

Chapter XV

TRIBAL ELDER AND ADULT PROTECTION CODE

1500. Be it enacted by the Bay Mills Indian Community assembled:
1501. TITLE - This Code shall be known and cited as the Bay Mills Indian Community “Tribal Elder and Adult Protection Code.”
1502. POLICY - It is the policy of the Bay Mills Indian Community to hold our elders in high esteem. The elders of our community are the custodians of Tribal history, culture and traditions which are vital to Native Culture. It is also the policy of the Bay Mills Indian Community to protect those vulnerable adults who exceed the age of 18 and cannot protect themselves because of mental or physical impairments. This Code shall be liberally construed to affect its policies and purposes.
1503. PURPOSE - The purpose of this Code is to protect the elders and vulnerable adults within the jurisdiction of the Bay Mills Indian Community from abuse or neglect as defined by this Code. The Code shall be construed to achieve this purpose. This Code provides for:
1. Reporting abuse or neglect to the proper agency; and
 2. Receiving and investigating reports of abuse or neglect; and
 3. Providing protective services for elders or vulnerable adults.
1504. CIVIL NATURE OF CODE - This Code is civil and does not affect any applicable provisions of Bay Mills Indian

Community's Criminal Code unless specifically modified by this Code.

1505. **DEFINITIONS** - The following definitions shall apply.

A. Abuse is:

1. An intentional or negligent infliction of bodily injury, unreasonable confinement, intimidation, emotional abuse or cruel punishment of an elder or vulnerable person which results in physical pain or mental anguish. Abuse may be inflicted by relatives, acquaintances, caretakers or anyone else who comes into contact with an elder or vulnerable adult; and
2. Sexual abuse, which is physical contact without consent of an elder or vulnerable adult with the intent to derive sexual gratification by the person making contact. Consent may not be obtained by threat, coercion, intimidation or fraud; and
3. Exploitation, which is the improper or unauthorized use of an elder or vulnerable adult's funds, property or other resources. A failure to use an elder or vulnerable adult's funds, property or resources as the elder or adult desires or for their benefit shall be deemed exploitation.

B. Neglect is: A failure to provide for the basic needs of an elder or vulnerable adult by not supplying resources, care or supervision required to provide for these basic needs. Neglect also includes:

1. Interfering with delivery of necessary resources and services; or
2. Failing to report abuse of an elder or vulnerable person; or
3. Failing to provide an elder with services or resources to aid in the elder's practice of religion, tradition or custom.

- C. Elder is: A citizen of the Bay Mills Indian Community who is 55 years of age or older.
- D. Vulnerable Adult is: Those adults who exceed the age of 18 and are unable to protect themselves from abuse, neglect or exploitation. This includes the inability of the person to make responsible decisions for himself or herself because of mental illness or deficiency, physical disability or illness, age, or chronic use of alcohol or drugs.
- E. Caretaker is:
1. A person who is required by Tribal or State law or Tribal custom to provide services or resources to an elder or vulnerable adult; or
 2. A person who volunteers to provide services or resources to an elder or vulnerable adult; or
 3. An institution or agency and its employees who are required by Tribal, State or Federal law, Tribal custom or through any other agreement to provide services or resources to an elder or vulnerable adult.
- F. Emergency is: A situation in which an elder or vulnerable adult is immediately at risk of death or injury and is unable to consent to services to remove the risk.
- G. Family is: As determined by Tribal law, custom or traditions.
- H. Good Faith is: An honest and reasonable belief or purpose and the lack to defraud.
- I. Least Restrictive Alternative is: Whenever it is necessary to protect an elder or vulnerable adult, the least restrictive method of intervention shall be used to protect the freedom and independence of the elder or vulnerable adult. The least restrictive alternative is that environment which is the most like the elder or vulnerable adult's home setting and which is most capable of supporting the protected person's physical and mental health and emotional being.

- J. **Protective Placement is:** The placement of an elder or vulnerable adult in a hospital, nursing home, residential care facility, other suitable placement, or transfer from one facility to another with consent of that person or with appropriate legal authority.
- K. **Protective Services is:** Services provided to an elder or vulnerable adult with consent or by order of appropriate legal authority which includes but is not limited to: social services, mental and physical health examinations, home and day care, legal assistance, guardianship, case management and any other services consistent with this Code.
- L. **Retaliation is:** Intimidating, threatening to cause bodily harm, or causing bodily harm, or causing bodily harm to a reporter or family of a person reporting elder abuse; causing the reporter or reporter's family to be terminated, suspended or reprimanded by an employer; causing property damage to real or personal property belonging to a reporter's family.
- M. **Substantiated Report is:** When there is probable cause of abuse after an investigation conducted by a protective or social services worker. The report is sent to Tribal Court for further steps to be taken. Social/Protective services shall keep substantiated reports on file for five (5) years.
- N. **Unsubstantiated Report is:** When no probable cause exists after an investigation. Social Services will keep such reports on file for two (2) years following the completion of the report.

1506. DUTY TO REPORT ABUSE OF NEGLECT OF AN ELDER

- A. **Suspected abuse or neglect shall be reported to the Bay Mills Indian Community Protective Services or social workers by:**
 - 1. **The elder or vulnerable adult's family or caretaker; or**
 - 2. **Elected official of the Tribe; or**

3. All tribal social workers, medical and dental staff, religious practitioners or any other tribal employees who provide services to tribal elders or vulnerable adults; or
4. Any person or agency, including employees, with fiduciary duties to elders or vulnerable adults such as attorneys, accountants, property managers or financial institutions; or
5. The elder or vulnerable adult abused; or
6. Any other person(s) who have reason to suspect that an elder or vulnerable adult is abused or neglected.

B. Reports of suspected elder or vulnerable adult abuse is presumed to be made in good faith.

1507. **IMMUNITY FOR REPORTING** - A person who in good faith reports suspected abuse or neglect as defined by this Code is immune from any civil or criminal statute based upon that person's report if the report results in an unsubstantiated report.

1508. **FAILURE TO REPORT; CIVIL PENALTY; DAMAGES; CRIMINAL LIABILITY** - Any person required to report who fails to report suspected or actual abuse or neglect as required by this Code may be subject to a civil money penalty of up to \$5,000. All persons required to report who fail to report are entitled to petition, notice and an opportunity for hearing in Tribal Court. Fines shall be assessed only after determination of a duty to report is found at the hearing. A person failing to report suspected abuse or neglect may be subject to suit by or on behalf of abused persons for damages resulting from unreported abuse.

1509. **BAD FAITH REPORT; CIVIL LIABILITY, DAMAGES, CRIMINAL LIABILITY** - Any person who makes a report of suspected abuse or neglect as defined by this Code knowing it to be false shall be subject to a civil money penalty of up to \$5,000. Those accused of making bad faith reports are entitled to petition, notice and an

opportunity for a hearing in a civil suit for damages filed by persons unjustly charged. Criminal penalties may also be brought against a bad faith reporter as provided for in the Bay Mills Criminal Code.

1510. INVESTIGATION

- A. A Bay Mills protective/social services worker shall initiate an investigation, as required in part B of this section, upon receiving a report of elder or vulnerable adult abuse or neglect.
- B. The Bay Mills protective/social worker shall investigate the report of abuse or neglect within 48 hours and prepare a written report within 10 days based upon:
 - 1. Personal interviews of the abused, the immediate family and caretaker, suspected abuser, employees of agencies (if involved), and any other person who may have pertinent information; and
 - 2. Medical records and other evidence of abuse; and
 - 3. Assessments of elder or vulnerable adult's living conditions using Tribal standards for housing; and
 - 4. Any other observations, assessments, or documents that may aid in completing an accurate report.
- C. The written report shall contain:
 - 1. Elder or vulnerable person's name, address or location, telephone number; and
 - 2. Name, address or location, telephone number(s) of the person(s) or agency who is suspected of abuse or neglect under this Code; and
 - 3. The condition of the abused; and
 - 4. Names of witnesses and sufficient information to affect the subpoena power of the Court over them; and

5. Name, address or location, telephone number of caretaker(s); and
6. A description of the act(s) which are suspected of being abusive or neglectful; and
7. Any other information helpful in establishing abuse or neglect.

1511. PRIVILEGED COMMUNICATION - No evidentiary privilege may be raised as a defense, except attorney-client privilege, for failing to report suspected abuse or neglect or testifying as a witness under this Code.

1512. CRIMINAL INVESTIGATION - The investigation and other procedures allowed in this Code may run concurrently with criminal investigations.

1513. EMERGENCY

- A. The Tribal Court may issue an ex parte emergency protection order authorizing emergency services or protective placement upon clear and convincing evidence that an elder or vulnerable adult:
 1. Is at risk of immediate physical harm; and
 2. No one is authorized by law or court order to give consent; and
 3. The elder or vulnerable adult or authorized caretaker is incapacitated and cannot consent to services.
- B. The emergency protection order shall:
 1. Set out the specific emergency services to be provided to remove the emergency; and
 2. Allow protective placement only if the evidence indicates that it is absolutely necessary; and
 3. Designate the person or agency required to implement the order; and

4. Be issued for 72 hours excluding weekends and holidays and may only be renewed for a maximum of an additional 72 hours if evidence of a continuing emergency.
- C. Tribal Court may issue a warrant for forcible entry by Tribal Law Enforcement if attempts to gain voluntary access have failed.
 - D. The petition for an emergency protection order shall include the name and interest of the petitioner. Also, the name, address or location, proposed protective services, attempts to secure consent and any other facts that will assist the Court.
 - E. Emergency protection orders may be set aside by the Tribal Court upon written petition of any party showing good cause.
 - F. The Tribal Court shall hold a preliminary hearing on a petition to provide protective services within 72 hours, excluding weekends and holidays, after an emergency protection order is issued unless good cause exists to grant a delay. The Court shall state on the record any cause for such delay.
 1. All parties, including attorneys, are permitted to attend the preliminary hearing for a protection order. The hearing may be done ex parte if the need arises. The sufficiency of the petition will be determined on a totality of circumstances test and goes into effect upon the immediate granting of the order by the Tribal Court.
 - G. If there is good cause to believe that an emergency exists, and an elder or vulnerable adult is at risk of immediate or irreparable harm upon personal observation, the investigator or law enforcement officer may immediately protect the abused, including transporting him or her to adequate facilities. Immediately after the abused is protected, standard procedures for an emergency protection order must be followed.

H. Anyone who acts in reasonable good faith pursuant to this section shall be immune from criminal or civil suit if the suspected abuse or neglect results in an unsubstantiated report.

1514. RIGHTS OF ELDERS, ADULTS, THEIR FAMILIES AND CARETAKERS

- A. An elder, vulnerable adult, family or caretaker shall be informed of an abuse investigation before it begins unless an emergency exists. If an emergency exists, notice must be given using a means reasonably calculated to give actual notice as soon as possible but no later than 72 hours.
- B. Elders or vulnerable adults may refuse to accept protective services provided there is good cause to believe that the abused can take care of themselves and the elder or vulnerable adult knows of the services offered.
- C. Families or caretakers may refuse services for themselves but cannot refuse services for the elder or vulnerable adult.
- D. Elders, vulnerable adults, family or caretakers may refuse to allow investigators into their home and must be told of the right of investigator to seek a warrant for entry.
- E. If criminal charges may be brought against any party under the Bay Mills Criminal Code, the accused party must be informed of their rights under the Indian Civil Rights Act, 25 U.S.C. sec. 1301 (1994).
 - 1. Criminal charges may include, but are not limited to: battery, assault, domestic violence, or any other criminal offense that may warrant a charge.
- F. Personal service of notice to the elder, vulnerable adult, family or caretaker is required when a petition is filed pursuant to this Code.
- G. The elder, vulnerable adult, family or caretaker has the right to attend all proceedings pertaining to the

capacity of the abused unless the Tribal Court determines the elder or adult's health is at risk in attending such proceedings.

H. The elder, vulnerable adult, family or caretaker has the right to independent medical, psychological or psychiatric evaluations at their own expense.

1515. **PROCEDURES FOR DETERMINING CAPACITY, ABUSE OR NEGLECT** -The Tribal Court shall determine an elder or vulnerable adult's capacity, degree of incapacity, or whether abuse or neglect has occurred based on clear and convincing evidence at a hearing requested in a voluntary proceeding or required at an involuntary proceeding. All parties are entitled to petition, notice and an opportunity to be heard.

1516. **ELDER AND ADULT PROTECTION ORDER; TERM**

A. If the Tribal Court determines that there is incapacity or evidence of abuse or neglect of an elder or vulnerable adult, a protection order will be issued which may contain, but is not limited to the following:

1. Removal from the place where abuse or neglect occurs, including the elder or vulnerable adult's home; and
2. Enjoining the abuser from committing further abusive acts; and
3. Requiring any party having a fiduciary duty to the elder or vulnerable adult to account for the elder or vulnerable adult's funds and or property; and
4. Requiring compensatory damages to be paid by an abuser or neglectful person to the elder or vulnerable adult for injuries resulting from abuser's or neglectful person's wrongful act(s); and
5. Appointing a representative, guardian ad litem, or recommending a representative payee for the elder or adult; and

6. Ordering Bay Mills Protective Services to prepare a plan to deliver protective services which provides the least restrictive alternative to satisfy the elder or vulnerable adult's needs.
- B. An elder or adult protective order may not exceed 12 months. Extensions for the 12 months following may be obtained in Tribal Court by petition, notice and an opportunity for hearing. Extensions may be obtained as many times as necessary if cause is shown by clear and convincing evidence. Review of the need for continued protective orders shall occur every 6 months or upon motion of an interested party as accepted by the Court.

1517. CONFIDENTIALITY OF REPORTER, RECORDS, HEARINGS; PENALTIES FOR NONCOMPLIANCE

- A. The identity of the reporter of abuse or neglect under this Code is confidential and shall not be released unless the reporter consents or the Tribal Court determines that the need of the elder or vulnerable adult exceeds the reporter's right to privacy and mandates disclosure. The reporter has the opportunity to petition and be heard at a closed evidentiary hearing with regard to any such disclosure. Any disclosure may be released only to the extent necessary to protect the elder or vulnerable adult.
- B. Records of investigations concerning abuse or neglect under this Code are confidential. Bay Mills Protective Services, Law Enforcement, court officials, attorneys, coroner, medical staff and any other person whom the Court determines has reasonable cause to have access may view the record(s).
- C. Any one who violates this section of the Code shall be subject to a money penalty of up to \$5,000 per occurrence. Petition, notice and an opportunity for hearing in Tribal Court will determine if a violation has occurred.

1518. CRIMINAL PROSECUTIONS

- A. Any person(s) who commits abuse or neglect against an elder or vulnerable adult may be criminally prosecuted

under applicable provisions of the Bay Mills Criminal Code.

- B. Criminal prosecutions may run concurrently with civil proceedings under this Code. Dismissal or deferral of a criminal proceeding in no way affects the applicability of this Code. Factors for the Court to consider when dismissing or deferring criminal proceedings are:
1. The elder, adult, family or caretaker and suspected abuser agree to resolve conflicts through any dispute process recognized by the Bay Mills Indian Community; and
 2. All parties concerned agree to accept services as determined by Bay Mills Protective Services; and
 3. The crime is not of a serious nature involving intentional bodily harm or intentional property damage and the accused does not have a prior record of elder, adult, child or sexual abuse.

1519. COURT PROCEEDING ON PETITION

- A. Petition - The tribal prosecutor shall initiate proceedings on behalf of the Tribe, by filing a petition which contains the following information:
1. The name, birth date, age, residence, and gender of the elder.
 2. The basis for the Court's jurisdiction under this Chapter.
 3. A plain and concise statement of facts upon which the claim is made that the elder is in need of protection, including date(s), time(s), and location(s) at which the alleged facts occurred.
 4. The names, residences, and tribal affiliation, if any, of the person(s) alleged to have neglected and/or abused the elder.
- B. Notice of Petition Filing; Hearing - Any person who has an interest in the welfare of the elder shall be provided

notice of the filing of the petition and the date of hearing in any manner authorized by Chapter IV of the Tribal Court Code.

- C. Hearings – The Court shall conduct a hearing on the petition to determine whether the facts support a finding that the elder is in need of protection. All material and relevant evidence which is reliable and trustworthy may be admitted and relied upon by the Court to the extent of its probative value, including hearsay contained in a written investigative report, provided that the preparer of the report is present and available to provide testimony. The parties, including the elder, shall be afforded an opportunity to examine and controvert written reports, and cross-examine individuals whose testimony is presented. The Court may rely on conference telephone or other electronic devices that permit all those appearing or participating to hear and speak to each other.
- D. Judgments – The Court shall make a written decision at the conclusion of the hearing. If the allegations of the petition are not sustained by a preponderance of the evidence, the Court shall dismiss the matter. If the allegations of the petition are sustained, the Court shall find that the elder is in need of protection, and may enter further orders for evaluation, assessment or other orders to protect the elder. At the Court’s discretion, a Dispositional Order ensuring the protection of the elder may be held immediately or at an interval following the initial hearing.

1520. SEVERITY AND EFFECT – This Code shall be of immediate effect upon vote of the Executive Council. However, if any provision, clause or section shall be invalid, the remainder of the Code shall remain in full force and effect.