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Special Needs Legal & Future Planning

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THE CHROMOSOME 18

REGISTRY & RESEARCH SOCIETY

Friday, July 14, 2017, 10:00 a.m. – 11:00 a.m.

ABLE ACCOUNTS: A NEW TOOL

Benjamin A. Rubin



Brian Rubin—Pittskull Rubin—Benjamin Rubin

"Legal and future planning for our fellow Illinois families of individuals with special needs, including intellectual disabilities, developmental disabilities, physical disabilities, and/or mental illness, is not one thing we do, it's the only thing we do; it's not one area of our practice, it's our only area of practice."

Brian N. Rubin, Parent

Benjamin A. Rubin, Sibling

**It is
TIME
to start**



My goal is to
“UN-confuse”

you!

LOST
CONFUSED
INSURE
UNCLEAR
PEPPLED
DISORIENTED
BEWILDERED

1st,

a “little”

about the
speaker...

Benji Rubin

An attorney, Benji is the younger brother of Mitchell, now 36, who has Autism, and lives in a CILA in the northwest suburbs of Chicago.

Having Mitchell as a brother profoundly shaped who Benji is today, & thus the area of law he chose to practice. His personal experiences as a sibling offer a unique perspective into the responsibilities that come with caring for a sibling with special needs, a concern that he shares with all brothers & sisters of individuals with special needs.

Benji Rubin

- Director, The Arc of Illinois
- President, S.I.B.S., Illinois Chapter of Sibling Leadership Network (National Sibling Association)
- Member of the Special Needs Alliance, the national, non-profit, membership by invitation, organization of special needs planning attorneys
- Member of the Academy of Special Needs Planners
- Clearbrook Associate Board of Directors, an agency serving over 8,000 individuals with intellectual and/or developmental disabilities, including Benji's brother, Mitchell
- Vice Chair, American Bar Association Special Needs Planning Committee
- Member, Encompass, Advisory Council, a joint venture of Jewish Children & Family Services, Jewish Federation of Metropolitan Chicago, & Keshet, developing a sustainable, community integrated future for people with developmental &/or intellectual disabilities
- Faculty Member of IICLE, The Illinois Institute for Continuing Legal Education, on the topic of special needs trusts, and special needs legal & future planning
- Director, The SEDOL (Special Education District of Lake County) Foundation

January 27, 1981

MITCH



Special Olympics



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Growing up as a “Sibling”...

- **Helps put things in perspective in life**
 - **Different than parents...**
 - **Vacations...**
 - **Trips to the Store...**
- **Understanding our future responsibilities**

Benji Rubin

President

S.I.B.S.

**Supporting Illinois Brothers & Sisters
Illinois Chapter of the national
Sibling Leadership Network**





S.I.B.S. www.sibsnetwork.org

**Supporting Illinois Brothers & Sisters
Illinois Chapter of the national
Sibling Leadership Network**



Sibli
[www](http://www.siblingsnetwork.org)

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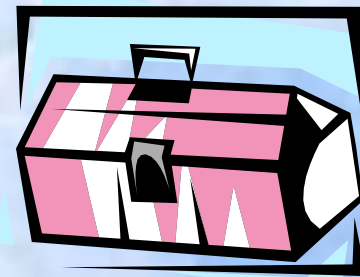
www.siblingsnetwork.org

WHY ABLE... SNTs?

- SSI has asset limit of \$2,000
- Traditional Medicaid has asset limit of \$2,000
- ACA (Obama Care Expanded) Medicaid has NO asset limit, BUT:
 - Days may be numbered... it may be “trumped”
 - Does not apply if parents claiming child as a dependent on their tax return
 - Does not apply if on Medicare, which “comes” 2 years after SSDI &/or DAC
- SO... need to have a place to legally accumulate assets for supplemental needs
- History of solutions for Illinois residents on SSI and/or Medicaid:
 - 1982 Illinois Court case gave us third party special needs trusts
 - 1991 Illinois statute formally approves third party special needs trusts
 - 1993 Federal law approves first party special needs trusts
 - 1996 Illinois statute amended to approve first party special needs trusts
 - 2014 Federal law approves ABLE 529A Accounts for limited amounts
 - 2016 Four States (so far) establish ABLE Account programs and are open to Illinois residents, Ohio, Nebraska, Tennessee, and Michigan
 - 2016 Illinois says may be ready with own program in next year

The Achieving a Better Life Experience (ABLE) Act of 2014

- While we discuss tonight this new tool – it has very specific applications and limitations, all of which are important to understand.
- We will discuss tonight:
 - when an ABLE Account is the right tool, and
 - when other options like special needs trusts are more appropriate
 - and when maybe using both may open new doors
 - **and we will leave time for questions!**



IN RUBIN LAW A Professional Corporation HANDOUT

Many of you have probably heard about a tax-free savings account similar to a 529 College Savings Plan (ABLE accounts will be "529A" accounts). Currently three states are operating ABLE programs and are accepting accounts from out of state residents, [Ohio](#), [Tennessee](#), and [Nebraska](#).

However, while an ABLE account may be a very useful additional "tool" in some circumstances, an ABLE account may not be as useful as first thought for many families of individuals with disabilities.

First, the ABLE account is limited in terms of the amount of money that can be deposited on an annual basis; the current limit is \$14,000 per year, and there is a limit of one ABLE account per individual. Second, the total value of an ABLE account cannot exceed \$100,000 or the individual will have their SSI eligibility suspended until the account balance returns below that level. Also, the ABLE account is capped at the College Savings 529 Plan maximum in the state in which the ABLE account is open; State limits vary from approximately \$250,000 to \$450,000. Third, ABLE accounts can be used solely to cover disability related expenses or face a penalty. An ABLE account also requires strict, complex reporting and record keeping. Finally, there is a "payback" to the State(s) upon the individual's death for the cost of all Medicaid services (including medical and Medicaid waiver) which were provided to the individual after the establishment of the ABLE account.

There are several circumstances in which an ABLE account may be very useful. For example, in situations where an individual with disabilities wants to save excess work earnings or Social Security money so that it may be used in the future, as this money cannot be accumulated over \$2,000 in their own name (under SSI and "traditional" Medicaid rules) but they can place up to \$14,000 a year into an ABLE Account which the individual with disabilities has full and complete control over unless there is a Guardianship established, or the individual is a minor. It might also be useful where a relative has left an inheritance of less than \$14K directly to the child who is on "traditional" Medicaid and/or SSI and mistakenly did not leave it to a 3rd party Special Needs Trust. Another possible use for an ABLE account might be to receive "adult" child support ordered by a court, in order not to impact SSI or Medicaid. Lastly, it might be the perfect vehicle for small litigation settlements. But, due to the "payback" to the State(s) for Medicaid use, it is definitely not an appropriate vehicle for gifts or inheritances from others for the benefit of the individual with disabilities, unless there is the strong belief that all funds gifted will be spent for disability related expenses before the individual with disabilities dies. In that situation a Third Party Special Needs Trust is the only

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ABLE Accounts?

(Revised 11/18/16)

Brian Rubin & Benji Rubin

Many of you have probably heard about "ABLE" accounts. The concept is for individuals with disabilities to have a tax-free savings account similar to a 529 College Savings Plan (ABLE accounts will be "529A" accounts). Currently three states are operating ABLE programs and are accepting accounts from out of state residents, [Ohio](#), [Tennessee](#), and [Nebraska](#).

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continued on other side...

First the “Original” Solutions Still Available Special Needs Trusts

 **3rd Party**

Private & Pooled Versions

 **Self Settled, aka OBRA, 1st Party,
Pay Back...**

Private (d4A) & Pooled (d4C)

Special Needs Trusts

✓ **2 Versions...**

✓ **Reserve**

✓ **Supplemental Fund**

✓ **Over & Above Government
Benefits**

✓ **No \$ limit unlike ABLE as
you will see**

✓ **Federal**



Special Needs Trusts

"3RD PARTY

TRUSTS"

FOR

INHERITANCES

& GIFTS



3rd Party Trust

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INHERITANCE

GIFT

INSURANCE
IRA
401K

**SPECIAL
NEEDS
TRUST**

~~Beneficiary's own assets~~

THEN UPON
BENEFICIARY
PASSING...
PARENT(S)
DECIDE:

FAMILY
CHARITY
GUARDIANS

NO STATE
REIMBURSEMENT
AS ABLE
ACCOUNTS HAVE!
STAY TUNED...



Special Needs
Alliance

National Academy of Elder Law
MEMBER

Third-Party Trust

Third Party Special Needs Trust

- A third-party trust can have great latitude, and upon the death of the beneficiary can be left to anyone you wish with **no payback** to the state as an ABLE account requires (stay tuned).
- There are **no limits** to how much can be placed in a third party special needs trust unlike an ABLE Account (stay tuned).
- A third-party trust has **no age limit** for the beneficiary as an ABLE Account does (stay tuned).
- A third-party trust has no **limitations on its use** so long as for the benefit of the beneficiary, unlike an ABLE Account (stay tuned).
- A third-party trust has no **reporting requirements**, unlike an ABLE Account (stay tuned).

Beneficiary



HAS assets

Savings Bonds *UTMA Accounts AT 21* *Large Gift*
IRA - 401k *Law Suit Settlement*

Excess SSI/SSDI *Inheritance*
WILL/TRUST/BENEFICIARY



If “not that much”

*...consider spending it down on
allowed expenditures, such as:*

- ✓ **COMPUTER, TV, DVD PLAYER...**
- ✓ **VACATION**
- ✓ **PRE-PAID FUNERAL**
- ✓ **PAY OFF DEBTS... EVEN TO
PARENTS...**
- ✓ **CLOTHES**
- ✓ **BUT MUST BE FOR HIS/HER**
- ✓ **SOLE BENEFIT...**

Before ABLE only option:

1st Party SNT

Called... “Self Settled”... or

☑ “OBRA 93 Trust”...

☑ “(d)(4)(A) or (C) Trust”

☑ “PAY BACK Trust” (like an
ABLE account... again stay tuned)

☑ **because...** The Law Offices of Brian Rubin & Associates ©
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1st Party Special Needs

Trust

Medical
Malpractice

Personal
Injury

Inheritances
& Gifts **NOT**
to 3rd party
SNT

Special
Needs
Trust



His/Her own assets,
such as savings bonds

Child Support

**Then
upon
passing...**

*The State,
even before
FUNERAL
bill...*

*any left
only then:
FAMILY
CHARITY
GUARDIANS*

1st Party SNT...

"NOT" SO GOOD...

- ✚ Only if not 65... unlike ABLE – again, stay tuned
- ✚ Only by Parents, Grandparents, Courts & Guardians... NOT self...
unlike ABLE – again, stay tuned... BUT pending legislation!
- ✚ Pay Back... Like ABLE...



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An Overview of the ABLE Act

- Starting in **2015**, States would have the **option to establish an ABLE program**, under which eligible individuals with disabilities could start an ABLE account, modeled after current Section 529 savings accounts.

An “intro” overview

Is an ABLE Account an option?

1. Illinois has its own program (but can use others States)
2. Maximum \$14,000 a year from all sources!
3. Only one account per beneficiary!
4. Beneficiary is owner and in control!
5. Balance can not be more than \$100,000 for SSI, & never more than maximum for 529s in host State.
6. But, limited on how can spend! Penalties & tax!
7. Pay back on death so not for 3rd party contributions.
8. Complex reporting requirements on every expenditure... burden on beneficiary/owner!
9. Tax free? SO WHAT!
10. What if Beneficiary has Guardian or is a minor?

Who Qualifies?

1. Persons Diagnosed as Disabled Before Age 26 and Receiving SSI or SSDI

or

2. Persons Diagnosed as Disabled Before Age 26 and Certified as Meeting Conditions Similar to that Required by SSI or SSDI

Who owns the ABLE Account?

The proposed regulations also makes clear that the

- **designated beneficiary is the owner of that account and**
- **presumes the designated beneficiary manages the distributions.**

“ABLE Observations”

- **controlled by the individual with special needs, IF they are 18 & their OWN Guardian!**
- **Good or Bad?**

What if Account Holder Lacks Capacity to Establish the Account?



The Treasury Department and the IRS recognize, however, that **certain eligible individuals may be unable to establish an account themselves.**

What if Account Holder Lacks Capacity to Establish the Account?



Therefore, the proposed regulations clarify that, if the eligible individual cannot establish the account,

- **the eligible individual's agent under a power of attorney or, if none,**
- **his or her parent or**
- **legal guardian subject to court?**

may establish the ABLÉ account for that eligible individual.

An Overview of the ABLE Act

Other key features:

- **Contributions** into an ABLE account **could be made by any person**;
- Contributions would **NOT be tax deductible**;
- **Income earned** by the accounts would **NOT be taxed (so what... Big deal NOT...stay tuned)**;
- Account **withdrawals**, including portions attributable to investment earnings generated by the account, **for qualified expenses would not be taxable, penalties and tax if...;**



An Overview of the ABLE Act

- Individuals with ABLE accounts could maintain eligibility for means-tested benefits.

In SSI, the first \$100,000 in account balances are excluded from counting as resources, as are most account withdrawals.

ABLE account balances and withdrawals are completely excluded for the purpose of Medicaid and other benefit programs.

ABLE and SSI Eligibility

- If the beneficiary is receiving Supplemental Security Income (SSI) benefits, **when the assets in the account total \$100,000**, any monthly SSI benefits will be **placed in suspension**.
- **If the assets in the ABLE Account drop back below \$100,000**, the SSI benefit suspension ceases and any **SSI benefit resumes**.
- The beneficiary **will not have to reapply for SSI** benefits once the account drops back below the \$100,000 threshold.



35 ABLE and Medicaid Eligibility

- ABLE account beneficiaries do not lose Medicaid eligibility based on assets in their ABLE account or suspension of SSI benefits.
- For instance, in Illinois the maximum amount that can be placed in a 529 plan is \$350,000 .
- Therefore – if contributions exceed \$100,000 – SSI eligibility would be lost – but as long as the account remains below \$350,000 – Medicaid eligibility continues.



What can be Contributed to an ABLE Account



(2) **CASH CONTRIBUTIONS**.—A program shall not be treated as a qualified ABLE program unless it provides that no contribution will be accepted—

- (A) **unless it is in cash**, or“
- (B) with a coupl

UNLIKE A SNT THAT CAN RECEIVE REAL
ESTATE, INVESTMENTS, ETC.

Transfers of the Account during the Beneficiaries Lifetime or Upon the Beneficiaries Death

- **The ABLE Act allows transfers of an ABLE Account during the lifetime of the ABLE Account beneficiary or on the beneficiaries death to siblings that also qualify to have an ABLE Account.**
- **Note if more than one child with special needs!**

Qualified Disability Expenses

- Qualified disability expenses are any expenses made for the designated beneficiary related to their disability, including:
 - education,
 - housing,
 - transportation,
 - employment training and support,
 - assistive technology and personal support services,
 - health, prevention and wellness,
 - financial management and administrative services,
 - legal fees,
 - expenses for oversight and monitoring,
 - funeral and burial expenses.
- IRS can expand... **BUT, much, much more limited than Special Needs Trusts.**
 - **3rd party... ANYTHING for benefit of beneficiary**
 - **1st party... ANYTHING for the sole benefit of beneficiary**

IRS “proposed” Regs:



In order to implement the legislative purpose of assisting eligible individuals in maintaining or improving their health, independence, or quality of life, the Treasury Department and the IRS conclude that the term “**qualified disability expenses**” should be broadly construed to permit the inclusion of **basic living expenses** and **should not be limited to expenses for items for which there is a medical necessity or which provide no benefits to others in addition to the benefit to the eligible individual.**

So in “plain english” what???????????

Tax Free Growth and Penalties if Used for Non Qualified Expenses

- Example – Bob over a decade saves \$50,000, and over that period the account earns \$10,000 for a total of \$60,000.
- If Bob were to use the \$60,000 for a down payment on a home, no taxes would be due
- If instead Bob were to use \$5,000 to pay for a trip to Disney World – the \$5,000 would be taxable, plus a 10% penalty (MAYBE... MAYBE NOT – subject to IRS Final Regs not expected until sometime next year).



ABLE Accounts are TAX FREE...

SO WHAT!

A 3rd party special needs trust (Qualified Disability Trust “QDT”):

- A QDT Special Needs Trust has a **\$4,050** exemption in 2016...
...SO... on the maximum (ABLE for SSI) of \$100,000, would have to earn more than 4% before any tax, & even if it did earn more than 4%:
 1. All distributions from the Trust for the benefit of the beneficiary carry out the income to the beneficiary's 1040 (i.e. not taxed at Trust Level), &
 2. The beneficiary has his/her own, exemption, of **\$4,050**, & a standard deduction of **\$6,300** in 2016, another \$10,350 of income not taxed!
- **Potential \$14,400 in income NOT TAXED ANYWAY!**

ABLE Accounts are TAX FREE...

SO WHAT!

A 1st party special needs trust (Per IRS a “Grantor” trust of the beneficiary):

- **All income is taxed on the beneficiary’s 1040, with a:**
 - **\$4,050 exemption in 2016 and a**
 - **\$6,300 standard deduction in 2016...**


...SO... on the maximum (ABLE for SSI) of \$100,000, would have to earn more than **10.35% before any tax.**

ABLE Accounts are TAX FREE...

SO WHAT!


ABLE ACCOUNT INCOME

INDIVIDUAL'S 1040 IF 1st Party SNT TAXABLE

 \$7,000 \$7,000 

Exemption:  (\$4,050)

Net Income:  \$2,950

Standard Deduction:  (\$6,300)

Actual Taxable Income:  (\$3,350)

**Could be used to offset
any earned income!**


 That is, NO tax
ANYWAY!

3rd PTY SNT/QDT

 \$7,000

SNT QDT EXEMPTION:  (\$4,050)

Net Income:  \$2,950

Assume at least \$2,950 was
spent for person from SNT
during year:  (\$2,950)

\$2,950 

Exemption & Standard
Deduction:  (\$10,350)

Actual Taxable Income:  \$0  (\$7,400)

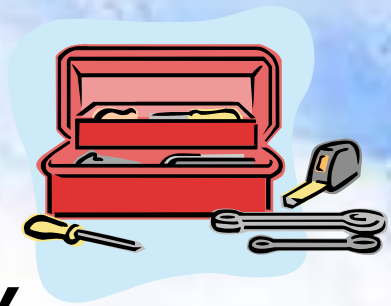
**Could be used to offset
any earned income!**

LET'S TALK ABOUT PAYBACKS AND MEDICAID LIENS ON DEATH



3rd party SNT – NOPE
1st party SNT – YEP
ABLE Account - YEP

ABLE and the Medicaid Payback



- ***In the event the qualified beneficiary dies with remaining assets in an ABLE account:***
 - ***The assets in the ABLE Account are first distributed to any State Medicaid plan that provided medical assistance to the designated beneficiary***
 - ***The amount of any such Medicaid payback is calculated based on amounts paid by Medicaid after the creation of the ABLE Account***




Medicaid Payback



PLAN FOR LIEN UPON DEATH

- If family are using this as a savings tool – ideally the funds will be expended before death. This is a 529 plan with a lien.
- **Many folks do not realize they are using Medicaid – for instance Medicaid waivers (HBSS, HBWD, CILA, ICFDD, Supported Employment, DT, etc.)**

ALSO: Medicaid Payback Comparison

 <u>OWN Name</u>	 <u>ABLE Account</u>	<u>3rd Party SNT</u>	 <u>D4A/C Trust</u> <u>1st Party SNT</u>
Medicaid <u>re-paid</u> on death EVERY-THING after age 55	Medicaid <u>re-paid</u> on death EVERY- THING after creation of the ABLE Account	<u>No pay back at all ZIP...</u>	Medicaid <u>re-paid</u> on death <u>EVERYTHING</u> during lifetime

more ABLE Observations

**IF there is a GUARDIANSHIP,
even if 3rd funds (becomes 1st party money),
then, in the State of Illinois:**

- **COURT APPROVAL is REQUIRED to establish & fund the ABLE Account;**
- **In many counties, required annual surety bond (premium).**
- **NONE OF WHICH IS THE CASE FOR A 3RD PARTY SPECIAL NEEDS TRUST!**

Let's Compare

	Individual's Own Name	3 rd Party SNT QDT ELIGIBLE	1 st Party SNT	IL HBWD Medicaid Buy-In	ABLE Account
Maximum Assets for SSI	\$2,000 + EXEMPT ASSETS	UNLIMITED	UNLIMITED	\$2,000	\$100,000
Maximum Assets for Medicaid (IL)	\$2,000 + EXEMPT ASSETS	UNLIMITED	UNLIMITED	\$25,000 + UNLIMITED QUALIFIED PLAN ASSETS	\$350,000 (IL)
MAXIMUM CONTRIBUTIONS PER YEAR	N/A	UNLIMITED	UNLIMITED	N/A	\$14,000
MEDICAID PAYBACK OR RECOVERY	ALL MEDICAID USED AFTER 55	NONE	ALL MEDICAID USED DURING LIFE	ALL MEDICAID USED AFTER 55	MEDICAID USED AFTER THE CREATION OF THE ACCOUNT
ALLOWABLE EXPENDITURES	ANYTHING FOR THE BENEFIT OF THE BENEFICIARY	ANYTHING FOR THE BENEFIT OF THE BENEFICIARY	ANYTHING FOR THE SOLE BENEFIT OF THE BENEFICIARY	ANYTHING FOR THE BENEFIT OF THE BENEFICIARY	LIMITED: MUST BE "DISABILITY RELATED" AND ON LIST OF EXPENDITURES IN LAW OR REGULATION
FEDERAL 2015 INCOME TAX EXCLUSION 2015 #s	\$4,050 NO TAX ON 1 ST \$10,400, THEN AT 10% ON NEXT \$9,225, THEN 15% ON NEXT \$28,225.	NO TAX ON 1 ST \$4,000 AT TRUST LEVEL. THEN DISTRIBUTIONS FOR BENEFIT OF BENEFICIARY ARE TAXED ON BENEFICIARY'S 1040, \$10,400 EXEMPT, THEN AT 10%... POSSIBLE \$14,400 EXEMPT!	ALL TAXED ON BENEFICIARY'S 1040, NO TAX ON 1 ST \$10,400, THEN AT 10% ON NEXT \$9,225, THEN 15% ON NEXT \$28,225.	NO TAX ON 1 ST \$10,400, THEN AT 10% ON NEXT \$9,225, THEN 15% ON NEXT \$28,225.	NO TAX... ONLY IF ALL EXPENDITURES ARE FOR THE DISABILITY RELATED EXPENSES APPROVED IF NOT 10% PENALTY & APPLICABLE INCOME TAX
REQUIRED REPORTING OF EXPENDITURES	NONE	NONE	UPON REQUEST ONLY		REQUIRED!

**BUT, in one year can
ONLY ADD to the
account (only one
account allowed), IN
TOTAL, from ALL
CONTRIBUTORS,
\$14,000!**

ABLE, In Conclusion

- **A new, additional tool – in limited situations can be an easy way to shelter assets and still remain qualified for SSI and Medicaid.**
- **Not a substitute for a 3rd party special needs trust, and in most cases not a substitute for a 1st party special needs trust.**

REMEMBER
SPECIAL NEEDS
PLANNING IS NOT
JUST A SPECIAL
NEEDS TRUST, NOT
JUST DOCUMENTS,
BUT RATHER IS A
RELATIONSHIP.

QUESTIONS



RUBIN LAW

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- **Special Needs Trusts**
- **Wills & Living Trusts**
- **Estate Tax Planning**
- **Medicaid/SSI Planning**
- **Adult Guardianship**
- **Powers of Attorney**
- **Letters of Intent**
- **Navigating the Illinois "maze" of children & adult services**
- **Estate, Probate & Trust Administration**
- **Consulting on Special Needs Family divorces**
- **Consulting on Special Needs Family litigation matters, including medical malpractice & personal injury settlements and many related matters**

"Legal and future planning for our fellow families of individuals with special needs, including intellectual disabilities, developmental disabilities, physical disabilities, and/or mental illness, is not one thing we do, it's the only thing we do; it is not one area of our practice, it's our only area of practice."



Brian Rubin, parent
Benji Rubin, sibling

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Brian Rubin, parent

Benji Rubin, sibling

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- **and many related matters**



Special needs require special attorneys.

