

CHOCTAW VULNERABLE ADULT PROTECTION CODE

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Chapter 1.

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§31-1-1 Title

This Code shall be known and cited as the “Choctaw Vulnerable Adults Protection Code.”

§31-1-2 Purpose

The purpose of this code is to protect vulnerable adults, as defined in this Title, who are within the jurisdiction of the courts of the Mississippi Band of Choctaw Indians from abuse, neglect and exploitation, as defined in this title. This title shall be liberally interpreted in order to achieve its purpose. The code provides for:

- A. Reporting suspected abuse, neglect or exploitation to the proper agency;
- B. Receiving reports of and investigating suspected abuse, neglect or exploitation;
- C. Delivering protection services to vulnerable adults.
- D. Criminal sanctions for abuse, neglect or exploitation of a vulnerable adult.

§31-1-3 Definitions

For purposes of this Title, the following words shall have the meanings ascribed herein unless the context otherwise requires:

- (1) **“Abuse”** shall mean the willful or non-accidental infliction of physical pain, injury or mental anguish on a vulnerable adult; the unreasonable confinement of a vulnerable adult; or the willful deprivation by a caretaker or a care facility or its employees of services which are necessary to maintain the mental and physical health of a vulnerable adult. “Abuse” shall include sexual assault as defined in CTC §3-3-29. “Abuse” also means the unreasonable interference with a vulnerable adult’s practice of his customs, traditions or religion. “Abuse” includes, but is not limited to, a single incident.
- (2) **“Care Facility”** shall mean:
 - a. Any hospital that is required to be licensed by a state, the federal government or the Tribe;
 - b. Any adult day care service facility, which shall mean a community based group program for adults designed to meet the needs of vulnerable adults through structured, comprehensive, planned, non-residential programs providing a variety of health, social and related support services in a protective setting.

- c. Any residential nursing home, convalescent home, home for the aged, assisted living center/home or any other place which provides living arrangements for persons unrelated to the operator and who are being provided food, shelter or personal care.
 - d. Any home health agency or other provider of home health services or hospice service.
- (3) **“Caretaker”** shall mean an individual, corporation, partnership or other organization which has assumed the responsibility for the care of a vulnerable adult or is required by law to provide care to a vulnerable adult, or a person who has been appointed by a court of competent jurisdiction to care for another as a conservator or guardian, but shall not include institutions defined as a care facility;
- (4) **“Emergency”** shall mean a situation in which a vulnerable adult is immediately at risk of death or injury and is unable to consent to services which would remove the risk.
- (5) **“Emergency Order”** shall mean an order of the Tribal Court authorizing and compelling the provision of essential services to a vulnerable adult due to an emergency.
- (6) **“Essential Services”** shall mean social work, medical, psychiatric or legal services necessary to safeguard a vulnerable adult’s rights and resources and to maintain the physical or mental well being of the person. Those services shall include, but not be limited to, the provision of medical care for physical and mental health needs, assistance in personal hygiene, food, clothing, adequately heated and ventilated shelter, protection from health and safety hazards, protection from physical mistreatment and protection from abuse, neglect or exploitation. It may include service or items considered essential under the person’s customs, tradition or religion, including but not limited to, access to traditional foods and access to religious ceremonies or services.
- (7) **“Exploitation”** shall mean the illegal or improper use of or influence over a vulnerable adult’s income, property or resources, including but not limited to trust funds or distribution funds from the Tribal government, by another person for the profit or advantage of person(s) other than the vulnerable adult, with or without the vulnerable adult’s consent; or the failure by a person with proper legal authority to use the vulnerable adult’s income or resources for the vulnerable adult’s benefit, and may include acts committed pursuant to a power of attorney. Exploitation may include, but is not limited to a single incident. For purposes of this Title, if any portion of a tribal members’ distribution or other funds from the tribe are used for the benefit of another person, then that tribal

member, for purposes of handling funds, shall be deemed a vulnerable adult for the purposes of this Title, and there shall be a rebuttable presumption that exploitation shall have occurred.

- (8) **“Good Faith”** shall mean an honest belief or purpose or the lack of intent to defraud, harm or cause harm.
- (9) **“Incapacity”** shall mean the current inability of a person to sufficiently make, or communicate responsible decisions about himself or herself as a result of mental illness, mental deficiency, physical illness or disability, or the chronic use of drugs or liquor, and to understand the consequences of any such decisions. Incapacity may vary in degree and duration and shall not be determined solely on the basis of age.
- (10) **“Least Restrictive Alternative”** shall mean an approach in providing essential services to a vulnerable adult that is the least intrusive or disruptive of a vulnerable adult’s independence while still protecting the vulnerable adult from abuse, neglect or exploitation.
- (11) **“Neglect”** shall mean the failure of a caretaker or care facility to provide for the basic needs of a vulnerable adult by not supplying food, clothing, shelter, healthcare resources, and the supervision necessary to maintain a vulnerable adult’s minimum physical and mental health, or other services necessary to maintain his mental or physical health. “Neglect” also is failing to report abuse, neglect or exploitation of a vulnerable adult by a person who has legal duty to report such and who knows or reasonably should have known of such abuse, neglect or exploitation. Neglect may include, but is not limited to a single incident.
- (12) **“Retaliation”** shall mean threatening a reporter of vulnerable adult abuse, neglect or exploitation or the reporter’s family in any way, causing bodily harm to the reporter or the reporter’s family because of a report of abuse, neglect or exploitation; causing the reporter or any of the reporter’s family to be terminated, suspended from employment or reprimanded by an employer because of a report of abuse, neglect or exploitation, or damaging the reporter’s or the reporter’s family’s real or personal property in any way because of a report of abuse, neglect or exploitation.
- (13) **“Vulnerable Adult”** shall mean a person eighteen (18) years of age or older whose ability to perform the normal activities of daily living or to provide for his own care or protection is impaired due to a mental, emotional, physical or developmental disability or dysfunction, or brain damage or the infirmities of aging. The term “Vulnerable Adult” shall also include all residents or patients in a care facility.

§31-1-4 Duty to report abuse, neglect or exploitation of a vulnerable adult.

Any person who has a duty to report suspected abuse, neglect or exploitation of a vulnerable adult shall immediately make a verbal report to the Choctaw Police Department and the Department of Family and Community Services, and shall file a written Vulnerable Adult Protection Referral Form with the Choctaw Police Department and Department of Family & Community Services by hand-delivery within twenty-four (24) hours after the person becomes aware of the suspected abuse, neglect or exploitation.

The following persons shall have a duty to report suspected abuse, neglect or exploitation:

- (1) Any elected official of the Tribe; with regard to any vulnerable adult whom the elected official encounters as a result of his official duties as an elected official;
- (2) Any employee of the Tribe or of a tribally-owned business, even if not managed by the Tribe, with regard to any vulnerable adult whom the employee encounters as a result of the employee's employment duties;
- (3) Indian Health Service personnel, with regard to any vulnerable adult encountered as a result of Indian Health Services official duties;
- (4) Bureau of Indian Affairs personnel, with regard to any vulnerable adult encountered as a result of Bureau of Indian Affairs official duties;
- (5) Any medical or osteopathic doctor, physician, psychiatrist, psychologist, coroner or medical examiner, chiropractor, podiatrist, dentist, religious practitioner, nurse, health aide, human services worker, elders' service provider, nursing home provider, or any other health and elder or human service provider or its employees with regard to any vulnerable adult encountered in the performance of professional or service provider or employment duties or official duties.
- (6) Any person or entity, including but not limited to persons or entities that are, by statute or other law, in a fiduciary relationship with a vulnerable adult.

§31-1-5 Immunity for reporting.

A person who in good faith reports suspected abuse, neglect or exploitation of a vulnerable adult is immune from any civil suit or criminal prosecution based on that person's report. In any civil or criminal action against a person for making a report pursuant to this Code, there shall be a rebuttable presumption that a person who made the report acted on good faith.

§31-1-6 Failure to report and false reporting, criminal liability.

- (1) Any person who knowingly fails to make a report as required by this Code shall be subject to a civil fine of up to five hundred dollars (\$500.00) per violation. The penalty shall be assessed by the Tribal Court only after petition, notice and the opportunity for a hearing.
- (2) Any person who makes a false report of vulnerable adult abuse, neglect or exploitation knowing the report to be false or with a lack of good faith is subject to a civil fine of up to five hundred dollars (\$500.00), in addition to any other criminal or civil sanctions that may be applicable pursuant to law. The Tribal Court shall assess the penalty only after petition, notice and opportunity for hearing.

§31-1-7 Investigation.

- (1) The Choctaw Police Department Dispatcher or a special designated person at the Department of Family & Community Services shall receive reports of vulnerable adult abuse, neglect or exploitation. All such reports received shall be investigated as required by Paragraph C of this section.
- (2) When receiving the report, the Choctaw Police Department Dispatcher or other specially designated person at the Department of Family & Community Services, shall ask the reporter for the following information, and shall, to the extent possible, complete a Vulnerable Adult Protection Referral Form. The identity of the person making the report shall not be disclosed, without the consent of the individual, to any person other than the Tribal Court or other court of competent jurisdiction.
 - a. the vulnerable adult's name, address or location, telephone number, sex, race, and physical description;
 - b. name, address or location, telephone number of the person(s) or agency who is suspected of abusing, neglecting or exploiting the vulnerable adult;
 - c. the nature or degree of incapacity of the vulnerable adult;
 - d. the name, address or location, telephone number of witnesses;
 - e. the name, address or location, telephone number of the vulnerable adult's caretaker and/or care facility;

- f. name, address, and telephone number of the vulnerable adult's family members;
 - g. a description of the acts alleged to be abusive, neglectful or exploitative;
 - h. any other information that the reporter believes might be helpful in establishing whether or not abuse, neglect or exploitation has occurred.
- (3) The Choctaw Police Department shall initiate an investigation after receiving a report of abuse, neglect or exploitation within forty-eight (48) hours and will prepare a written report of the findings of the investigation. The report shall include the information set forth in paragraph B above as well as the results of interviews, observations and assessments, and other findings of fact.

The investigator may, as necessary, conduct personal interviews with the vulnerable adult, their family and caretaker, any persons suspected of committing the abuse, neglect or exploitation alleged, employees of agencies or institutions with knowledge of the vulnerable adult's circumstances and any other person the investigator believes has pertinent information.

The existence and contents of medical records and other reports of abuse, neglect or exploitation shall be ascertained and assessed, if necessary, as part of the investigation. The Tribal Court, upon petition and for good cause shown, may order the agency or person in possession of such record to provide such records or copies thereof to the investigating officer. Such records shall be treated as confidential to the same extent as the Vulnerable Adult Protection Referral form.

- (4) During the course of the investigation, the Choctaw Police Department has the option of calling upon other service providers and agencies of the Tribal government to assist in the process of determining the findings of the investigation and the needs of the vulnerable adult. This may include an assessment of the vulnerable adult's physical, mental and emotional needs as they relate to the alleged abuse, neglect or exploitation.

Such providers and agencies shall respond to such request immediately and will make available to the Choctaw Police Department all manpower and services within their respective programs that are appropriate and necessary to meet the needs of the vulnerable adult; copies of the Vulnerable Adult Protection Referral form or the contents thereof may be shared with each of these entities as to the extent necessary to facilitate the assistance of such entities.

These entities shall maintain the confidentiality of the Vulnerable Adult Protection Form and/or its components.

- (5) If the results of the investigation indicate the abuse, neglect or exploitation has occurred, and that a felony criminal violation has occurred, the Choctaw Police Department will immediately report the findings to the U.S. Attorney's office or to the appropriate state authority. The Choctaw Police Department Administration shall also inform the Tribal Prosecutor of the results of any investigation indicating that a violation of this code or other criminal violations may have occurred.

§31-1-8 Interference with investigation and retaliation prohibited, civil penalty.

- (1) No person shall interfere intentionally with a lawful investigation of suspected abuse, neglect or exploitation.
- (2) No person shall retaliate by any means against any person who has made a good faith report of suspected vulnerable adult abuse, neglect or exploitation or who cooperates with an investigation of suspected vulnerable adult abuse, neglect or exploitation.
- (3) In the event that any person who violates paragraphs A or B of this section, the Choctaw Police Department may petition a court of competent jurisdiction to enjoin the person interfering with the investigation from such activity and that person shall further be subject to a civil fine of up to five hundred dollars (\$500.00) per occurrence. The fine shall be assessed by the Tribal Court only after petition, notice, and the opportunity to be heard.

§31-1-9 Privileged communication.

No evidentiary privilege except for the attorney-client or priest-penitent privilege may be raised as a justifiable defense or reason for failing to report suspected vulnerable adult abuse, neglect or exploitation.

§31-1-10 Vulnerable adult essential services, other services; evaluation procedure.

- (1) Essential services may be provided on a voluntary basis to a vulnerable adult by agencies of the Tribal government when requested by any vulnerable adult and the vulnerable adult or his or her family is found to be in need of such services. Voluntary essential services provided by Tribal government agencies shall only be provided subject to available appropriations and resources and only as determined necessary by the appropriate Tribal agency. If the vulnerable adult's consent to such services is withdrawn, the services shall cease. Such protective services shall be provided for a period of no more than six (6) months at a time. At the end of each period, the agency shall reassess the vulnerable adult's needs before agreeing to continue providing services.

§31-1-11 Emergency orders.

- (1) Essential services may be provided on an emergency basis by agencies of the tribal government, provided such services are ordered by the Tribal Court and further provided such services are the least restrictive alternatives. Any person may petition the Tribal Court for an emergency order; provided, however, when the petition is filed by the Tribe, the Department of Family & Community Services shall be the agency authorized to file the petition and the Office of the Attorney General's office shall represent the Department of Family & Community Services.
- (2) Any petition for an emergency order shall contain the name, address or location, and interest of the petitioner; the name, address or location, and condition of the vulnerable adult; the nature of the emergency; the nature of the vulnerable adult's incapacity; the proposed essential services; the basis for a proposed finding that the vulnerable adult cannot consent to the services due to incapacity and any other facts the petitioner believes will assist the court.
- (3) The Tribal Court may issue an order authorizing and compelling the provision of essential services to a vulnerable adult by tribal agencies on an emergency basis upon petition supported by clear and convincing evidence that a vulnerable adult:
 - a. is at risk of immediate physical harm;
 - b. is incapacitated and cannot consent to essential services;
 - c. no one is authorized by law or court order to give consent on an emergency basis; and
 - d. an emergency exists.
- (4) Any court order authorizing and compelling the provision of essential services on an emergency basis shall;
 - a. specify the specific essential services to be provided to the vulnerable adult to remove or address the conditions creating the emergency, and further specify that only these services shall be provided;
 - b. designate the tribal agency or persons required to implement the order;
 - c. set forth any necessary conditions on the provision of the services such as the place and time such services shall be rendered;

- d. issue the order for a maximum of seventy-two (72) hours; provided, however, such an order may be renewed only once for a maximum of seventy-two (72) additional hours provided the evidence shows that the emergency necessitating the order continues to exist or other services are also needed.
- (5) The Tribal Court may authorize forcible entry by law enforcement to enforce the emergency order after it has been shown that attempts to gain voluntary access to the vulnerable adult have failed.
- (6) The emergency order shall be issued only after notice accompanied by a copy of the petition has been given to the vulnerable adult, or an immediate family member, or the vulnerable adult's caretaker, and 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 proceed without the vulnerable adult, a family member or a caretaker if reasonable attempts have been made to notify the parties but such has not been possible.
- (7) The Tribal Court shall hold a hearing on a petition for an emergency order as soon as possible, but in no event more than seventy-two (72) hours after a petition is filed.
- (8) An emergency order can be set aside by the Tribal Court upon a petition of any party or upon the court's own motion if sufficient evidence is presented to the court showing the order was issued without adequate basis or the emergency upon which the order was based no longer exists.
- (9) Any person who files a petition in good faith pursuant to this section is immune to any civil or criminal suit based on that person's actions.

§31-1-12 Rights of vulnerable adults, their families and caretakers.

- (1) A vulnerable adult, his family and/or caretaker shall be informed about a vulnerable adult abuse, neglect or exploitation investigation before it begins unless an emergency exists that prevents it. If this is the case, they shall be informed as soon as possible, but no later than forty-eight (48) hours after the investigation begins.
- (2) A vulnerable adult may refuse to accept any and all services even if there is good cause to believe that they have or continue to be abused, neglected or exploited, provided the vulnerable adult is able to care for himself and has the capacity to understand the nature of his circumstances and the services being offered.

- (3) A vulnerable adult, and his family or caretaker may refuse to voluntarily allow a duly authorized investigator of the tribe into their home, absent a court warrant. In such instances, the investigator may inform the vulnerable adult, his family or caretaker of the investigator's right to obtain a court warrant to seek access if access is not voluntarily allowed.
- (4) In the event an investigator of the Tribe determines that criminal violations may have occurred, the vulnerable adult, the vulnerable adult's family or caretaker shall be afforded all rights afforded other persons by law.
- (5) The vulnerable adult, his family and caretaker have the right to attend any proceeding pertaining to the determination of the vulnerable adult's capacity to care for them and make decisions of their own. The vulnerable adult shall be present at all proceedings unless the tribal court determines the vulnerable adult's health would be at risk at such proceeding.
- (6) The vulnerable adult, his family and caretaker have the right to be represented by counsel at all proceedings.
- (7) In the event a petition is filed to provide essential services to a vulnerable adult without the vulnerable adult's consent, the vulnerable adult, his family and caretaker have the right to seek independent, medical, psychological or psychiatric evaluation of the vulnerable adult at the expense of the Tribe; provided, however, any such evaluations at the expense of the Tribe must be approved by the court.

§31-1-13 Procedures for determining incapacity; and abuse neglect or exploitation

- (1) If it is the opinion of the investigator of the Tribe that a vulnerable adult lacks the capacity to make decisions on his own and, as a result, he is at risk, then steps shall be taken to obtain a medical opinion from appropriate licensed professionals, *i.e.*, psychiatrist, physician, or psychologist, etc., in order to make a determination on the capacity of the vulnerable adult. If the vulnerable adult and his family and caretaker are willing to submit to these examinations, then referrals to the proper resources will be made.

If either the vulnerable adult or his family or caretaker is unwilling to agree to the examinations, then a petition may be filed in Tribal Court asking permission for these examinations to be conducted. The family and caretaker may take the lead in filing the petition if they agree with the investigator. If they disagree, the petition may be filed by the Department of Family & Community Services. On the basis of the medical opinion(s) obtained, the Tribal Court shall determine whether a vulnerable adult is incapacitated and the degree of incapacity and, on basis of this decision, will determine the course of action to be take, *i.e.*,

commitment proceedings, admission to nursing home, appointment of a conservator or any other service.

- (2) The Office of the Attorney General, the Department of Family & Community Services or the Choctaw Police Department, or any family member or the caretaker of a vulnerable adult may file a petition with the Tribal Court for a determination as to whether a vulnerable adult has been abused, neglected or exploited. The Tribal Court shall determine whether a vulnerable adult has been abused, neglected or exploited on the basis of clear and convincing evidence. This determination shall be made only after petition and notice to the vulnerable adult, family, and/or caretaker and any other person(s) allegedly responsible for causing the abuse, neglect or exploitation and a hearing at which the vulnerable adult, family and/or caretaker, and the person accused shall be allowed to participate and at which they may be represented by counsel. The court may appoint counsel to represent the interests of the vulnerable adult if the court determines the vulnerable adult's interests may not be represented otherwise.

§31-1-14 Confidentiality of reporter, records, hearings; penalty for not complying with confidentiality.

- (1) The name of a reporter who reports abuse, neglect or exploitation shall be treated as confidential and shall not be released to any person unless the reporter consents to the release or the release is ordered by the Tribal Court. The Tribal Court may release the reporter's name only after notice to the reporter is given, a closed evidentiary hearing is held, and the need to protect the vulnerable adult is found to be greater than the reporter's right to confidentiality. The reporter's name shall be released only to the extent determined necessary to protect the vulnerable adult.
- (2) Records of a completed investigation into all allegations of vulnerable adult abuse, neglect or exploitation or of a Tribal Court hearing into these matters shall remain confidential, and shall be made available to persons other than the vulnerable adult or his caretaker only after determination by the Tribal Court that a person has just and reasonable cause to have access to such record.
- (3) Any court proceeding as a matter of law held pursuant to this code shall be closed and confidential. Persons who may attend are the vulnerable adult, their family and/or caretaker, the person(s) allegedly causing the abuse, neglect or exploitation, law enforcement officials, necessary Tribal Court officials, and attorneys for the parties. Other persons may appear only if, and only to the extent, their presence is necessary as a witness. No one attending or testifying at such a proceeding shall reveal information about the proceeding unless ordered to do so by Tribal Court Order. The Tribal Court shall issue any

necessary orders to maintain the confidentiality of any proceeding held pursuant to this Code.

- (4) Any person who violates any paragraph of this section shall be subject to a civil penalty of up to five hundred dollars (\$500.00) per occurrence. The penalty shall be assessed by the Tribal Court after petition, notice, opportunity to be heard and a determination that a violation has occurred. In addition, if the violation is committed by a Tribal employee, they are further subject to appropriate disciplinary measures as provided for in Tribal personnel policies and procedures.

§31-1-15 Criminal and civil sanctions for abuse neglect or exploitation of a vulnerable adult.

- (1) Abuse, neglect or exploitation of a vulnerable adult shall be a criminal violation punishable as a Class A offense.
- (2) In addition to any criminal sanctions, a person who abuses, neglects or exploits a vulnerable adult shall be required to make full restitution and also be subject to a civil fine not to exceed five hundred dollars (\$500.00), to be determined by the Tribal Court in any action brought against such person by the Tribe.
- (3) Nothing contained in this Code shall supplant or restrict any person's right to bring a private cause of action that may exist at law for personal injury, property damage or other damages.

§31-1-16 Deferring criminal prosecution.

Criminal prosecution of any person accused of vulnerable adult abuse, neglect or exploitation may be deferred or dismissed as allowed by the provisions of the Choctaw Tribal Criminal Code provided that, in addition to those provisions:

- (1) the vulnerable adult, the vulnerable adult's family and caretaker, and the accused, agree to resolve conflicts either through counseling, mediation or other tribally recognized dispute resolution process;
- (2) all parties concerned agree to accept services that are necessary to rectify the situation;
- (3) the crime is not of a nature involving significant bodily injury or intentional bodily injury regardless of extent of injury or intentional property damage;
- (4) the accused person does not have a prior record of related criminal offenses; and

- (5) essential witnesses will likely be available if prosecution is undertaken within six (6) months.

§31-1-17 Construction with other law.

Notwithstanding any provision of this Title to the contrary or that may be construed to the contrary, no agency of the Tribal government shall have a duty pursuant to this Title to provide services to a person to whom the agency is prohibited by federal law or Tribal law from providing such services or to a person to whom the agency is not authorized to provide services by Federal law or Tribal law.