



GIVING TO AN INDIVIDUAL WITH SPECIAL NEEDS

Loving and Positive Gestures Could Result In Negative Unwanted Results

The holidays, especially around **Christmas** is typically when we start thinking about giving. One research study found that 1/3rd of all giving in the United States occurs in December and 22% of total charitable giving is done within last 2 days of the year. It would be magical if giving was a part of everyday life. Although, that is just not possible for the majority – at least not financially speaking.

If you are getting ready to do some holiday shopping or make some year-end donations, please read the following 2 articles before doing so. What might be a thoughtful, generous gift to a loved one with special needs, may just end up hurting them.

Our 1st article was found on [Friendship Circle of Michigan's website](#).

Friendship Circle is a non-profit organization affiliated with Lubavitch of Michigan. Their “goal is to provide every individual with special needs the support friendship and inclusion that they deserve.” They “offer a number of [online special needs resources including a blog with over 1,000 articles on special needs parenting, products, therapy and more.](#) The resources site also offers information about [special needs apps](#) and the [Great Bike Giveaway](#), a program which gives away adaptive bikes to children and teens with special needs.”

A Guide For Gifting To Children With Special Needs

[Amy C. O'Hara](#) who is an attorney with the New York law firm of [Littman Krooks LLP](#). According to <http://www.friendshipcircle.org/> Ms. O'Hara has the following advice.

“As a [special needs planning](#) attorney, I am often asked by clients and financial planners how family members can make gifts of cash and other financial assets to a child with special needs.”

Don't Give A Gift!

“Generally, making outright gifts to a child with special needs is never good planning because it will jeopardize the child's eligibility for needs-based government benefits, such as Supplemental Security Income (SSI) and Medicaid. This includes annual exclusion gifting (currently, \$14,000 for 2013), both in the form of outright gifts and gifts made in trust where a child has a beneficial interest.”

“Further, establishing a [Uniform Transfers to Minors Act](#) (UTMA) account for a child is not recommended. Although the UTMA account may not be counted as part of the child's assets while he/she

is a minor, many problems ensue when the child reaches the age of 18 or 21 and the UTMA account becomes the child's property."

529 Accounts

"If you think the child may be able to go to college, you can open a 529 Account. A [529 Plan](#) is an education savings plan operated by a educational institution designed to help families set aside funds for future college costs. It is named after Section 529 of the Internal Revenue Code which created these types of savings plans in 1996."

"Under this account, the person holding the money (i.e., the person making the gift) and not the person who might use the money to pay for higher education expenses (i.e., the child) is the owner of the account. If it turns out that the child is not able to go to college, the money can be used by another beneficiary."

Special Needs Trust

"A [third-party supplemental needs trust](#) (sometimes referred to as a special needs trust or SNT) is another option for family members to make gifts to a child with special needs. A supplemental needs trust is a trust that is specifically designed to hold money for a person with special needs but will preserve that person's eligibility for needs-based government benefits."

"A third-party supplemental needs trust is funded with assets belonging to a person other than the beneficiary. In fact, no funds belonging to the child may be used to fund this type of trust. The person making the gift can gift cash, real estate, securities and insurance proceeds. It is important to note that gifts made by family members to these types of trusts cannot count as annual exclusions gifts for the trust beneficiary."

"Gifting is complex and it is essential that care be given to the gifting process to ensure the child's eligibility of needs-based government benefits is not put in jeopardy. When considering making a gift to a child with special needs, it is important that you consult with a legal professional experienced in special needs planning."

[Amy C. O'Hara](#) is an attorney with the New York law firm of [Littman Krooks LLP](#). Her practice focuses on special needs planning, trust administration, guardianships, elder law, veterans' benefits and estate planning and administration. Amy is a member of the Special Needs Alliance. She is also a member of the New York State Bar Association. Amy graduated from the State University of New York at Buffalo Law School.

Our 2nd article was found in [The Voice](#), an email newsletter by [The Special Needs Alliance](#).

You might be thinking: *“I could never talk with my family about gifting and the implications it could have. That would imply that I am assuming they are going to give a gift or will something to my child with special needs.”* The Special Needs Alliance has provided **an example letter** you can send to your family. *If I personally were gifting or willing something to someone with special needs, I would want to know it was going to help them. I would not want my loved one losing benefits, or having my hard-earned money go to the state instead of my family.*

The Special Needs Alliance (SNA) is a national, not for profit organization of attorneys dedicated to the practice of disability and public benefits law. Individuals with disabilities, their families and their advisors rely on the SNA to connect them with nearby attorneys who focus their practices in the disability law arena.

[The Special Needs Alliance](#)

The Voice is the e-mail newsletter of [The Special Needs Alliance](#). This installment was written by Special Needs Alliance member Edward Wilcenski, a founding partner of the law firm of [Jones, Wilcenski & Pleat, PLLC](#) in Clifton Park, New York. He practices in the areas of Special Needs Planning, Elder Law, and Trust and Estate Planning and Administration. Ed is a past President of the Special Needs Alliance, and writes and lectures frequently on issues affecting individuals with disabilities and their families

Dear Grandma and Grandpa...

Each year as we approach the holiday season, we receive questions from our clients as to how grandparents and other relatives can make gifts to children with special needs without creating problems for government benefits. These conversations don't involve gifts of toys and other items of personal property, since these items are typically excluded as “exempt” resources and have no impact on public benefits. Instead, the questions usually involve how grandparents and other family members might make gifts of cash or other financial assets.

Most of our clients are informed enough to know that a direct gift of cash is almost always a bad idea. In fact, the challenge often lies not in the discussion of the type of gift, but rather in determining how best to raise the topic in the first place. Indeed, discussions of money can often be awkward and uncomfortable for both sides.

In this issue of *The Voice*, we thought it might be helpful if we wrote a letter to Grandma and Grandpa on behalf of the grandchild with special needs, in hope that it may facilitate a more detailed discussion with those who are inclined to be generous.

Dear Grandma and Grandpa:

Thank you so much for thinking about me again at this time of year. I know how lucky I am to have such generous family and friends. I am writing this letter to you because sometimes things that are done with the best intentions can result in unintended problems. Sometimes those problems occur immediately, but in many cases they don't happen until many years later.

I understand that you are concerned that I may not be able to work and support myself when I get older and that you would like to provide some financial assistance to help make it easier for me when that day comes. I want to explain some of the things that can happen when these acts of generosity are carried out for the right reasons, but in the wrong way.

Counting Your Nickels

You probably know that I get special help because of my disability. Sometimes that help comes in the form of a check each month, and sometimes that help comes in the form of government funded insurance to pay for social workers, therapists, and other aides that are not available through the school district or through mom and dad's health insurance. These programs have very strict limits on what I can own and what I can earn. When someone gives me money or opens an account in my name, I have to tell the government that I have assets in my name (even if I'm too young or incapable of spending it). When that happens, it puts my benefits at risk.

Delaying (not avoiding) the Problem

You might be thinking that a safe way to make gifts is to open an account which is not available to me until I reach 18 or 21. This is partially true, because some government programs will disregard these accounts until I reach the age when the account will be put into my name. More often than not, however, these accounts create significant complications in the future, often involving additional time, effort and expense at precisely the time when you thought the money would be available to help.

For example, a Uniform Transfers to Minors Act (UTMA) account becomes my property when I reach the age of 18 or 21. This occurs automatically, regardless of whether I am participating in one of those means tested government programs, and even if I am not capable (because of my disability) of managing that money. When this happens, I am really stuck. On the one hand, by law the money is considered mine when the account terminates on my 18th or 21st birthday. This means I will likely lose my Supplemental Security Income (SSI), Medicaid and other government benefit programs as of that date. Yet, at the same time, my disability may prevent me from making my own decisions with the money, so I may not be capable of taking any steps in order to protect my eligibility for benefits.

In many cases I will need to hire a lawyer in order to get court permission to put the money in a different type of account, usually a type of “first party supplemental (special) needs trust” account. Depending on the amount in the account, I could end up with quite a bit less than you originally intended once the costs and expenses of the proceeding have been paid. In addition, any funds remaining in that trust at my death would have to first reimburse the government for any services it has paid on my account through the Medicaid program before it could pass to anyone else (your other grandchildren, for example). I know you wouldn’t want that.

Words Matter

I know that you have been buying savings bonds for me from the day I was born. Sometimes you put my name on the bond, sometimes you put both my parent’s and my names on the bond, and sometimes you put my parent’s name on the bond, “payable on death” to me. These bonds can create the same types of problems that a Uniform Transfers to Minors Act account can create. At some point they will be countable in determining my continuing eligibility for one of these really important programs, and I may not be capable of taking any steps to protect the bonds without the assistance of a lawyer and the permission of a judge.

The Unlucky Beneficiary

Maybe you were thinking that you can avoid some of these problems by waiting until the end of your life before the property is given to me, perhaps by naming me as a beneficiary on a life insurance policy, an annuity, or even a small retirement account. But remember that those proceeds are available (and countable) to me when you die if I am the named beneficiary. Just as with the Uniform Transfers to Minors Act account, the government benefit programs will count any assets that come to me by beneficiary designation.

Hoping for the Best, but...

While it may be difficult for you (and for me) to admit, it could turn out that I will not be ready to manage money when I turn 18 regardless of possible concerns with government benefits. We both know how difficult it is to predict how any young child may act when he or she reaches adulthood. I may be able to read and write, have conversations, go to school and hold down a job, but I may simply be unable (or unwilling) to make good decisions with my money. I may spend it irresponsibly, I may give it away, or (worse yet) I may not be able to tell when someone is taking advantage of me. Government benefits aside, it just may not be a great idea for me to have direct access to a lot of money when I get older.

What Can You Do?

There are ways that you can help me. Depending on the size of the gift, it may be easiest to simply give the gift to my parents and ask them to hold it for me. So long as the bank account is in their name and uses one of their social security numbers, it won’t create a problem with my government benefits. For smaller gifts, this can be the best solution.

If you think that I may one day go on to higher education, you could open a “529 Account” for my benefit. These accounts earn money on a tax-free basis, and have other tax advantages too. But the most important thing is that the accounts are considered owned by the person holding the money (i.e., the “owner” of the account), and not the person who might be using the money to pay for education expenses at some point in the future.

Some grandparents open these accounts in the name of their children (i.e., the parent of the child with special needs). If it turns out that I’m not able to go to school, the money could be used for one of your other grandchildren who will have that opportunity. Your financial advisor can help you set up one of these accounts (although you might want to check with my parents’ special needs trust lawyer to be sure the account is titled correctly, and that the government benefit program rules which deal with these types of accounts haven’t changed).

It may be that my parents have done their estate planning and have already created a “supplemental (special) needs trust” for me as part of that plan. These trusts are specifically designed to hold money for people with special needs, and can provide the best of both worlds: a trustee is appointed to manage the money (sometimes a parent will serve as the trustee), and the trust is “exempt” in determining eligibility for most government benefit programs (i.e., the government won’t treat the money as if I own it).

You could also name the trust as the beneficiary of a life insurance policy or retirement account. Just remember that if you are thinking about a significant sum of money, it’s important for you to talk to a lawyer who has experience working with these types of trusts.

And, of course, you could always buy me some toys...

But In The End, What I’m Really Thankful For ...

...is knowing that you are thinking about me this holiday season.

About this Newsletter: We hope you find this newsletter useful and informative, but it is not the same as legal counsel. A free newsletter is ultimately worth everything it costs you; you rely on it at your own risk. Good legal advice includes a review of all of the facts of your situation, including many that may at first blush seem to you not to matter. The plan it generates is sensitive to your goals and wishes while taking into account a whole panoply of laws, rules and practices, many not published. That is what The Special Needs Alliance is all about. Contact information for a member in your state may be obtained by calling toll-free (877) 572-8472, or by visiting [the Special Needs Alliance online](http://www.specialneedsalliance.org).

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