

CRIMINAL MODEL TRIBAL ELDER PROTECTION CODE

001.0 TITLE

This code shall be known and cited as the "[Name of enacting Tribe or Nation] Elder Protection Code."

002.0 AUTHORITY

[Cite all relevant sections of Tribe or Nation's constitution, charter or governing documents that grant the Tribe or Nation's legislature or lawmaking body the authority to enact laws prohibiting and regulating conduct, and imposing penalties upon all persons within the jurisdiction of the Tribe or Nation]

003.0 POLICY

It is the policy of the [Tribe or Nation] to continue the traditional respect the members of the [Tribe or Nation] have had for elders. Elders are a valuable resource to the [Tribe or Nation] because they are repositories and custodians of tribal history, language, culture and tradition; and, they are the best hope of the [Tribe or Nation] to pass on the tribal history, language, culture, and tradition to children of the [Tribe or Nation]. Thus, the interests of the [Tribe or Nation], now and in the future, are advanced when its Elders can be confident they are protected from abuse, neglect, and exploitation and are free to fully participate in the activities and proceedings of the [Tribe or Nation].

004.0 PURPOSE

The purpose of this code is to establish a tribal criminal law that protects elders within the jurisdiction of the [Tribe or Nation] from abuse, exploitation and neglect as defined in this code. The code shall be liberally interpreted in order to achieve its purpose and comport with the customs and traditions of the [Tribe or Nation].

005.0 DEFINITIONS

- A. A person is guilty of elder abuse if they knowingly and willfully commit the following:
- 1) PHYSICAL ABUSE is any intentional or negligent infliction of bodily injury, unreasonable confinement, intimidation, or cruel punishment of an elder with resulting physical harm or pain or mental anguish by any person;
 - 2) SEXUAL ABUSE is any physical contact which is not consented to by the elder intended for sexual gratification of any person making such contact or to abuse, humiliate, or degrade the elder;
 - 3) EMOTIONAL ABUSE is the intentional infliction of threats, humiliation, intimidation or any other demeaning behavior towards an elder;
 - 4) EXPLOITATION is the unauthorized or improper use of funds, property, or other resources of an elder; or the unauthorized or improper use of an elder by a caregiver or by any other

person for personal gain or profit; or the failure to use the funds, property, or other resources of an elder to the elder's benefit or according to the elder's desires.

- 5) NEGLECT is the wanton, reckless, and grossly negligent
- a) failure of a caregiver to provide for the basic needs of an elder by not supplying resources, services, or supervision necessary to maintain an elder's physical and mental health and includes the inability of an elder to supply such basic needs for himself;
 - b) interference with the delivery of necessary services and resources;
 - c) failure to report abuse, exploitation or neglect of an elder by any person;
 - d) failure to provide services or resources essential to the elder's practice of his customs, traditions or religion; or
 - e) abandonment of an elder.

B. CAREGIVER is:

- 1) a person who is required by tribal law or tribal custom (or state or federal law) to provide services or resources to an elder;
- 2) a person who has volunteered to provide care or resources to an elder;
- 3) an institution or agency which voluntarily provides or is required by tribal law or custom (state or federal law, or tribal-state agreement) to provide services or resources to an elder; or,
- 4) an employee of any institution or agency specified within this code.

C. CONSENT is agreement given without intimidation or coercion by an elder with the capacity to make an agreement.

D. ELDER is a person subject to the jurisdiction of the [Tribe or Nation] who is at least [____] years of age.

E. EMERGENCY is a situation in which an elder is immediately at risk of death or injury and is unable to consent to services which would remove the risk.

F. FAMILY is [determined by Tribe or Nation's legal definition and custom].

G. GOOD FAITH is a reasonable person's honest belief or purpose and the lack of intent to defraud.

H. INCAPACITY is a legal determination made by tribal/state court regarding the current inability (functional inability) of a person to sufficiently understand, make, and communicate responsible

decisions about themselves as a result of mental illness, mental deficiency, physical illness or disability, or chronic use of drugs or liquor, and to understand the consequences of any such decision. Incapacity may vary in degree and duration and shall not be determined solely on the basis on age.

- I. LEAST RESTRICTIVE ALTERNATIVE is an approach which allows an elder independence and freedom from intrusion consistent with the elder's needs by requiring that the least dramatic method of intervention be used when intervention is necessary to protect the elder from harm. Caregivers, tribal/state courts and any other person/entity providing services to elders will be controlled by this standard.
- J. POWER OF ATTORNEY is a written document signed by an elder and notarized providing another person with the legal authority to conduct business on behalf of the elder in the name of the elder. There are two main types of power of attorney.
 - 1) A General Power of Attorney covers all the elder's business activities, including signing papers, title documents, contracts, bank accounts, etc.
 - 2) A Special Power of Attorney grants powers limited to specific areas as set forth in the document.
- K. PROTECTIVE PLACEMENT is placement of an elder in a hospital, nursing home, residential care facility or the transfer of an elder from one such institution to another by tribal/state court or with the elder's consent or appropriate legal authority.
- L. PROTECTIVE SERVICES are services provided to an elder with the elder's consent or with appropriate legal authority and include, but are not limited to: social case work, psychiatric and health evaluation, home care, day care, legal assistance, social services, health care, case management, guardianship and other services consistent with this code. Protective services include protective supervision, but they do not include protective placement.
- M. RETALIATION is threatening of a reporter mandatory or otherwise of elder abuse or the reporter's family in any way; causing bodily harm to the reporter or the reporter's family; causing the reporter or any of the reporter's family to be terminated, suspended from employment, or reprimanded by an employer; or damaging the reporter's or the reporter's family's real or personal property in any way.

006.0 MANDATORY ARREST AUTHORITY

An officer shall arrest and take into custody person(s) whom the officer has probable cause to believe abused/neglected a person defined as an "elder." No warrant is required to make an arrest. This mandatory arrest provision means that the victimized not sign a complaint for an arrest to occur. Further, an officer may arrest under probable cause even though it may be against the express wishes of the victim.

Mandatory arrest is required when:

- 1) The victim is injured;

- 2) The use of threatened use of a weapon is involved;
- 3) The violation of a valid restraining order; or
- 4) Imminent danger through abuse or neglect of a victim

Any person arrested under this provision shall be held without bail, in custody for a period of [forty-eight (48) hours] as a mandatory “cooling off” period in the best interest of the [Tribe or Nation]

007.0 DUTY TO REPORT ABUSE OR NEGLECT OF AN ELDER

Any person who has reasonable cause to suspect that an elder has been abused, neglected, self-neglected, or exploited shall immediately report the abuse, neglect, or self-neglect, or exploitation to the [tribal human services agency, other designated tribal entity] unless they have a privileged relationship as attorney-client, doctor-patient or priest-penitent.

The following individuals have a special duty in reporting abuse, neglect, self-neglect or exploitation:

- A. the elder's family or caregiver as defined within this code;
- B. any employee or elected official of the [Tribe or Nation];
- C. any medical doctor, physical therapist, coroner, or medical examiner;
- D. any nurse, physician's assistant; or health aide;
- E. any dentist or dental hygienist;
- F. an elder and adult program services case/social worker, or elder services provider;
- G. any mental health practitioner or counselor;
- H. any law enforcement officer;
- I. any person with a fiduciary duty to the elder, including but not limited to a guardian or employee of elder/nursing home;
- J. any tribal court employee;
- K. any person subject to federal reporting requirements (see Title 18 United States Code Section 1169).

007.1 CONFIDENTIALITY

The identity of a person who in good faith reports suspected elder abuse, neglect, self-neglect or exploitation is confidential and shall not be released unless the reporter consents or the tribal/state court orders the release because it finds, after notice to the reporter and an opportunity to be heard; that the need to protect the elder outweighs the reporter's interest in confidentiality.

007.2 IMMUNITY FOR REPORTING

A person who in good faith reports suspected abuse or neglect for an elder is immune from any civil or criminal suit based on that person's report.

007.3 FAILURE TO REPORT

Any person who is required by this code to report suspected elder abuse and fails to do so is subject to a civil penalty of up to [\$5,000] and a term of imprisonment not to exceed [one year], or both.

007.4 BAD FAITH REPORT; CIVIL PENALTY; DAMAGES; CRIMINAL LIABILITY

Any person who makes a report of suspected elder abuse knowing it to be false maybe subject to a fine not to exceed [\$5,000] and a term of imprisonment not to exceed [one year], or both.

007.5 REPORTS

Reports of suspected elder abuse as defined in this code shall be made to [tribal law enforcement]. The [officer] taking an oral report shall immediately complete a written incident report. Unless anonymously made, the incident report should contain the name of the reporter and, if possible, the reporter should sign the report. Anonymous reports shall be investigated as required by this code.

007.6 PRIVILEGED COMMUNICATION

No evidentiary privilege, except for the attorney-client, doctor-patient or priest-penitent privilege as detailed in Section 007.0, may be raised as a justifiable defense or reason for failing to report suspected elder abuse or neglect or for testifying as required by this code.

008.0 EMERGENCY PROTECTION ORDER

- A. The [tribal court] shall issue an emergency protection order authorizing protective services or protective placement on an emergency basis upon petition supported by clear and convincing evidence that:
- 1) the elder is at risk of immediate (physical) harm;
 - 2) the elder is incapacitated and cannot consent to protective services;
 - 3) the person possessing power of attorney for the elder is unavailable, or there is no one authorized by law or court order to give consent on an emergency basis; and
 - 4) an emergency exists.

- B. The emergency protection order shall:
- 1) set out the specific emergency services to be provided to the elder to remove the conditions creating the emergency;
 - 2) provide only those services which will remove the emergency;
 - 3) allow protective placement only if the evidence shows that it is necessary;
 - 4) designate the [agency] required to implement the order;
 - 5) be issued for a maximum of [hours/days] and may be renewed only once for a maximum of [hours/days] provided the evidence shows that the emergency is continuing.
- C. The [tribal court] may authorize forcible entry by law enforcement to enforce the emergency protection order after it has been shown that attempts to gain voluntary access to the elder have failed.
- D. The petition for an emergency protection order shall contain the [name/address/location], and interest in the petitioner; the [name/address/location], and condition of the elder; the nature of the emergency; the nature of the elder's incapacity; the proposed protective services, and where applicable, protective placement; the attempts, if any to secure the elder's consent to services; and, any other facts the petitioner believes will assist the [tribal court].
- E. The emergency protection order shall be issued only after notice. The notice accompanied by a copy of the petition shall be given to the elder, the elder's family and caregiver at least [___] hours before a hearing on the petition is scheduled and the [tribal court] has had the opportunity to hear all parties and the evidence. The [tribal court] may waive the waiting period if the emergency is such that the elder will suffer immediate and irreparable harm or reasonable attempts have been made to notify the parties.
- F. The [tribal court] shall hold a hearing on a petition to provide protective services or placement to an elder within [___] hours after an emergency protection order is issued.
- G. The [tribal court] can set aside an emergency protection order upon a petition of any party showing good cause.
- H. If there is good cause to believe that an emergency exists and that an elder is at risk of immediate and irreparable (physical) harm and, based on personal observation, an [investigator/ law enforcement officer] believes that the elder will be irreparably harmed during the time an emergency protection order is secured, the [investigator/ law enforcement officer] shall immediately protect the elder, including, where necessary, transporting the elder for medical treatment or to an appropriate facility. Immediately after the elder is protected, a petition for an emergency protection order shall be filed and the procedures set out in this section followed.

- I. Any person who acts in good faith pursuant to this section is immune from any civil or criminal suit based on that person's actions.

009.0 WRITTEN REPORTS

In all cases of elder abuse as defined in this code the officer involved shall make a written report with the tribal court prosecutor, setting forth the reason(s) for his/her decision within [ten (10) days] of the incident.

010.0 REPORTING STATISTICS

In all cases of elder abuse as defined in this code the officer shall make a written report which will be reviewed by the tribal prosecutor and housed at the tribal court. A quarterly report shall be made by the tribal court and shared with law enforcement, elected tribal officials, and other appropriate tribal employees that includes the number of elder abuse reports, investigations, and arrests. These reports will exclude all identifiable information of individuals involved.