The decree doesn't contain a division of marital assets. So, the spouse with a disability has to trust the spouse without the disability to establish & fund the SNT.
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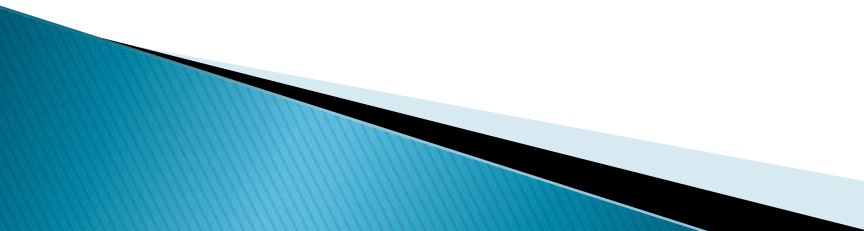
Funding the SNT

- ▶ Some assets are better than others:
 - ▶ Disabled person on SSI, the addition of income, especially pension income that cannot be liquidated or refused without a possible penalty period, can cause loss of the SSI benefits.
 - ▶ Other assets should be exchanged for defined benefit pension plans if the person is on SSI.
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Retirement Plans

- ▶ If a tax-qualified retirement plan, e.g., 401(k) or Keogh plans, the benefits can be divided by Qualified Domestic Relations Order. These are very plan-specific and usually require the use of an expert to review the plan document and draft the QDRO.
 - ▶ If the plan is not qualified, e.g., an IRA, the plan can be divided or transferred by court order.
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Retirement Plans

- ▶ No tax consequences are generated by the transfer if done properly because it is incident to divorce and not a taxable event under IRC §1041(a)(2).
 - ▶ If the person is disabled and under age 59.5, the alternate beneficiary will not pay any penalty upon withdrawal of the money from the retirement plan (qualified or nonqualified). State and federal taxes are still due.
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Retirement Plans

- ▶ Regardless of disability, the alternate beneficiary can withdraw money from a qualified plan without paying a penalty, even before age 59.5 due to an exception for an interest received under a QDRO.
- ▶ If the retirement interest is in a qualified plan and the individual wishes to place the asset into a (d)(4) SNT, it must first be liquidated and the income taxes paid because an irrevocable trust cannot be a participant in or own an interest in a qualified plan. This is because the trust is not an “individual” within the meaning of ERISA law.

Harvey & Wendy

- ▶ Harvey and Wendy have been married for 30 years. About 12 years ago, Wendy was diagnosed with MS and she quit working in order to preserve her energy and to raise their children. Harvey is 55 and Wendy is 50. She is currently receiving care in her home paid for by the IHSS program. They fear that soon Wendy will need 24 hour care and it cannot be provided at home. She may need to be in a group home or in a nursing home. She is in a wheel chair and needs assistance to transfer from the chair to her bed or to the toilet. She is bordering on losing capacity. Their children are both grown and are working and doing well. They now have decided to get a divorce. It is amicable.

Harvey & Wendy's Assets

Joint:

Home	\$190,000
Automobile	\$ 20,000
Savings	\$ 50,000
Checking	\$ 4,000

Harvey:

401(k)	\$ 50,000
Defined benefit plan	\$200,000
Roth IRA	\$200,000
403(b)	\$ 21,000

Wendy

¼ interest in family cabin:	\$ 40,000
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Income:

Harvey: 80,000 per year from work

Wendy: None

Health insurance: Harvey pays for insurance for both of them through his work.

Wendy also receives health insurance benefits through MA

Problem

- ▶ If assets are split 50/50 and Wendy receives them and a maintenance award without taking into account payment sources for her disability, these are the adverse consequences:
 - She will no longer be financially eligible for Medical Assistance
 - She will have to spend all of her assets before Medical Assistance will pay for her care.
 - Her financial and care needs will not be met adequately.

Divorce Settlement

Should they get a divorce?

Would the property division need to be equitable?
Is there adequate funding to meet Wendy's needs?
Where will she live?
Will she need a Conservator?

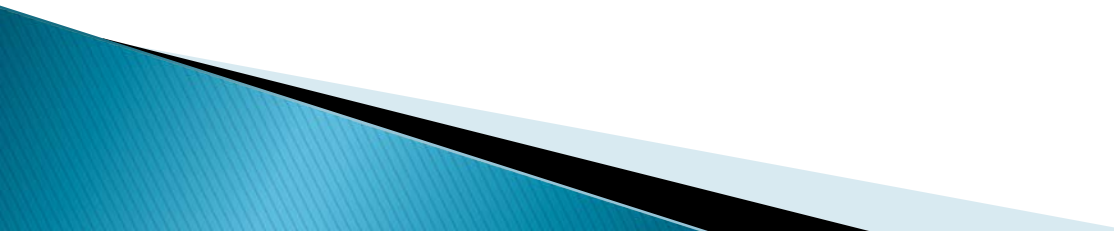
Will her interests in the divorce be represented adequately?

Any Maintenance must be directed irrevocably into a Special Needs Trust
Can continue past age 65
Wendy has no income so could she get SSI?

Retirement Assets must go into Special Needs Trust.
QDRO - Harvey will not get tax hit; Wendy will.
Would it be smarter to take a higher maintenance/alimony payment?
Who should get home? Wendy cannot live there anyway...
Equity can be accessed
Can put into the SNT
What about the cabin?
Should there be a hearing or simply an agreement?

What documents should be in place so that Wendy can provide for her imminent incapacity?

Harvey, Wendy & Dawn

- ▶ Assume that Harvey & Wendy have a daughter, Dawn, who is 30 and on SSI and a Medicaid Waiver program.
 - ▶ How can Harvey and Wendy provide for Dawn; what are the various options they have?
 - ▶ What affect do these options have on Harvey and Wendy's divorce and on Wendy's benefits?
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Questions?

Thank You!