

# Guardianship

## What does guardianship mean?

All teens become adults and their own legal guardians on their 18th birthday. This includes teens with autism spectrum disorders (ASDs). By law, when a person turns 18, her parents' signatures are no longer valid, and the parents' right to make decisions for her is no longer allowed. The only way parents can continue making decisions for their child is to become their adult child's legal guardian. This requires legal action. It is best to start the process in a non-rushed manner well before the teen's 18th birthday. A *legal guardian* usually makes *all decisions* about the adult child's well-being. Some families may choose to divide decision-making duties between the guardian and a conservator. A *conservator* takes care of the individual's *financial affairs* only. When the adult with an ASD has the thinking skills needed to make personal decisions but not complex financial ones (especially those relating to public supports), she may need only a conservator.

## How do we know if our child needs a legal guardian?

If, at age 18 years, your young adult is not able to make responsible decisions, a formal evaluation should be done. This evaluation will determine if your child needs a legal guardian. Guardianship is not an easy issue, especially if your adult child has borderline thinking skills and can make some decisions on his own. Guardianship will result in the loss of your child's independence in many areas of his life. Therefore, it should be pursued only when you are sure that your child is unable to make good decisions and care for himself. You may wish to explore other options first that may protect your adult child without court involvement. Family members, social workers and agencies, consumer groups, lawyers, and health care professionals can offer advice and help in your search for financial and personal protection. If your child receives social security as a primary source of income, talk with the US Social Security Administration or an attorney for advice. Consumer organizations may also be helpful, such as MetLife ([www.metlife.com](http://www.metlife.com)), Special Needs Advocate for Parents ([www.snapinfo.org](http://www.snapinfo.org)), and Special Needs Alliance ([www.specialneedsalliance.com](http://www.specialneedsalliance.com)).

## How do we become our teen's legal guardians?

If the formal evaluation shows that your 18-year-old is unable to make responsible decisions, you will need to file a petition to request guardianship. In most states, the petition requests a court hearing on the case and follow-up reports from the guardian.

## Do we need a lawyer?

An attorney is not legally required. But you are wise to use a lawyer because there are many choices to be made in the process. Probate court officials can answer questions about the steps involved in appointing a guardian, but state rules do not allow court officials to be involved in making decisions or to give legal advice. Legal advice is often helpful, if not critical.

## What does the court decide?

If the court decides your adult child needs a guardian of "his or her person," it will rule that your child is *incapacitated*. This means that your adult child does not have enough understanding or capacity to make or communicate responsible decisions about herself and cannot meet her needs for medical care, nutrition, clothing, shelter, or safety.

## Who can be a legal guardian?

You, as parents, may ask to remain as your child's legal guardians. Other options for legal guardians may include an adult sibling, a relative, a family friend, or a professional. If the court finds your adult child to be in need of a guardian, it will not automatically appoint the person who filed the petition. Although you may be the legal guardians for your adult child and may have a will stating whom you wish to be appointed after your death, that preference may not necessarily be honored.

State law says that

1. Kinship is not a conclusive factor in deciding guardianship.
2. If the person in need of a guardian has "sufficient capacity to form an intelligent preference," he may nominate the person he wishes to serve as guardian. Unless the court finds that appointing the nominee would not be in the person's best interest, the nominee will be named to serve as guardian.

### What are the duties of a legal guardian?

A guardian “of person” has *all* of the powers or duties that follow:

- Have custody of the individual and establish her place of residence.
- Provide for the individual’s care, comfort, and maintenance needs. These include food, clothing, shelter, health care, and social and recreation activities. Also, when appropriate, provide for training, education, and rehabilitation.
- Take reasonable care of the individual’s clothing, furniture, vehicles, and other personal effects.
- Give consent for the individual to receive medical care, counsel, treatment, or service.
- Approve or withhold approval of any contract that the individual may make or wish to make.

A guardian does not assume a legal duty to pay for food, clothing, shelter, or any other needs out of her own funds. However, the guardian is encouraged to use public benefits or services to which the person in her care is entitled.

No guardian may give consent for psychosurgery, electroshock, sterilization, or experimental treatment of any kind unless the procedure is first approved by order of the court. The guardian shall not consent to any medical care for the individual that goes against the known conscientious, religious, or moral beliefs of the individual.

The Doctor’s Form Letter included in this handout is also provided as a Word document to allow for modification.

The information contained in this publication should not be used as a substitute for the medical care and advice of your pediatrician. There may be variations in treatment that your pediatrician may recommend based on individual facts and circumstances.

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# Doctor's Form Letter—Guardianship

Re: IN THE MATTER OF THE GUARDIANSHIP OF \_\_\_\_\_, AN INCAPACITATED PERSON

Dear Judge:

I am a physician currently licensed in the state of \_\_\_\_\_. I have been the doctor for \_\_\_\_\_ (“Proposed Ward”)

whose Social Security number is \_\_\_\_\_, whose birth date is \_\_\_\_\_,

and who resides at \_\_\_\_\_,

since \_\_\_\_\_, 20\_\_\_\_\_. I examined the Proposed Ward on \_\_\_\_\_, 20\_\_\_\_\_.

Based on that examination and my observation, it is my opinion that the Proposed Ward is incapacitated. The nature and degree of incapacity is described in my answers to the following questions:

1. What is the general nature and degree of the incapacity of the Proposed Ward?
2. What is the Proposed Ward's medical history as it relates to the incapacity?
3. What is the prognosis, including the estimated severity, of the incapacity?
4. How and in what manner does the Proposed Ward's physical or mental health affect ability to make or communicate responsible decisions?
5. Is the Proposed Ward taking any medications that affect ability to participate in court proceedings? If so, what medication is the Proposed Ward taking, and how is his or her ability to participate in court proceedings affected?
6. If the underlying diagnosis of the incapacity is that of senility, please describe the precise physical and mental condition underlying that diagnosis.
7. Is mental retardation the basis of the Proposed Ward's incapacity?
8. It is my opinion that the Proposed Ward is incapable of making decisions about the following tasks and responsibilities, as indicated by a mark in the appropriate column:

Capable    Incapable

- |                          |                          |   |
|--------------------------|--------------------------|---|
| <input type="checkbox"/> | <input type="checkbox"/> | Apply for psychological and psychiatric tests and evaluations.                      |
| <input type="checkbox"/> | <input type="checkbox"/> | Consent to medical and dental treatment and testing.                                |
| <input type="checkbox"/> | <input type="checkbox"/> | Consent to disclosure of psychological and medical records.                         |
| <input type="checkbox"/> | <input type="checkbox"/> | Enter into insurance contracts of every nature.                                     |
| <input type="checkbox"/> | <input type="checkbox"/> | Handle a bank account.  |
| <input type="checkbox"/> | <input type="checkbox"/> | Contract and incur obligations.   |
| <input type="checkbox"/> | <input type="checkbox"/> | Collect and file suit on debts, rentals, wages, and other claims due Proposed Ward. |
| <input type="checkbox"/> | <input type="checkbox"/> | Pay, compromise, and defend claims against himself or herself.                      |
| <input type="checkbox"/> | <input type="checkbox"/> | Apply for or consent to government services.  |
| <input type="checkbox"/> | <input type="checkbox"/> | Apply for and receive funds from government sources.                                |
| <input type="checkbox"/> | <input type="checkbox"/> | Enroll in public or private residential care facilities.                            |
| <input type="checkbox"/> | <input type="checkbox"/> | Make employment decisions.  |
| <input type="checkbox"/> | <input type="checkbox"/> | Make decisions related to military service.   |
| <input type="checkbox"/> | <input type="checkbox"/> | Vote.   |
| <input type="checkbox"/> | <input type="checkbox"/> | Operate a motor vehicle.  |
| <input type="checkbox"/> | <input type="checkbox"/> | Participate in the selection of residential placement.                              |
| <input type="checkbox"/> | <input type="checkbox"/> | Handle funds of \$50 or less.   |

THEREFORE, it is my opinion that the Proposed Ward is incapacitated as stated in this letter and that the Court should consider the appointment of a guardian. FURTHERMORE, (please check one of the following:)

- It is my opinion that the Proposed Ward is *partially incapacitated*.
- It is my opinion that the Proposed Ward is *totally without capacity*.

9. I believe that the Court should also be aware of the following additional information, if any, that concerns the Proposed Ward and that is not included above, but which may be of interest to the Court.

Sincerely,

Signature

Printed Name

Medical License Number

Address

Phone Number