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## ***“Guardianship”***

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# Guardianship & Other Alternatives to Assisting Individuals with Special Needs

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MEMBER



*Special needs require special attorneys.*

*Materials in this power point are for informational purposes only and are not intended as legal advice.*



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**When someone is an “adult”**

**i.e., 18 years old in N.H.**

**that person is *presumed* to  
have the mental capacity to  
make all his/her own  
decisions.**

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# Meet Sam...

Sam just turned 18  
and still is in school ...

# Inherent rights at age 18



Some of the activities around which we all desire to make our own choices relate to our freedoms of:

- Privacy
- With whom we wish to associate
- Where and how we travel
- How we take care of our bodies

# The hard questions ...



Is Sam able to fully manage his personal, medical & financial decisions?



Could Sam be vulnerable to others?

# What is the situation?

- Sam is still living at home
- Due to his disabilities, Sam could apply for Supplemental Security Income (SSI) to bring additional cash into the household on a monthly basis
- Sam spends all his money quickly
- Sam is very generous and would give the shirt off his back for a friend



# Because Sam is 18 ...

- School officials will not speak with Sam's parents without Sam's permission
- Sam's doctors won't speak to Sam's parents without Sam's permission



# Or ...

- Sam has not applied for SSI/SSDI &/or Medicaid/Food Stamps, for which he is eligible, and the governmental agencies won't speak to anyone without Sam's permission.
- Sam is going for his driver's license, but all agree – including his doctors – that he should not be driving.
- *Or many other possible scenarios....*

# When faced with a situation such as this ...



What do you WANT to do?

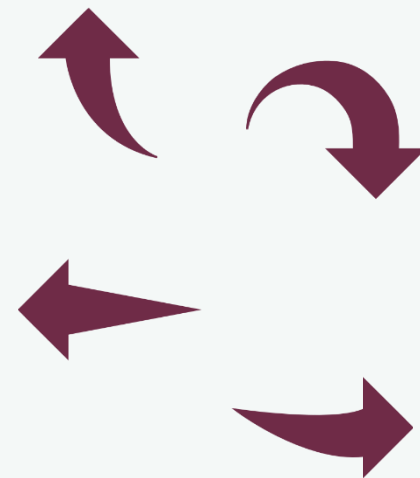


What CAN you do to help Sam?

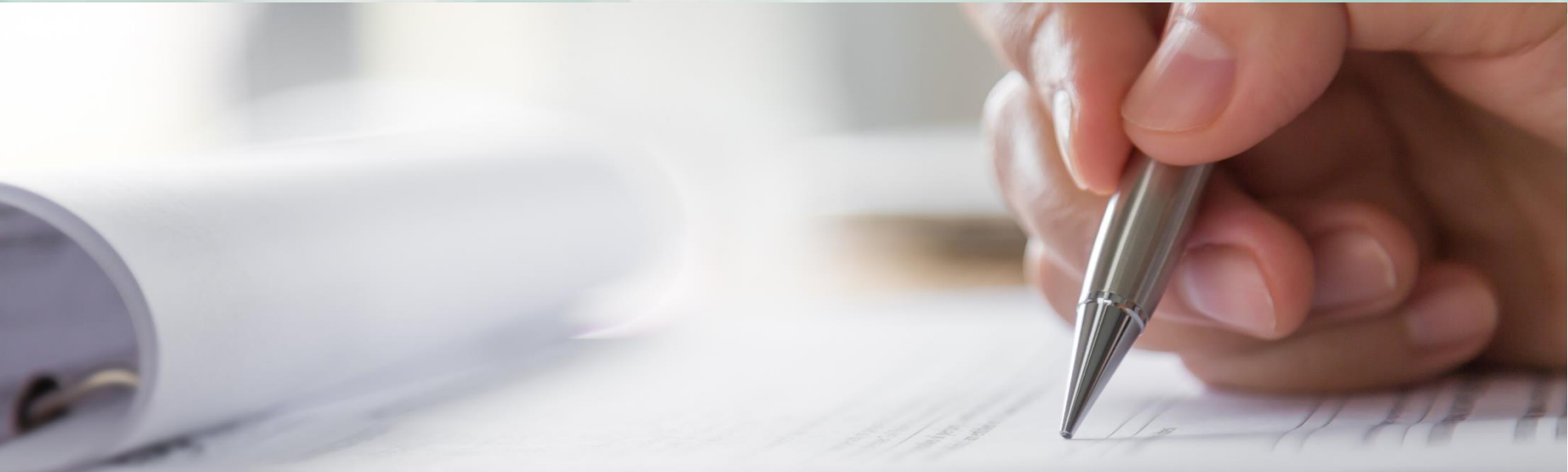
# Before Considering Guardianship ...

Consider possible alternatives:

- SSA Rep. Payee for SSI/SSDI
- Joint Bank Account
- Signature Authority on Bank Account
- Advance Directives



# Advance Directives



- If Sam has the requisite mental capacity
- If Sam can identify people he trusts to assist him with decision making
- Then signing legal documents *may* be an available option for Sam

# Advance Directives

## Powers of Attorney

- Financial Matters
- Health Care
- Educational

## Can be

- Limited or General
- Temporary or Durable
- “Springing” versus “immediate”



# What is a Power of Attorney?

- **Purpose of the Document:** To authorize an individual (the “attorney-in-fact” or “agent”) to make decisions for the person executing the document (the “principal”).
- Revocable at any time, as long as the principal has the mental capacity.
- Agent’s authority is controlled by the terms of the document (no more/no less).
- Anyone over the age of 18 should execute one if possible.



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# Limited vs. General

- An agent's authority is limited to the express terms of the power of attorney.
- A "general" power of attorney authorizes an agent to manage all of the principal's financial affairs.
- A "limited" power of attorney grants authority to accomplish a specific task, e.g., authority to speak to a therapist or teacher.



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# “Durable” or “Not Durable”

A “durable” power of attorney means that the agent’s authority will continue even if the principal lacks mental capacity.

Without this language, the power of attorney is no longer valid if/when the principal loses mental capacity

# “Springing” vs. “Immediate”



- A “springing” power of attorney goes into effect only upon the occurrence of a specific event, e.g., the principal’s incapacity.
- A power of attorney that goes into “immediate” effect ensures an agent need not prove mental incapacity to schools or financial institutions before acting.
- Choosing “springing” versus “immediate” is a personal decision.

# Power of Attorney for Financial Matters

- Purpose: To authorize an individual (the “attorney-in-fact” or “agent” (could be a family member)) to make financial decisions for the individual executing the document (the “principal” (the child)), including authority to:
  - ❑ Sign contracts and pay bills.
  - ❑ Funding trusts, including self-settled SNTs.
  - ❑ Process paperwork with public benefits agencies, for Medicaid, etc.

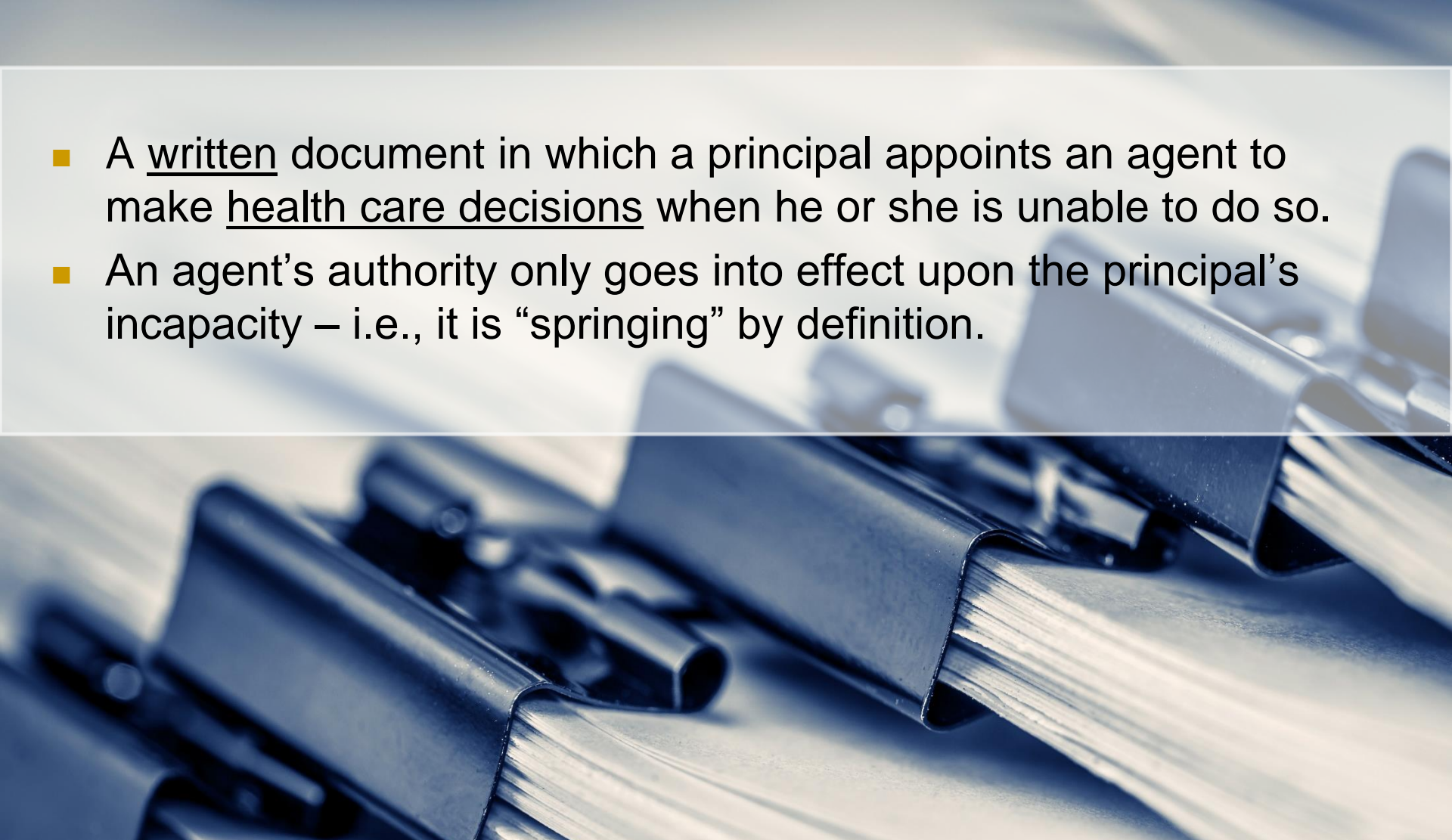
# Limited Power of Attorney for Educational Decisions

- Same concept – student can appoint someone to be involved in any aspect of educational decision making
  - Speak to guidance counselors and teachers
  - Access to school records
  - Attend IEP or other meetings
  - Generally serve as an advocate
  - Fill out financial aid applications



# Durable Power of Attorney for Health Care & Living Will Declaration

- A written document in which a principal appoints an agent to make health care decisions when he or she is unable to do so.
- An agent's authority only goes into effect upon the principal's incapacity – i.e., it is “springing” by definition.



# HIPAA

- The Health Insurance Portability and Accountability Act (protects privacy of medical information)
- If goal is to give someone else immediate access to medical information and permission to speak to physicians, a HIPAA release is key.



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# Does Sam have “Capacity to sign POAs?”

- Does Sam understand the nature of the document?
- Does Sam appreciate the role of an agent?
- What is Sam’s understanding & appreciation of the power of the agent, as well as the limitations on those powers, and Sam’s ability to terminate the agency?



- Again, when someone is over the age of 18, that person is an “adult” and presumed to have the mental capacity to make his/her own decisions
- Only a Court can declare an adult lacks capacity and needs a guardian.



- If Sam can't, or won't sign powers of attorneys ...
- If he is vulnerable to the influence of others ...
- If his decisions are likely to place him or others at risk of harm ...
- Then some form of Guardianship might be appropriate.

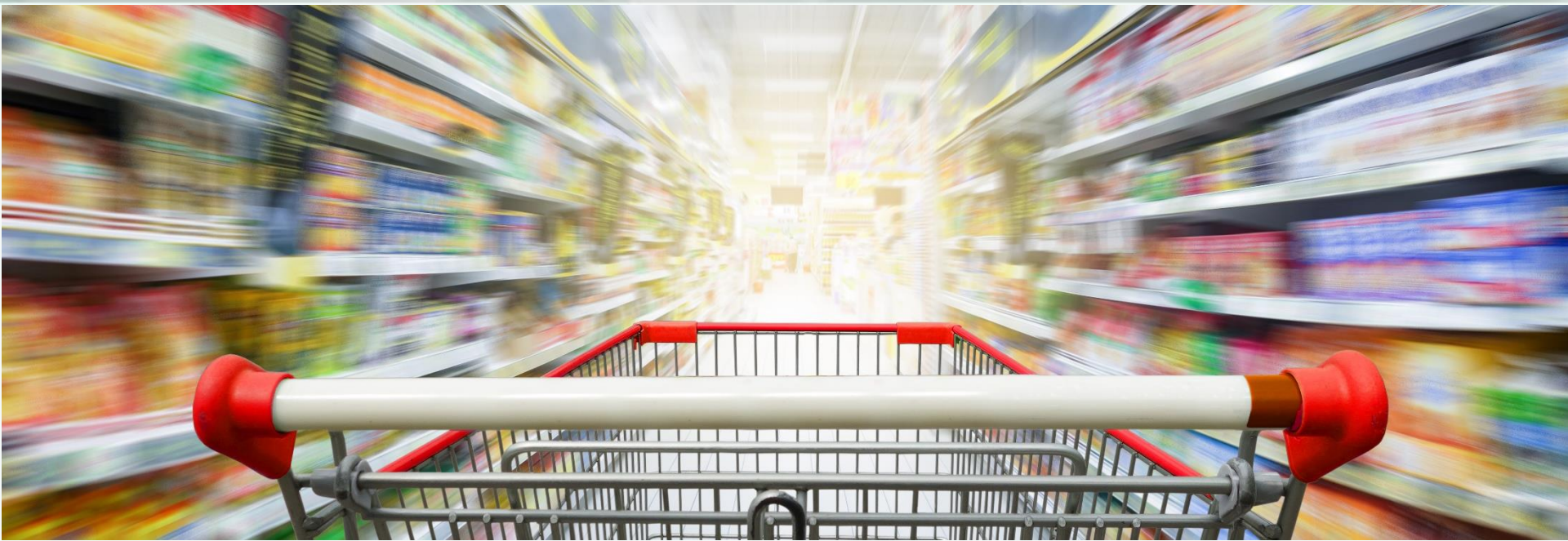
# What Is A Guardianship?

- A legal relationship created by a court
- Between an individual (guardian) who has been given legal authority to make decisions
- On behalf of another individual (the ward) who has been deemed by a court to lack sufficient capacity to manage his or her own affairs or make and communicate important decisions.

# “Incapacity”

- A legal, not a medical, disability ... measured by functional limitations.
- The proposed “ward” has suffered, is suffering or is likely to suffer substantial harm due to an inability to provide for his/her personal needs for food, clothing, shelter, health care or safety or an inability to manage his/her property or financial affairs.

# “Functional Limitations”



- Court is looking for “functional limitations”:
  - Behavior or conditions which impair one’s ability to perform minimal activities of daily living that secure and maintain proper food, clothing, shelter, health care or safety for himself or herself.

# Proof of Functional Limitations

- “Inability to provide for personal needs or to manage property” must be evidenced by specific acts or occurrences – which are not isolated incidents.
- All evidence of inability must have occurred within 6 months prior to filing the guardianship petition with one incidence having occurred within 20 days of the filing.

- Isolated instances of simple negligence, or
- Lack of resources, or
- If an act, occurrence or statement is the product of an informed judgment

These are NOT evidence of inability to provide for personal needs or to manage property.

# “Informed Judgment”

This is defined by statute as “a choice made by a person who has the ability to make such a choice, and who makes it voluntarily after all relevant information necessary to making the decision has been provided, and who understands that he/she is free to choose or refuse any alternative available and who clearly indicates or expresses the outcome of his/her choice.”

# Guardianship Process Means:

- Filing a law suit
- Potentially Adversarial Court hearing (proposed ward is assigned his/her own attorney)
- Revealing medical records
- Perhaps family testimony





# Obtaining Guardianship Is Not Easy, Nor Should It Be ...

- Legal presumption of capacity
- Burden of proof is on the petitioner
- Proof must be established beyond a reasonable doubt that the proposed ward is incapacitated and in need of a guardian.

# Types of Guardianship

Guardianship can be:

- Over the “person” (health, education, where to live),
- Over the “estate” (money, contracts, etc.),
- Over *both* “person and estate.”



# What Are the Ward's Rights?

- Will Sam agree to the appointment of a Guardian?
- Or at least not object?
- Sam has the right to legal counsel, whose job is to defeat, or narrow, the guardianship, consistent with his wishes.



# Who Will Serve as Guardian?

- Parents, siblings or other relatives as guardians
  - Will your decision to proceed for Guardianship affect your relationship with Sam?
- What if a family member is not the best option?
  - An agency or private individual could serve as Guardian.

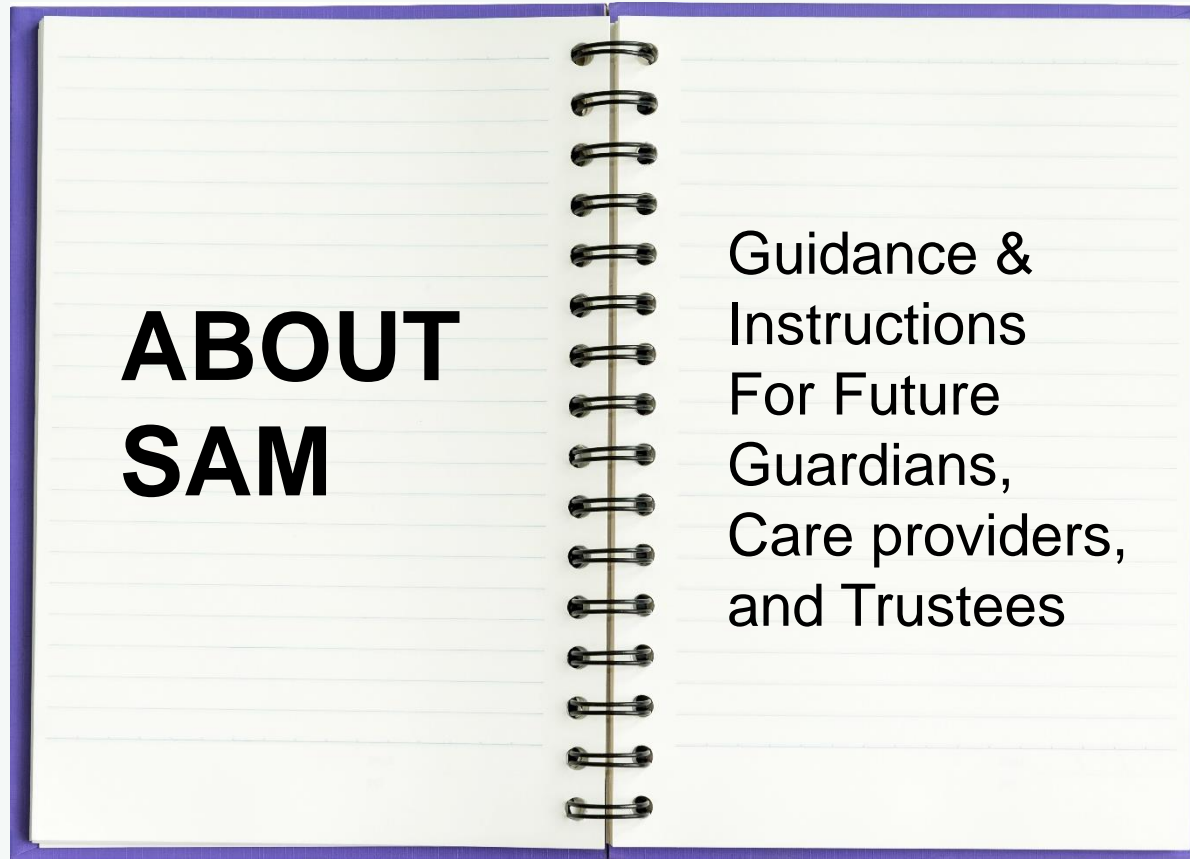


# What Powers Will Guardians Have?

Guardianship order must be “least restrictive form of intervention”

- Limited in scope
- Designed to maintain the greatest amount of personal freedom and civil liberties for the Ward consistent with his/her mental and physical limitations.

# Provide Written Guidance for Future People in Sam's Life!!



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Include Sam as an active participant and take his wishes into consideration.

# Write it Down!

- Family information & history
- Relationships
- Family medical history





# Include:

## History of:

- Diagnoses
- Hospitalizations
- Medications
- Doctors
- Other professionals
- PAST & PRESENT



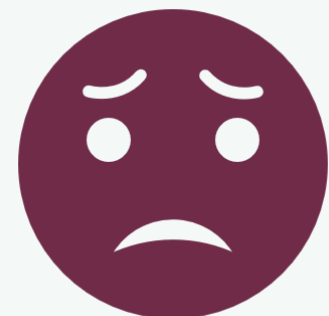
# Don't Forget:

Habits  
&  
Hobbies  
&  
Routines



# Only you know:

- Stress relieving techniques
- Support system, resources, people, organizations
- “Buzz” words or phrases
- Behavior – Dos and Do Nots



# Other Considerations:

- Employment history
- Day programs and activities
- Preferred living situation
- Educational limitations and goals



# Equally Important:

- Government Benefit Information to maximize medical and financial assistance
- Advance planning by family members:
  - Wills, special needs trusts, life insurance

MEMBER



*Special needs require special attorneys.*

**Nationwide Listing of  
Attorneys  
and  
“Voice Articles”**

# For More:



Download the **Milestone  
Ages of Special Needs  
Planning eBook** at

<https://hubs.ly/H0fdbhhh0>



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