

# Elder Abuse and Capacity

Judith Wahl  
Wahl Elder Law  
[wahlelderlaw@gmail.com](mailto:wahlelderlaw@gmail.com)  
416 209 3407

---

WAHL ELDER LAW 2021 WAHLELDERLAW@GMAIL.COM

1

1

## Disclaimer

The information provided at this session is legal information for an educational purpose. It is not legal advice. Should you need legal assistance on any particular matter, please seek advice from legal counsel.

WAHL ELDER LAW 2021 WAHLELDERLAW@GMAIL.COM

2

2

## Most Common Questions from Health and Social Service providers

I have a client / patient who is a victim of elder abuse.

How can I get them to accept help from me or others?

AND

If they are refusing help, do they lack capacity to make their own decisions? How do I determine that and then what can I do?

WAHL ELDER LAW 2021 WAHLELDERLAW@GMAIL.COM

3

3

## Overview

Decisional Capacity – what is it

How is decisional capacity determined?

If a person is capable of making their own decisions, how to help that person if you believe there are being victimized?

If a person is not capable and is a victim of some form of abuse, what can be done to help them?

WAHL ELDER LAW 2021 WAHLELDERLAW@GMAIL.COM

4

4

## The Right to Decide

### Fundamental principle in the law

- People have the right to make decisions for themselves if capable
- If not capable, their Substitute Decision Maker (SDM) makes the decisions for them

WAHL ELDER LAW 2021 WAHLELDERLAW@GMAIL.COM

5

5

## Right to Decide

- So what does this mean?
- What is “capacity” ?
- How is capacity “determined” and who does that and why?
- If a person is capable to make decisions, can anyone else make decisions for them? Under what circumstances?

WAHL ELDER LAW 2021 WAHLELDERLAW@GMAIL.COM

6

6

**Mental Capacity**

Mental Capacity in law is a socio-legal construct and its meaning varies over time and across jurisdictions

Capacity concepts have CHANGED over the years from global incapacity to issue specific capacity in Ontario

NEED to look at ONTARIO legislation

WAHL ELDER LAW 2021 WAHL ELDER LAW@GMAIL.COM

7

7

**Capacity to Make Property Decisions**

**SDA s. 6**

A person is incapable of managing property if the person is **not able to understand the information** that is relevant to making a decision in the management of his or her property, or is **not able to appreciate** the reasonably foreseeable consequences of a decision or lack of decision

WAHL ELDER LAW 2021 WAHL ELDER LAW@GMAIL.COM

8

8

## Definition of Incapacity to Make Personal Care Decisions

### SDA s. 45

a person is incapable of personal care if the person is **not able to understand information** that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or **is not able to appreciate** the reasonably foreseeable consequences of a decision or lack of decision.

WAHL ELDER LAW 2021 WAHLELDERLAW@GMAIL.COM

9

9

## Definition Of Capacity In Respect To Treatment, Admission To Care Facilities, And Personal Assistance Services

### HCCA s.4

**Able to understand** the information that is relevant to making a decision about the treatment, admission, or personal assistance service as the case may be and **able to appreciate** the reasonably foreseeable consequences of a decision or lack of decision.

WAHL ELDER LAW 2021 WAHLELDERLAW@GMAIL.COM

10

10

## Mental Capacity

Mental Capacity is issue specific – person can be capable for some decisions and not capable for others

Capacity can fluctuate – can be capable at some times and not at others for the same decision

Capacity may need to be reassessed at the time of a decision even if previously assessed as incapable or capable

WAHL ELDER LAW 2021 WAHLELDERLAW@GMAIL.COM

11

11

## Presumption of Capacity

§ There is a “presumption” of capacity to make any particular decision, unless there is evidence otherwise.

§ **Substitute Decisions Act s.2.**

- (1) A person who is **eighteen** years of age or more is presumed to be capable of entering into a contract.
- (2) A person who is **sixteen** years of age or more is presumed to be capable of giving or refusing consent in connection with his or her own personal care.
- (3) A person is entitled to rely upon the presumption of capacity with respect to another person **unless he or she has reasonable grounds to believe that the other person is incapable of entering into the contract or of giving or refusing consent, as the case may be.**

WAHL ELDER LAW 2021 WAHLELDERLAW@GMAIL.COM

12

12

Presumption  
of Capacity

**Health Care Consent Act s. 4 (2)(3)**

(2) A person is presumed to be capable with respect to treatment, admission to a care facility and personal assistance services.

**Exception**

(3) A person is entitled to rely on the presumption of capacity with respect to another person unless he or she has reasonable grounds to believe that the other person is incapable with respect to the treatment, the admission or the personal assistance service, as the case may be.

WAHL ELDER LAW 2021 WAHLELDERLAW@GMAIL.COM

13

What does  
Presumption  
of Capacity  
MEAN  
practically?

People of advanced age should be presumed to be capable unless there is evidence otherwise

- *What could be that Evidence otherwise??*

Seniors who live in long term care homes or in retirement homes or who are in a hospital should be presumed to be capable unless there is evidence otherwise

A senior may have named a relative to be his/her attorney in a POA for Personal care (POAPC) BUT because a POAPC does NOT come into effect until the grantor (the senior) is incapable for some type of personal care decision (decisions about health care, nutrition, safety, hygiene, shelter, clothing), the SENIOR continues to be his or her own decision maker despite having done this advance care planning

WAHL ELDER LAW 2021 WAHLELDERLAW@GMAIL.COM

14

What is  
“Mental  
Capacity” for  
Decision  
Making for  
any purpose

Mental capacity for DECISION MAKING is **NOT a diagnosis**

A person can be eccentric and still capable

A person may have physical disabilities/ communication disabilities and still be capable for decision making

HOWEVER a person may seem to be capable but have little “appreciation” (insight) and therefore could be incapable – Just because a person says “no” that doesn’t necessarily mean they are capable of saying “no”

WAHL ELDER LAW 2021 WAHLELDERLAW@GMAIL.COM

15

15

What is  
“Mental  
Capacity” for  
Decision  
Making for  
any purpose

**Capacity assessment is not a “risk assessment”** – a person can make a decision to live at risk if he or she is mentally capable and has the ability to understand and ability to appreciate that risk

Capacity assessment is an assessment of mental ability to understand and mental ability to appreciate and is **not an assessment of the functional ability** of a senior or an assessment of that senior to live safely at home, free from risk.

If the senior is mentally capable, assistance should be provided to help that person address risk rather than removing from him/her their authority to make decisions for themselves.

WAHL ELDER LAW 2021 WAHLELDERLAW@GMAIL.COM

16

16

## Ability to Appreciate

However , again, just because a person can articulate a refusal doesn't necessarily mean that they have insight to meet the standard of "ability to appreciate"

WAHL ELDER LAW 2021 WAHLELDERLAW@GMAIL.COM

17

17

## What is "Mental Capacity" for Decision Making for any purpose

Capacity assessment is **not an assessment of "Best Interests"** – capacity assessments should not be used as a tool to address social / family problems such as:

- Alcohol abuse (senior can be capable and an alcoholic)
- Depression (senior can be depressed and capable)
- As a means of moving a senior into a long term care home or assisted living (senior can be capable and not want to move to LTC home)
- As a means of "managing" family conflicts over money (senior giving money to a particular adult child or some other person instead of dividing it amongst all the adult children etc) – senior can be making a CAPABLE decision to favour one child
- As a means of managing conflict between adult children who are all seeking to "control" the senior (e.g. adult child blocking access by other family members to the senior) - senior if capable is entitled to decide who visits

WAHL ELDER LAW 2021 WAHLELDERLAW@GMAIL.COM

18

18

## What is “Mental Capacity” for Decision Making for any purpose

Capacity assessment is **not an assessment of “Best Interests”** – capacity assessments should not be used as a tool to address social / family problems such as:

Any form of elder abuse , be it a physical abuse or a financial abuse and so forth.

If a person is a victim of abuse it is important to support that person to recognize the abuse and help them put an end to it by suggesting options, helping them understand the choices, and take direction from that person.

Finding that person incapable when they are not just to manage the situation in their best interests is subjecting that person to more abuse.

WAHL ELDER LAW 2021 WAHLELDERLAW@GMAIL.COM

19

19

## What is “Mental Capacity” for Decision Making for any purpose

Mental Capacity/ Incapacity for decision making is not the score on the MMSE, MOCA, ACE or any other capacity test used for clinical purposes

In assessing capacity, must use definition of capacity in the legislation and do analysis of person’s decision making abilities based on that definition

WAHL ELDER LAW 2021 WAHLELDERLAW@GMAIL.COM

20

20

## Capacity Assessments

Everyone “assesses” mental capacity for some purpose if they work in health care or in any services or businesses

The Substitute Decisions Act (SDA) and the Health Care Consent Act (HCCA) are the two core pieces of Ontario legislation dealing with mental CAPACITY and decision making authority

But “requirements” for “assessments” also are part of common law ( ie Can’t have a valid contract unless both parties to the contract are mentally capable and are in agreement) and are in other legislation ( ie Privacy legislation)

Also part of professional obligations to get decisions from a capable person or their proper SDM

WAHL ELDER LAW 2021 WAHL ELDERLAW@GMAIL.COM

21

21

## Capacity Assessments

Assessments of decision making capacity may be “formal”, meaning that they are REQUIRED by legislation to trigger something or are needed before something else happens

What assessments are required by legislation?

These are important to understand in situations where abuse may be occurring.

WAHL ELDER LAW 2021 WAHL ELDERLAW@GMAIL.COM

22

22

## Examples of Capacity Assessments in legislation

**SDA s16** – By “Capacity Assessor” as defined in SDA Regs- may result in a Statutory Guardianship of Property -

*IMPORTANT to know in some cases of financial elder abuse*

**Mental Health Act s. and SDA s 15** -by Physician to determine capacity of an inpatient in a psychiatric facility to manage property . This may result in a Statutory Guardianship of Property or the person's Attorney named in a Power of Attorney for Property taking over their financial management temporarily until assessed again before discharge or long term if not

*IMPORTANT to know in some cases of financial elder abuse*

)

WAHL ELDER LAW 2021 WAHLELDERLAW@GMAIL.COM

23

23

## Examples of Capacity Assessments in legislation

### **Health Care Consent Act (HCCA) s.10**

By Health Practitioner offering Treatment to a patient to determine capacity of the patient to consent or refuse consent to treatment –If the patient is not capable for this decision, then the patient's proper SDM is required to make the decision

*Failure to get informed consent before treatment in a non emergency situation is abuse.*

**HCCA s** by “Evaluator” to determine capacity of a person to make a decision about admission to a long term care home  
(This is NOT a determination of capacity for shelter decisions ONLY LTC admission decisions)

*Failure of an evaluator to talk to the senior to determine whether or not they are capable to consent and to make their own decisions about admission is abuse*

WAHL ELDER LAW 2021 WAHLELDERLAW@GMAIL.COM

24

24

## Health Care Decision Making

Read literature carefully and with a critical eye

There is medical literature from credible sources that states that a capable patient may choose

- To make the decisions about treatment themselves or
- To ask another person to make the decisions for them – a family member , a person of their choosing , or their SDM ) or
- To have the health practitioner treating them to make the decisions for them

THE SECOND AND THIRD OPTIONS ARE INCORRECT IN LAW. Not all medical and research literature is correct as the law was ignored when the research was done or article written.

If a health practitioner does not get the decisions (informed consent or refusal) from the capable patient , that is a form of abuse.

A patient may choose to get help and rely upon family and friends and others when making their decisions , but the decisions must be that of the patient and not another party if the patient is capable to consent to treatment.

WAHL ELDER LAW 2021 WAHLELDERLAW@GMAIL.COM

25

25

## Other Capacity Assessments

Just because an assessment is not specifically required in the legislation does not mean that attention doesn't have to be paid to whether a person is capable of making a particular decision

Some "assessments" are just opinions and don't necessarily result in a person's decision making authority being removed even if opinion is that the person is not capable to make certain decisions.

In most cases unless a capacity assessment is required in the law for something to happen, the assessments of capacity are opinions

WAHL ELDER LAW 2021 WAHLELDERLAW@GMAIL.COM

26

26

## Other Capacity Assessments

The opinion of incapacity may result

- in a business person refusing to enter into a contract with the person
- in a bank staff person refusing to take direction from a person about their accounts;
- In a lawyer refusing to represent a person because the person is believed not to be mentally capable of giving instructions to the lawyer,

WAHL ELDER LAW 2021 WAHLELDERLAW@GMAIL.COM

27

27

## Capacity Assessments

Assessment / evaluation of capacity refers to a “legal” assessment not a clinical assessment

Clinical assessments underlie diagnosis, treatment recommendations and identify or mobilize social supports

**Capacity assessments for decision making (Legal assessments) remove from the person the right to make autonomous decisions in specified areas – assessment is only for purpose of WHO decides for a particular decision or purpose**

WAHL ELDER LAW 2021 WAHLELDERLAW@GMAIL.COM

28

28

### Things to remember when thinking about how to do a capacity assessment

An assessment as to whether a person is capable to make a particular decision is an analysis of the person's

- Ability to Understand the information relevant to making the decision
- Ability to appreciate the consequences of making the decision or of not making the decision

So for the particular decision what would the person need to be able to understand and need to be able to appreciate in making that decision.

An example of this is detailed in the Substitute Decisions Act in a section that describes what a person needs to be able to understand and appreciate to make a power of attorney for property . See section

WAHL ELDER LAW 2021 WAHL ELDER LAW@GMAIL.COM

29

29

Excerpt - Re  
Koch 33  
O.R. (3d) 485  
[1997] O.J.  
No. 1487

This was a case decided just two years after the Substitute Decisions Act and a year after the Health Care Consent Act came into force.

It is still a relevant case to guide how a person should do a capacity assessment.

Some facts of the case – a woman was assessed by a capacity assessor (Talosi) in respect to her ability to manage finances and by an evaluator (Higgins) as to her ability to make decisions about admission to a long term care home.

Her husband was seeking to get a divorce from this woman, his wife. She was found incapable to manage her own property and incapable to make the decision about admission to a long term care home. She appealed these determinations of incapacity.

WAHL ELDER LAW 2021 WAHL ELDER LAW@GMAIL.COM

30

30

Excerpt - Re  
Koch 33  
O.R. (3d)  
485 [1997]  
O.J. No.  
1487

The Justice said :

- “In my view, it was **not sufficient** for Talosi and Higgins **merely to record information provided by the appellant and then form an opinion.**”
- “In some instances the appellant **should have been PROBED to determine the thought process by which she arrived at an answer or statement.** Until her thought process is known, it is neither fair nor reasonable to impugn the appellant's mental capacity.”

WAHL ELDER LAW 2021 WAHL ELDER LAW@GMAIL.COM

31

31

Excerpt - Re  
Koch 33  
O.R. (3d)  
485 [1997]  
O.J. No.  
1487

- “By not exploring the process by which the appellant arrived at her decisions, answers and statements, Talosi and Higgins have assumed, quite unfairly, the absence of logic.

In doing so, they greatly impaired their ability to assess and evaluate the appellant's cognitive abilities. ““In some instances, **verification** should have been sought.”

- “For example, regarding the allegations made by the appellant against her husband (which Talosi seems to have dismissed as delusional) Talosi should have made some effort to verify their accuracy

WAHL ELDER LAW 2021 WAHL ELDER LAW@GMAIL.COM

32

32

Excerpt - Re Koch 33 O.R. (3d) 485 [1997] O.J. No. 1487

“It is immaterial whether the appellant's words, deeds and choices appear reasonable to the assessor/evaluator.”

**“Reasonableness in the eyes of the assessor/evaluator (or the Board) is not the test.”**

“The assessor/evaluator (and the Board) are not to inject their personal values, judgments and priorities into the process.”

WAHL ELDER LAW 2021 WAHLELDERLAW@GMAIL.COM 33

33

Excerpt - Re Koch 33 O.R. (3d) 485 [1997] O.J. No. 1487

“Talosi and Higgins have confused their view of the best interests of the appellant with the state of the appellant's cognitive capacity. The former, no matter how well-intentioned, is irrelevant.”

**“The test, under both statutes, for incapacity is an objective one. It is mental capacity and not wisdom that is the subject of the SDA and the HCCA.”**

“The right knowingly to be foolish is not unimportant; the right to voluntarily assume risks is to be respected. The State has no business meddling with either. The dignity of the individual is at stake.”

WAHL ELDER LAW 2021 WAHLELDERLAW@GMAIL.COM 34

34

## Capable person that others think is a victim of abuse

❖ Is the person capable or not to make the particular decisions that need to be made to address the abuse?

❖ Does the person know that they are being abused and how they are being abused?

❖ Have you told them why you are concerned and why you think the person needs help

❖ Does the person have all the information they need to make an informed decision as to what to do?

(resources, who to turn to for help, temporary and long-term options, how to keep safe until the abuse is addressed, where to get money to support themselves if they need to move or leave where they live short term)

WAHL ELDER LAW 2021 WAHL ELDERLAW@GMAIL.COM

35

35

## Why people refuse help in cases of abuse

If they are living with the person that is abusing them, the person may not know

❖ how to get the abuser out of the home they live in and that the senior owns or

❖ know how to get out of the house themselves to another safe place, short term or long term.

If that abuser was providing them with care and assistance in order to stay in their home, the person may not want to move to a retirement home or long term care home as an alternative place to get that care.

WAHL ELDER LAW 2021 WAHL ELDERLAW@GMAIL.COM

36

36

### Why people refuse help in cases of abuse

The person may not TRUST the person speaking to them about the abuse and about the need for help.

Most people assisting an abused person are only in that persons life for a short time and not the long haul in case things go badly for them when trying to address the abuse.

The person may fear losing their relationship with family members even if the family are causing the abuse

The person cant see an alternative to the situation they are in because of .....

WAHL ELDER LAW 2021 WAHL ELDERLAW@GMAIL.COM

37

37

### Why people refuse help in cases of abuse

The person may want help to address the abuse but not the type of help that is being suggested

To address the abuse may need planning and going through steps and the person feels overwhelmed

The person fears retribution for speaking up about the abuse and for wanting to get help

WAHL ELDER LAW 2021 WAHL ELDERLAW@GMAIL.COM

38

38

## Why people refuse help in cases of abuse

The person seeking to help may be setting up barriers unknowingly that prevents the person from agreeing to the help offered.

The person may need time to consider the options and may be willing to take help but at their own pace, a pace that is different than the person offering the help.

The person offering the help may have done things that cause the person needing help to distrust them ie. taking direction from an abusing caregiver instead of the victim or disclosing information to the abuser that the victim did not want to be disclosed.

WAHL ELDER LAW 2021 WAHL ELDERLAW@GMAIL.COM

39

39

## When action needs to be taken despite the capable person refusal for the help

- ▶ In Ontario , there is mandatory reporting in respect to some forms of abuse if the person that is abused lives in a long-term care home or lives in a retirement home. This reporting is required even if the person is now in a hospital but does live in a LTC home or a retirement home,
- ▶ Mandatory reporting of abuse is a requirement, in particular legislation, to report any incident of abuse (as defined in that legislation) that you believe **has occurred or may occur** to an individual.
- ▶ That report is made to a particular third party (person, agency, organization) as specified in that legislation, to investigate the allegations/ suspicions of abuse

WAHL ELDER LAW 2021 WAHL ELDERLAW@GMAIL.COM

40

40

## Mandatory Reporting of abuse if the person lives in a long term care home

Long Term Care Homes Act s. 24

**24. (1)** A person who has reasonable grounds to suspect that any of the following has occurred or may occur shall immediately report the suspicion and the information upon which it is based to the Director (Ministry of Long term Care ):

1. **Improper or incompetent treatment or care** of a resident that resulted in harm or a risk of harm to the resident.
2. **Abuse of a resident by anyone or neglect of a resident by the licensee or staff** that resulted in harm or a risk of harm to the resident.
3. **Unlawful conduct that resulted in harm or a risk of harm to a resident.**
4. **Misuse or misappropriation of a resident's money.**
5. Misuse or misappropriation of funding provided to a licensee under this Act or the *Local Health System Integration Act, 2006*.

WAHL ELDER LAW 2021 WAHL ELDERLAW@GMAIL.COM

41

41

## Mandatory Reporting of abuse if the person lives in a retirement home

Retirement Homes Act s.75

**RHA 75. (1)** A person who has reasonable grounds to suspect that any of the following has occurred or may occur shall immediately report the suspicion and the information upon which it is based to the Registrar:

1. **Improper or incompetent treatment or care of a resident** that resulted in harm or a risk of harm to the resident.
2. **Abuse of a resident by anyone or neglect of a resident by the licensee or the staff of the retirement home** of the resident if it results in harm or a risk of harm to the resident.
3. **Unlawful conduct** that resulted in harm or a risk of harm to a resident.
4. **Misuse or misappropriation of a resident's money.**

WAHL ELDER LAW 2021 WAHL ELDERLAW@GMAIL.COM

42

42

When action  
need to be  
taken  
despite the  
capable  
person  
refusal for  
the help

If a mandatory report must be made, it is important to tell the capable person that this must be done and the reasons for it so the person doesn't lose trust.

Other situation when a person may have to go against the wishes of the capable person --- if the person who is abused is at risk of serious physical harm or death and as such the abuse may be a criminal offense,

There is no requirement for reporting of a crime but reporting may be done on a voluntary basis.

WAHL ELDER LAW 2021 WAHLELDERLAW@GMAIL.COM

43

43

What if the  
person is not  
capable to  
make the  
decisions  
that may be  
needed to be  
made?

Who is the SDM for the  
person?

Do you know who is the  
RIGHT SDM?

What if the SDM is the  
abuser ?

WAHL ELDER LAW 2021 WAHLELDERLAW@GMAIL.COM

44

44

## Who are the SDMs?

Think of the type of abuse that is occurring or has occurred or may occur as that will determine who is the SDM for that person for the decisions that may need to be made.

For Property decisions, SDMs are

- Attorneys in Power of attorneys for Property
- Statutory Guardians for Property ( may be a family member or may be the Public Guardian and Trustee)
- Court ordered Guardians

For Personal care decisions other than health care (where the person lives, safety planning, food, clothing, hygiene )

- Attorneys in Powers of attorney for Personal Care
- Court Ordered Guardians

WAHL ELDER LAW 2021 WAHL ELDER LAW@GMAIL.COM

45

45

## Who are the SDMs for Health Care ( decisions about treatment , admission to a care home, personal assistance services in a care home)

1. Guardian of person with authority for treatment.
2. Attorney in attorney for personal care with authority for treatment.
3. Representative appointed by an application to the Consent and Capacity Board.
4. Spouse or partner.
5. A child or parent of the incapable person, or a children's aid society
6. Parent with right of access only.
7. Brother or sister.
8. Any other relative
9. OPGT

WAHL ELDER LAW 2021 WAHL ELDER LAW@GMAIL.COM

46

46

## What if the SDM is the abuser ?

What if the SDM is the abuser?

With financial abuse, are there other family of the person who would be willing to become the Statutory Guardian (done by having the person assessed by a capacity assessor and if found incapable then PGT steps in but person can apply to replace the PGT)

Or are there family or friends willing to apply to court to become the person's Guardian of Property?

If abuse of the person in respect to personal care issues. Is there any family or friends willing to apply to court to become the person Guardian of the Person?

WAHL ELDER LAW 2021 WAHL ELDERLAW@GMAIL.COM

47

47

## What if the SDM for Health Care is the abuser and health decisions need to be made for the Incapable Person?

If the SDM is not the Guardian of the person but is a family member lower on the hierarchy list, is there any other family or friends willing to apply to court to become the persons Guardian of the Person?

If the SDM is not the Guardian and not the Representative by appointment of the Consent and Capacity Board, is there anyone willing to apply to the Consent and Capacity Board to be named the Representative for the Person?

The SDM may also be asked to resign as the SDM for health decision making and the next highest ranking person in the hierarchy may step in to be the SDM for health care of the incapable person.

WAHL ELDER LAW 2021 WAHL ELDERLAW@GMAIL.COM

48

48

What if the person is incapable and a victim of abuse and you can't find or don't know who the SDMs for that person might be ?

The Substitute Decisions Act provides for voluntary reporting to the OPGT that a person is mentally incapable and is experiencing or is at risk of serious harm, either to their property or their person.

The OPGT then may investigate and may take steps to become that person's guardian or take other steps to assist the person

WAHL ELDER LAW 2021 WAHL ELDER LAW@GMAIL.COM

49

49

Substitute  
Decisions Act  
s. 27  
Person incapable  
of managing  
property and at  
serious risk of  
harm

**27. (1)** Loss of a significant part of a person's property, or a person's failure to provide necessities of life for himself or herself or for dependants, are serious adverse effects for the purposes of this section.

#### Duty to investigate

**(2)** The Public Guardian and Trustee shall investigate any allegation that a person is incapable of managing property and that serious adverse effects are occurring or may occur as a result.

#### Extent of investigation

**(3)** In conducting an investigation under subsection (2), the Public Guardian and Trustee is not required to take any steps that, in his or her opinion, are unnecessary for the purpose of determining whether an application to the court is required under subsection (3.1).

#### Application for temporary guardianship

**(3.1)** If, as a result of the investigation, the Public Guardian and Trustee has reasonable grounds to believe that a person is incapable of managing property and that the prompt appointment of a temporary guardian of property is required to prevent serious adverse effects, the Public Guardian and Trustee shall apply to the court for an order appointing him or her as temporary guardian of property

WAHL ELDER LAW 2021 WAHL ELDER LAW@GMAIL.COM

50

50

## Substitute Decisions Act s. 62

Person incapable  
of making  
personal care  
decisions and at  
serious risk of  
harm

**62. (1)** Serious illness or injury, or deprivation of liberty or personal security, are serious adverse effects for the purposes of this section.

### Duty to investigate

**(2)** The Public Guardian and Trustee shall investigate any allegation that a person is incapable of personal care and that serious adverse effects are occurring or may occur as a result.

### Extent of investigation

**(3)** In conducting an investigation under subsection (2), the Public Guardian and Trustee is not required to take any steps that, in his or her opinion, are unnecessary for the purpose of determining whether an application to the court is required under subsection (3.1).

### Application for temporary guardianship

**(3.1)** If, as a result of the investigation, the Public Guardian and Trustee has reasonable grounds to believe that a person is incapable of personal care and that the prompt appointment of a temporary guardian of the person is required to prevent serious adverse effects, the Public Guardian and Trustee shall apply to the court for an order appointing him or her as the incapable person's temporary guardian of the person.

WAHL ELDER LAW 2021 WAHLELDERLAW@GMAIL.COM

51

51

Thank  
You!

Judith Wahl

Barrister and Solicitor

Wahl Elder Law

60 Southport Street, Unit 906,

Toronto, Ontario

M6S 3N4

416 209 2407

wahlelderlaw@gmail.com

WAHL ELDER LAW 2021 WAHLELDERLAW@GMAIL.COM

52

52