

**RESOLUTION OF THE
WHITE MOUNTAIN APACHE TRIBE OF THE
FORT APACHE INDIAN RESERVATION**

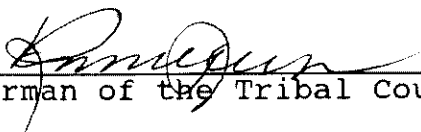
WHEREAS, the Tribal Council is advised that the Elderly Focus Group has had numerous meeting to review and discuss the Adult Protection Code; and

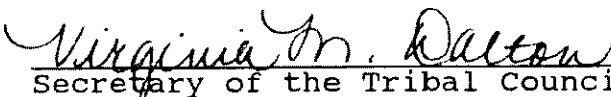
WHEREAS, the Elderly Focus group has made recommendations for revisions to the Adult Protection Code and has presented the recommended revisions to the Tribal Council; and

WHEREAS, the Tribal Council has reviewed the proposed revisions amending the Adult Protection Code and concludes that the Code should be amended in accordance with the proposed revisions.

BE IT RESOLVED by the Tribal Council of the White Mountain Apache Tribe that it hereby directs the Tribal Council Secretary to post the proposed amendments to the Adult Protection Code for a minimum of ten days in accordance with the requirements of the Tribal Constitution.

The foregoing resolution was on November 4, 1993 duly adopted by a vote of Five for and Zero against by the Tribal Council of the White Mountain Apache Tribe, pursuant to authority vested in it by Article V, Section 1 (a) of the Amended Constitution and By-Laws of the Tribe, ratified by the Tribe June 27, 1958 and approved by the Secretary of the Interior on May 29, 1958 pursuant to Section 16 of the Act of June 18, 1934 (48 Stat. 984).


Chairman of the Tribal Council


Secretary of the Tribal Council

**CHAPTER FIFTEEN
ELDERLY AND INCAPACITATED ADULT PROTECTION**

[HISTORICAL NOTE: CHAPTER FIFTEEN IS DERIVED FROM
ORDINANCE NO. 161, ENACTED NOVEMBER 16, 1990]

SECTION 15.1 DECLARATION OF PURPOSE

It is the tradition and custom of the White Mountain Apache people to honor and protect their elderly as they are the possessors of the spiritual and collective wisdom and traditions of the White Mountain Apache Tribe of the Fort Apache Indian Reservation which are passed on from generation to generation. As such, the elderly of the White Mountain Apache Tribe warrant the special concern and protection of the people of the White Mountain Apache Tribe. This Elderly Protection Chapter is to be liberally construed for their protection.

SECTION 15.2 DEFINITIONS; PROGRAM GOALS

A. In this Chapter, unless the context otherwise requires:

- (1) "Abuse" means:
 - (a) Intentional infliction of physical and or emotional harm,
 - (b) Injury caused by negligent acts or omissions,
 - (c) Unreasonable confinement.
 - (d) Sexual abuse or sexual assault.
- (2) "Adult" means any person who is eighteen years of age or older.
- (3) "Exploitation" means the illegal or improper use of an elderly person or an incapacitated adult or his resources for another's profit or advantage.
- (3) "Elderly" shall mean any person who has reached the age of ~~fifty-five (55)~~ sixty (60) years or older.

(4) "Incapacity" means an impairment by reason of mental illness, mental deficiency, mental disorder, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication or other cause to the extent that the person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person or property.

(5) "Neglect" means a pattern of conduct resulting in deprivation of ~~services necessary~~ necessities to maintain minimum physical and mental health.

~~(6) "Protective services" means a program of identifiable and specialized social services that may offer social services appropriate to resolve problems which have produced visible signs of incapacitation and abuse, exploitation or neglect.~~

(6) "Protective services worker" means a person who has been selected by and trained and employed under the requirements prescribed by the Tribal Social Services Department and/or Indian Heal Services to provide protective services to the elderly and incapacitated; and shall consist of, but not be limited to, Elderly Services Staff, Social Services Staff and any other person specifically employed to protect the best interest of the elderly and incapacitate adults..

~~(7) "The Advocacy Staff" shall consist of but not be limited to: coordinator/advocate; case manager/advocate; and ombudsman.~~

~~B. The Advocacy Staff shall seek to maintain the adult in his familiar environment by strengthening his capacity for self-maintenance or by providing supportive services.~~

[SECTION 15.2 C HAS BEEN MOVED TO SECTION 15.7]

SECTION 15.3 PROTECTIVE SERVICES WORKERS; POWERS AND DUTIES

A. Protective Services Workers shall:

(1) Receive oral or written reports of ~~incapacitated and~~ abused, exploited or neglected ~~incapacitated~~ adults and elderly persons.

~~(2) Receive from any source oral or written information regarding an adult or elderly who may be in~~

~~need of protective services.~~

(2) Upon receipt of such information, ~~make an evaluation to determine if the incapacitated adult or elderly is in need of protective services. and what services, if any, are needed.~~

~~(4) Offer an adult or elderly in need of protective services or his guardian whatever services appear appropriate in view of the evaluation.~~

(3) File petitions as necessary for the appointment of a guardian or conservator or the appointment of a temporary guardian or temporary conservator as provided for in Chapter Four, Section 4.2B of the White Mountain Apache Probate Code. When filing Petitions for Guardianship or Conservator, the Protective Service Worker shall try to locate a responsible and willing person to accept the responsibility of guardian and/or conservator. Every attempt shall be made to notify immediate members of the family of any guardianship proceedings.

(4) The Protective Service Worker shall immediately file a report with the Tribal Prosecutor for investigation in all cases of possible abuse, neglect or exploitation of elderly or incapacitated persons. In cases of physical abuse, the prosecutor shall cause the case to be investigated within 12 hours of receiving the report.

B. ~~A member of the Tribal Advocacy Staff or a protective services staff worker employed by the Tribal Social Services Department or Indian Health Services may not be appointed as guardian, conservator or temporary guardian for their own clients. Persons convicted of violation of this Chapter shall not be appointed as a guardian, temporary guardian, or conservator.~~

C. ~~The Tribal Advocacy Staff and the Protective Services Workers are immune from civil liability for applying for or filing a petition for guardianship or conservatorship unless the application or filing is done in bad faith.~~

D. ~~Notwithstanding the provisions of Section 4.5 of the White Mountain Apache Probate Code, a guardian need not be a member of the White Mountain Apache Tribe or reside on the Fort Apache Indian Reservation if the Court determines it would be in the best interest of the client to appoint a~~

person as guardian who does not meet these qualifications.

SECTION 15.4 IMMUNITY OF PARTICIPANTS; NON-PRIVILEGED COMMUNICATION

A. Any person making a complaint, furnishing a report, information or records required or authorized by this chapter or otherwise participating in the program authorized by this chapter or in a judicial or administrative proceeding or investigation resulting from reports, information or records submitted or obtained pursuant to this chapter is immune from any civil or criminal liability by reason of such action, unless the person acted with malice or unless such person has been charged with or is suspected of incapacitating, abusing, exploiting or neglecting the adult or elderly in question. Except as provided in subsection B of this section the physician-patient privilege, husband-wife privilege or any privilege except the attorney-client privilege, provided for by professions such as the practice of social work or nursing covered by law or a code of ethics regarding practitioner-client confidences, both as they relate to the competency of the witness and to the exclusion of confidential communications, shall not pertain in any civil or criminal litigation in which an adult's or elderly's exploitation, abuse or neglect conducted by a peace officer, a protective services worker, ~~or tribal advocacy staff.~~

B. In any civil or criminal litigation in which incapacitation, abuse, exploitation or neglect of an adult or elderly is an issue, a clergyman, priest or recognized traditional Medicine Man or Medicine Woman shall not, without his consent, be examined as a witness concerning any confession made to him in his role as a clergyman, priest or Medicine Man or Medicine Woman in the course of the discipline enjoined by the church to which he belongs.

SECTION 15.5 DUTY TO REPORT ABUSE, NEGLECT AND EXPLOITATION OF INCAPACITATED ADULTS OR ELDERLY PERSONS; DUTY TO MAKE MEDICAL RECORDS AVAILABLE; VIOLATION; CLASSIFICATION

A. A physician, hospital intern or resident, surgeon, dentist, psychologist, social worker, peace officer or other person who has responsibility for the care of an adult or elderly who suffers from incapacity and whose examination or observation of the adult or elderly yields a reasonable basis to believe that abuse or neglect of the adult or elderly has

occurred or that exploitation of the adult's or elderly's property has occurred shall immediately report or cause reports to be made of such reasonable basis to a peace officer, ~~tribal advocacy staff~~ or to a protective services worker. ~~The guardian or conservator of an incapacitated adult or elderly shall immediately report or cause reports to be made of such reasonable basis to the tribal court.~~ All of the above reports shall be made immediately in person or by telephone and shall be followed by a written report mailed or delivered within forty-eight (48) hours or on the next working day if the forty-eight hours expires on a weekend or holiday.

B. An attorney, accountant, trustee, guardian, conservator or other person who has responsibility for preparing the tax records of an adult or elderly who suffers from incapacity or a person who has responsibility for any other action concerning the use or preservation of the adult's or elderly's property and who, in the course of fulfilling that responsibility, discovers a reasonable basis to believe that exploitation of the adult's or elderly's property has occurred or that abuse or neglect of the adult or elderly has occurred shall immediately report or cause reports to be made of such reasonable basis to a peace officer, ~~tribal advocacy staff~~ or to a protective services worker.

C. Reports pursuant to subsections A and B shall contain:

(1) The names and addresses of the adult or elderly and any persons having control or custody of the adult or elderly, if known.

(2) The adult's or elderly's age and the nature and extent of his incapacity.

(3) The nature and extent of the adult's or elderly's injuries or physical neglect or of the exploitation of the adult's or elderly's ~~property resources~~.

(4) Any other information that the person reporting believes might be helpful in establishing the cause of the adult's or elderly's injuries or physical neglect or of the exploitation of the adult's or elderly's property.

D. Any person other than one required to report or cause reports to be made in subsection A who has a reasonable basis to believe that abuse or neglect of an incapacitated

adult or elderly has occurred may report the information to a peace officer, ~~tribal advocacy staff~~ or a protective services worker.

E. When a report has been filed and upon written request from a peace officer or a Protective Services Worker, a person having custody or control of medical or financial records of an incapacitated adult or elderly ~~for whom a report is required or authorized under this section~~ shall make such records, or a copy of such records, available for inspection and copying ~~to a peace officer, tribal advocacy staff or protective services worker investigating the incapacitated adult's or elderly's neglect, exploitation or abuse, on written request for the records signed by the peace officer or tribal advocacy staff and/or protective services worker.~~ Records disclosed pursuant to this subsection are confidential and may be used only in a judicial or administrative proceeding or investigation resulting from a report filed ~~required or authorized under this section.~~

F. If reports pursuant to this section are received by a peace officer, he shall notify the adult protective services worker ~~of the Tribe's Department of Social Services and tribal advocacy staff as soon as possible and make such information available to them.~~

G. A person required to receive reports pursuant to subsection A, B, or D may take or cause to be taken photographs of the abused adult or elderly and the vicinity involved. Medical examinations including radiological examinations of the involved adult or elderly may be performed. Accounts, inventories or audits of the exploited adult's or elderly's property may be performed. The person, department, agency, or court that initiates such photographs, examinations, accounts, inventories or audits shall pay the associated costs in accordance with existing statutes and rules. If any person is found to be responsible for the abuse, neglect or exploitation of an incapacitated adult or elderly in a criminal or civil action, the tribal court may order the person to make restitution as the court deems appropriate.

H. If psychiatric and/or psychological records are requested pursuant to subsection E, the custodian of the records shall notify the attending psychiatrist, who may excise from the records, before they are made available:

- (1) Personal information about individuals other

than the patient.

(2) Information regarding specific diagnosis or treatment of a psychiatric condition, if the attending psychiatrist or psychologist certifies in writing that release of the information would be detrimental to the patient's health or treatment.

I. If any portion of a psychiatric or psychological record is excised pursuant to subsection H, the tribal court, upon application of a peace officer or ~~tribal advocacy staff~~ or protective services worker, may order that the entire record or any portion of such record containing information relevant to the reported abuse or neglect be made available to the peace officer, ~~tribal advocacy staff~~ or elderly protective services worker investigating the abuse or neglect.

J. A person found guilty of violating any provision of this section may be sentenced to imprisonment for a period not to exceed 365 days or to pay a fine not to exceed \$5,000.00, or both.

SECTION 15.6 PERMITTING LIFE OR HEALTH OF AN INCAPACITATED ADULT OR ELDERLY TO BE IMPERILED BY NEGLECT; VIOLATION; CLASSIFICATION; CIVIL REMEDY; REGISTRY; DEFINITION

A. Any person who inflicts physical injury on, exploits or abuses an elderly or incapacitated person is guilty of a criminal offense, punishable by imprisonment for a period not to exceed 365 days or a fine not to exceed \$5,000 or both.

B. A person who has been employed to provide care, or who has assumed a legal duty to provide care, or who has been appointed by a court to provide care to an incapacitated adult or elderly and who causes or permits the life of the adult or elderly to be endangered, his health to be injured or to be imperiled by neglect is guilty of a criminal offense, punishable by imprisonment for a period not to exceed 365 days or a fine not to exceed \$5,000.00, or both.

C. An incapacitated adult or elderly whose life or health is being or has been endangered, injured or imperiled by neglect, abuse or exploitation may file an action in tribal court against any person or enterprise that has been employed to provide care, that has assumed a legal duty to provide care or that has been appointed by a court to provide care to such incapacitated adult or elderly, for having caused or permitted

such conduct.

D. The tribe may file an action pursuant to this section on behalf of those persons endangered, injured or imperiled to prevent, restrain, or remedy the conduct described in this section.

E. The tribal court has jurisdiction to prevent, restrain and remedy the conduct described in this section, after making provision for the rights of all innocent persons affected by such conduct and after hearing or trial, as appropriate, by issuing appropriate orders.

F. Prior to a determination of liability, the orders may include, but are not limited to, appointment of guardian, entering restraining orders or temporary injunctions or taking such other actions, including the acceptance of satisfactory performance bonds, the creation of receiverships and the appointment of qualified receivers and the enforcement of constructive trusts, as the court deems proper.

G. After a determination of liability such order may include, but are not limited to:

(1) Ordering the ~~payment~~ restitution of actual and consequential damages, as well as punitive damages, costs of suit and reasonable attorney fees, to those persons injured by the conduct described in this section.

(2) Ordering the ~~payment~~ restitution of all costs and expenses of the prosecution and investigation of the conduct described in this section, civil and criminal, incurred by the tribe as appropriate, to be paid to the general fund of the tribe.

H. A defendant convicted in any criminal proceeding is precluded from subsequently denying the essential allegations of the criminal offense of which he was convicted in any civil proceeding. For the purpose of this subsection, a conviction may result from a verdict or pleas, including a plea of no contest.

I. The initiation of civil proceedings pursuant to this

section shall be commenced within seven years after actual discovery of the cause of action.

J. The standard of proof in actions brought pursuant to this section is the preponderance of the evidence.

K. The tribal prosecutor may, upon timely application, intervene in any civil action or proceeding brought under this section if the tribal prosecutor certifies that in his opinion the action is of special public importance. Upon intervention, the tribal prosecutor may assert any available claim and is entitled to the same relief as if the tribal prosecutor had instituted a separate action.

L. In addition to the tribe's right to intervene as a party in any action under this section, the tribal prosecutor may appear as a friend of the court in any proceeding in which a claim under this section has been asserted or in which a court is interpreting Section 15.4 of this Chapter.

M. A civil action authorized by this section is remedial and not punitive and does not limit and is not limited by any other civil remedy or criminal action or any other provision of law. Civil remedies provided under this title are supplemental and not mutually exclusive.

N. The tribal prosecutor shall maintain a registry containing such public records as are available identifying the names of persons and enterprises against whom civil or criminal complaints have been filed with the court pursuant to this Chapter, the dates of the conduct set forth in the complaint, the general nature of the complaint and the disposition of the complaint, if known. This information is available to the public on written request. A person or agency that distributes information in the registry in good faith is immune from civil liability or criminal penalty based on the release of the information. Any person or enterprise desiring to do so may present a written statement in his own behalf to the custodian of the registry, and such statement becomes a part of the record for distribution in response to all inquiries concerning that person or enterprise.

O. The cause of action or the right to bring a cause of action pursuant to subsection B or C of this section shall not

be limited or affected by death of the incapacitated person.

P. In this section, "enterprise" means any corporation, partnership, association, labor union, or other legal entity, or any group of persons associated in fact although not a legal entity, which is involved with providing care to an incapacitated adult or elderly.

SECTION 15.7 TRADITIONAL MEDICINE

[PREVIOUSLY SECTION 15.2 C]

Nothing in this ~~section~~ Chapter shall be construed to mean that an adult is abused, neglected or in need of protective services for the sole reason that he relies on treatment from a recognized religious method of healing in lieu of medical treatment.

SECTION 15.8 SEVERABILITY

If any provision of this Chapter or the application thereof is held invalid, the remainder of this Code, or other applications of such provision, shall not be affected.