

A new webinar series presented to you by Community Support Network, Inc.



“Guardianship”

October 25, 2018

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CSNINH



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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?



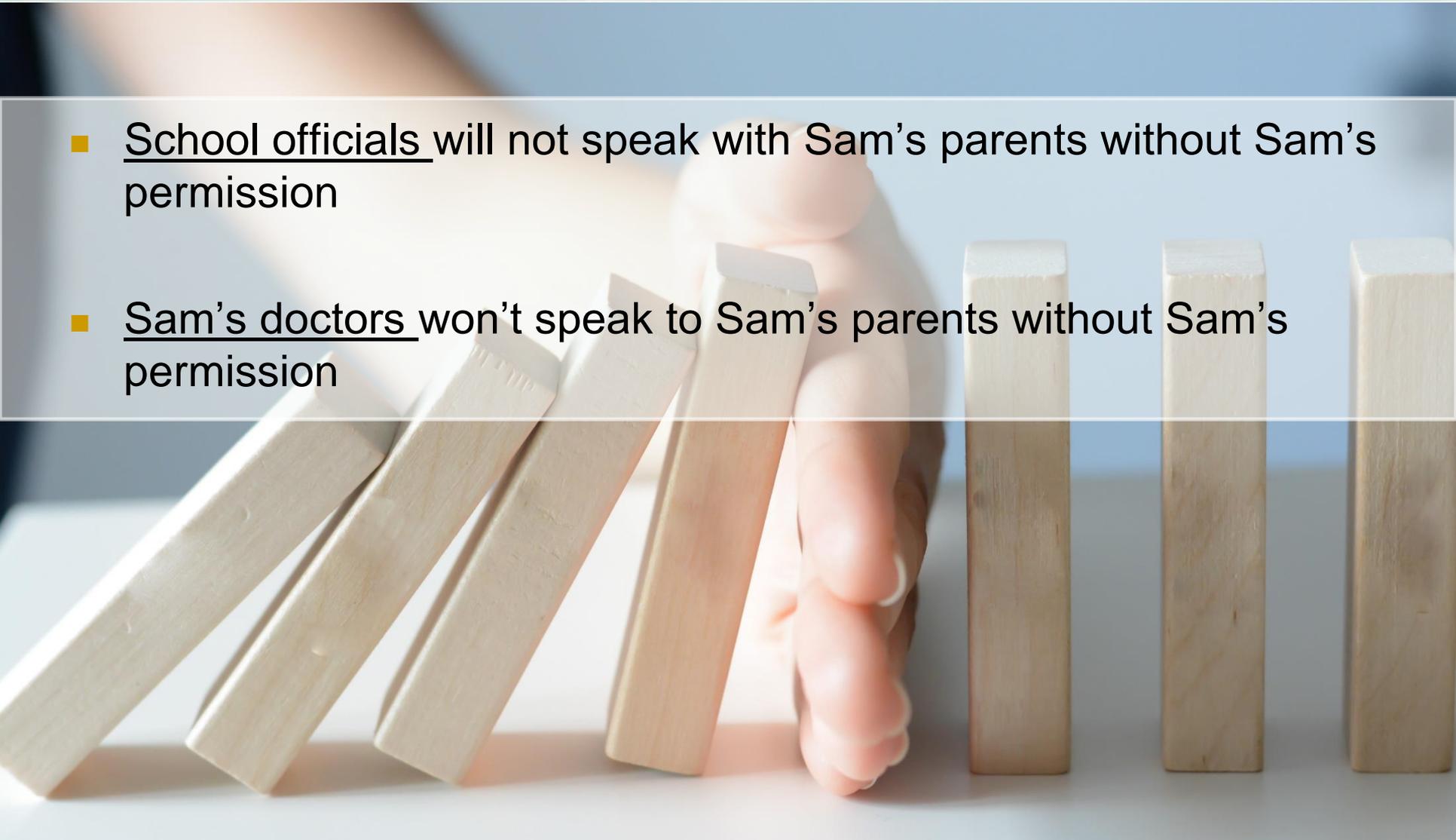
Could Sam be vulnerable to others?

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?

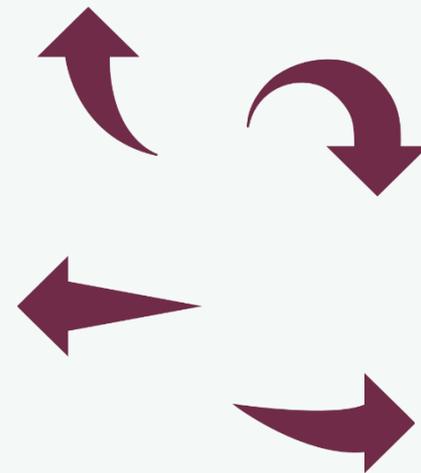


What CAN you do to help Sam?

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”



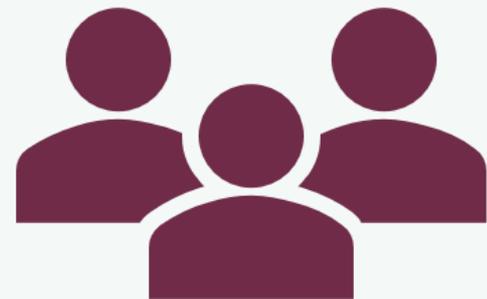
- A “springing” power of attorney goes into effect only upon the occurrence of a specific event, e.g., the principal’s incapacity.
- A power of attorney that goes into “immediate” effect ensures an agent need not prove mental incapacity to schools or financial institutions before acting.
- Choosing “springing”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

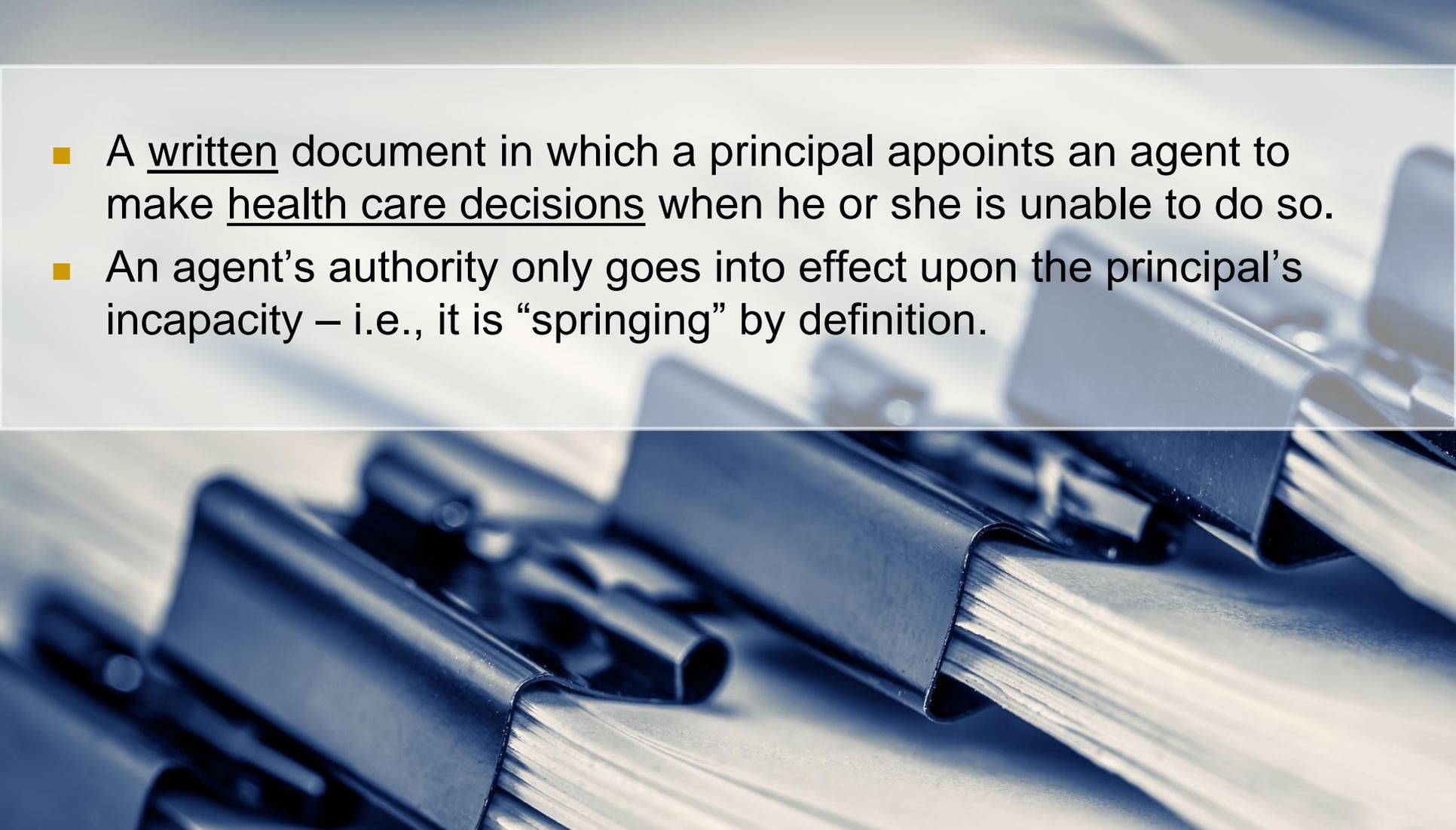
Limited Power of Attorney for Educational Decisions

- 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.

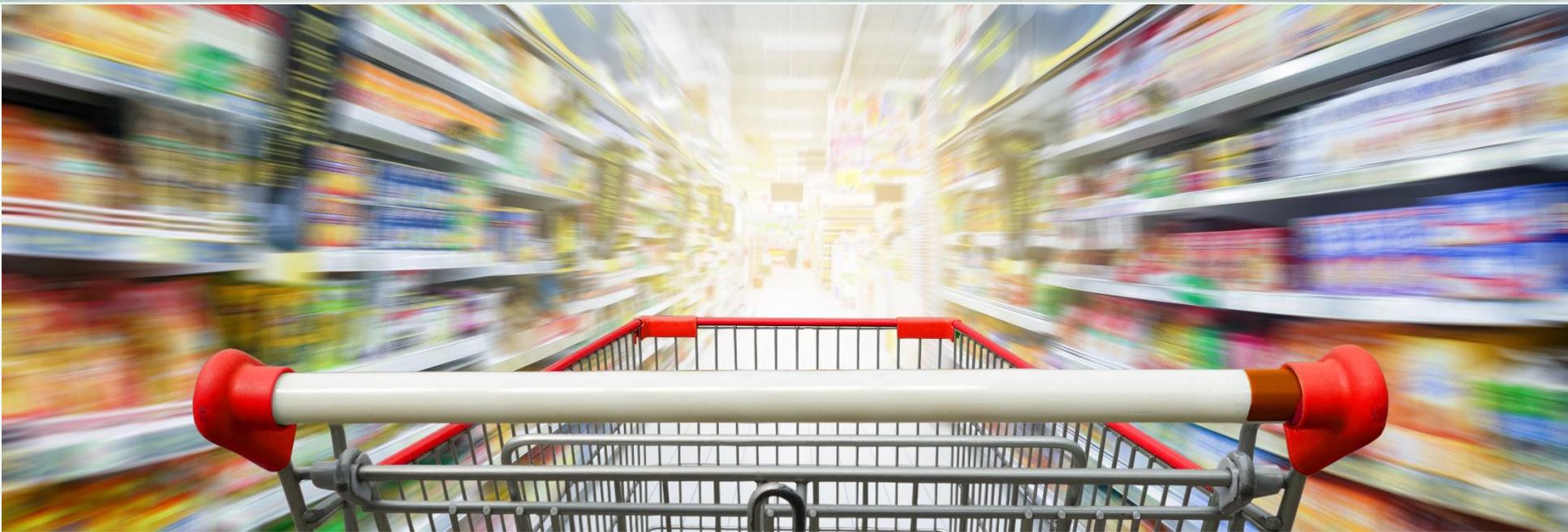
What Is A Guardianship?

- 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.

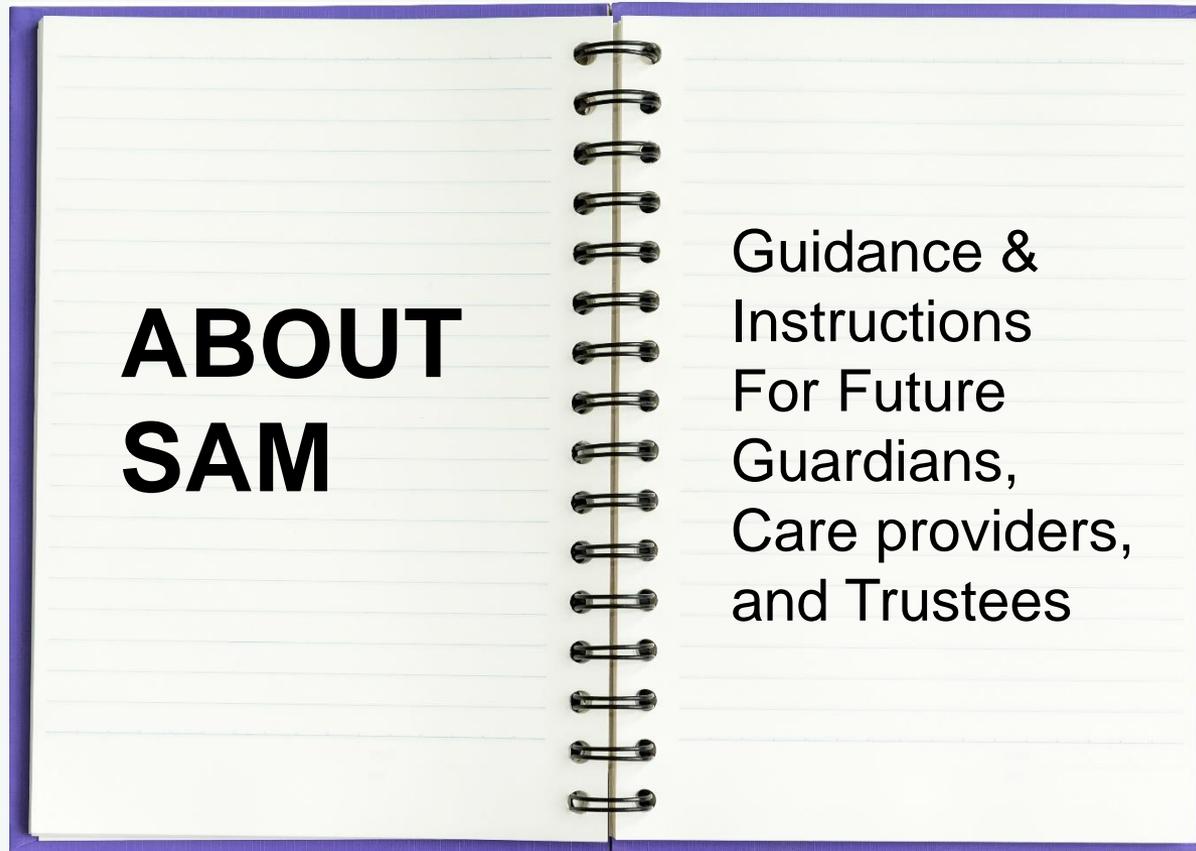


What Powers Will Guardians Have?

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.

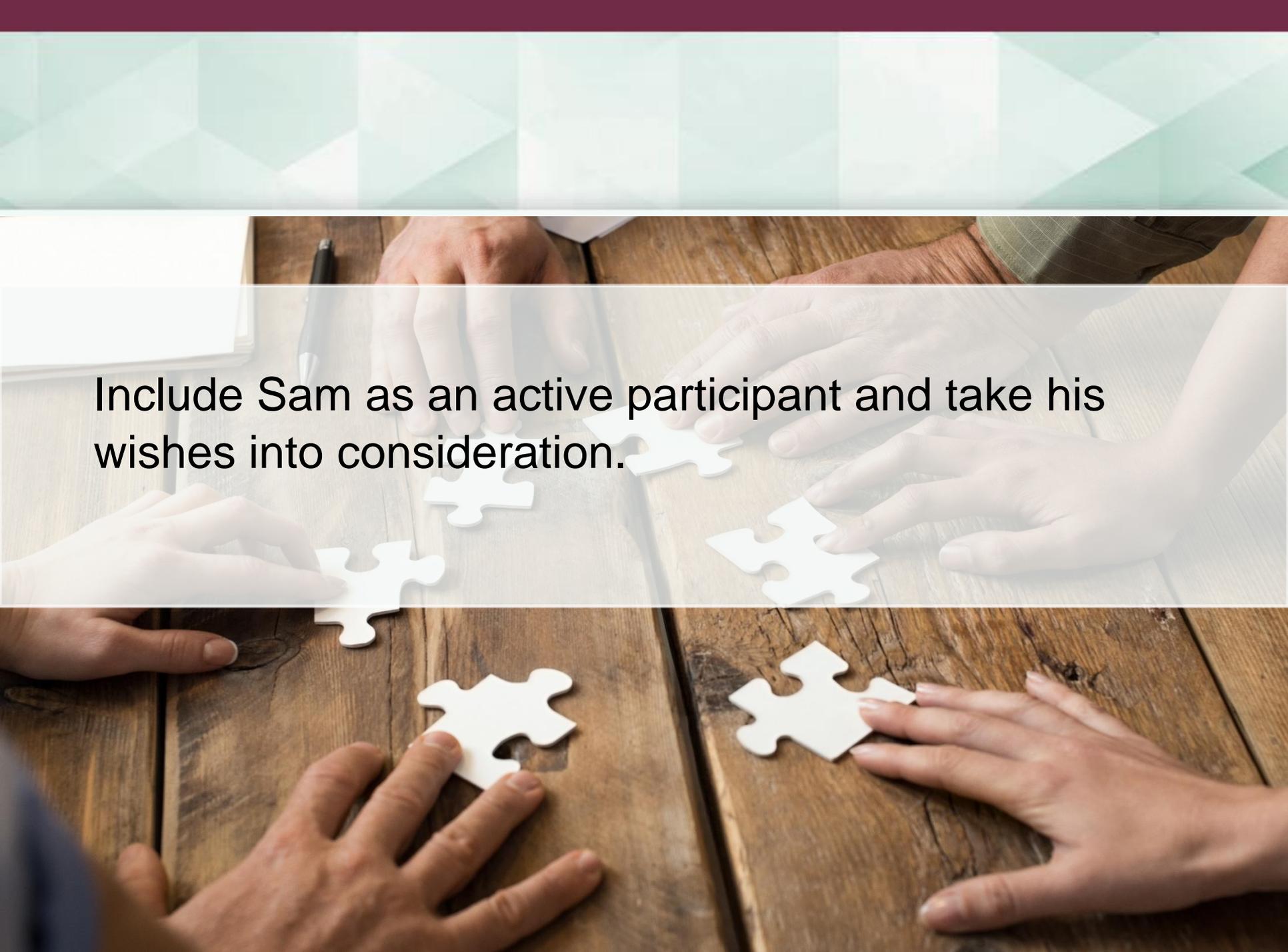
Provide Written Guidance for Future People in Sam's Life!!



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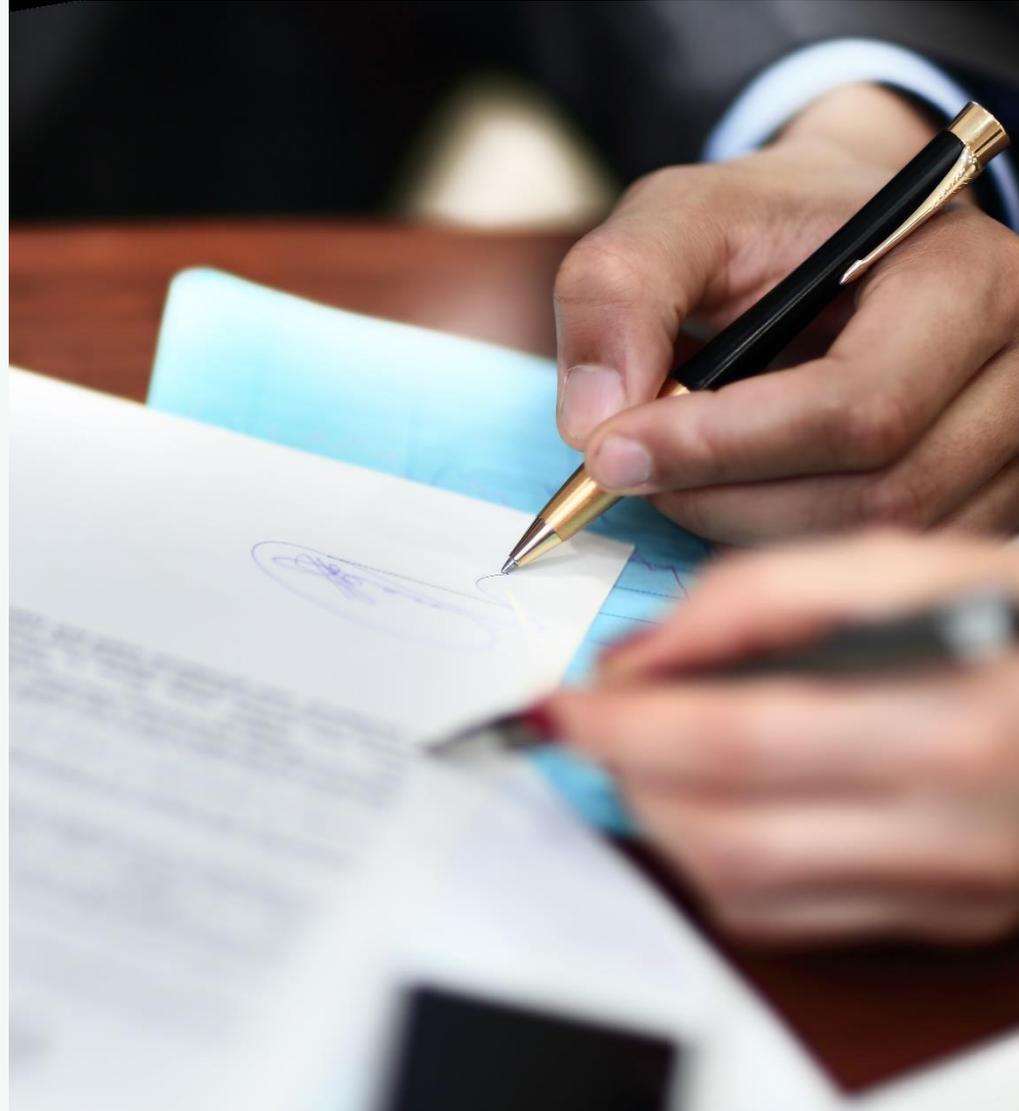
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A photograph showing several hands reaching towards white puzzle pieces scattered on a wooden table. The scene is overlaid with a semi-transparent white box containing text. The background features a decorative geometric pattern in shades of green and blue at the top.

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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