

TITLE 5B
LUMMI NATION CODE OF LAWS
ELDER AND VULNERABLE ADULT PROTECTION CODE

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Chapter 5B.01 General Provisions

5B.01.010 Policy and Purpose

The purpose of the Tribal Elder and Vulnerable Adult Protection Code is to protect the elders and vulnerable adults within the jurisdiction of the Lummi Nation from abuse or neglect. It is the policy of the Lummi Nation 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 Lummi Nation to protect those vulnerable adults over the age of 18 who cannot protect themselves because of mental or physical impairments. This Code shall be liberally construed to effect its policies and purposes. This Code does not modify any applicable provisions of Title 5 unless specifically provided in this Code.

5B.01.020 Definitions

For the purposes of this Title, unless otherwise provided in this Title,

(a) "Abuse or neglect" means abuse, sexual abuse, exploitation, neglect, abandonment, or self-neglect as defined in this subsection:

(1) "Abuse" means an intentional or negligent infliction of bodily injury; unreasonable confinement, chemical or physical restraints; isolation; ridicule; coercion, harassment, intimidation; verbal abuse; emotional abuse; or punishment of an elder or vulnerable person that results in physical harm, pain, or mental anguish; when the elder or vulnerable adult is unable to express physical harm, pain, or mental anguish, the abuse is presumed to cause physical harm, pain, or mental anguish if the abuse would cause physical harm, pain, or mental anguish in a person of a like age or condition with the ability to express physical harm, pain, or mental anguish;

(2) "Sexual abuse" means nonconsensual

physical contact with an elder or vulnerable adult when the person making the contact has the purpose of obtaining sexual gratification; consent is not voluntary if it is obtained by threat, coercion, intimidation, or fraud, or the elder or vulnerable adult is not competent or does not have the capacity to consent;

(3) "Exploitation" means the use of an elder or vulnerable adult's funds, property, credit, services, or other resources through improper or unauthorized means including coercion, force, deception, undue influence, violation of a fiduciary duty, or theft; exploitation includes the use of an elder's home to engage in illegal activities; any use, for another person's profit or advantage, of the elder or vulnerable adult's funds, property, credit, services, or other resources that leaves the elder or vulnerable adult unable to pay for food, clothing, shelter, health care, or a safe environment is deemed exploitation;

(4) "Neglect" means

(A) a caregiver failing to provide for the basic needs of an elder or vulnerable adult, including food, clothing, shelter, a safe environment, medication, and health care, by not supplying resources, care or supervision required to provide for these basic needs;

(B) a person interfering with delivery of necessary resources and services to an elder or vulnerable adult;

(C) a required reporter failing to report abuse or neglect of an elder or vulnerable person; or

(D) a caregiver failing to provide an elder with services or resources necessary to the elder's practice of religion, tradition or custom;

E) “Abandonment” means leaving the elder or vulnerable adult without means or ability to obtain one or more of the basic necessities of life.

F) “Self-Neglect” means the failure of an elder or vulnerable adult to obtain the necessary goods and services necessary for the basic needs of the person, including food, clothing, shelter, a safe environment, medication, and health care; “self-neglect” does not include the conscious and voluntary decision as a matter of personal choice of a mentally competent elder or vulnerable adult to live in circumstances that threaten his health or safety.

(2) “Elder” means a member of the community who is enrolled in an Indian tribe in the United States and who is 55 years of age or older;

(3) “Vulnerable adult” means a member of the community who is enrolled in an Indian tribe in the United States and who is:

(A) over the age of 18; and

(B) unable to protect himself or herself from abuse or neglect because of mental or physical disability, illness or deficiency;

(4) “Caregiver” means:

(A) a person who is required by law, contract, or tribal custom to provide services or resources to an elder or vulnerable adult; or

(B) a person who volunteers to provide services or resources to an elder or vulnerable adult; or

(C) an institution or agency which is required by law or agreement to provide services or resources to an elder or vulnerable adult

(D) a person who has undertaken authority to act for the elder or

vulnerable adult under a power of attorney, conservatorship, guardianship, representative payee, protective payee, or similar relationship;

(5) “Emergency” means a situation in which an elder or vulnerable adult is immediately at risk of death or injury or of imminent and substantial financial loss through unfair dealing;

(6) “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 person’s physical and mental health and emotional being while providing adequate protection to the person;

(7) “Guardian” means a person or organization appointed by the Court to exercise the rights and provide for basic needs of an elder or vulnerable adult; a “Limited Guardian” is a person or agency appointed by the Court to exercise the rights and provide for basic needs of an elder or vulnerable adult, but only to the extent that the elder or vulnerable adult is incapacitated from performing those functions without the help of a guardian;

(8) “Protective Payee” means a person or organization appointed by the Court to receive payment of funds, to secure the elder or vulnerable adult’s funds, property, services, or other resources, and to expend funds so that the elder or vulnerable adult’s needs for food, clothing, shelter, health care, and a safe environment can be met while the funds that are not needed to pay for those necessities are released to the elder or vulnerable adult;

(9) “Protective placement” means placement of an elder or vulnerable adult in a hospital, nursing home, residential care facility, family or community member’s home, designated tribal housing, or other suitable placement;

(10) “Protective Services” means services provided to an elder or vulnerable adult with consent or by court order that includes social services, mental and physical health

examinations, home and day care, legal assistance, guardianship, case management, and any other services consistent with this Code;

(11) “Adult Protection Worker” means a person designated by the Adult Protection Team to carry out investigations and provide services under this Title.

(12) “Adult Protection Team” means the group created under 5B.01.030 of this Title.

5B.01.030 Adult Protection Team

(a) The Adult Protection Team consists of representatives from Lummi Victims of Crime, Lummi Police Department, Lummi CARE, Lummi Health Clinic, Lummi Senior Advisory Council, Northwest Regional Council Tribal Program, Lummi Family Services, Lummi Elders Program, Lummi Housing, and other agencies that the Lummi Indian Business Council may later designate. The Law and Justice Commission shall also designate two community members, one of whom shall be an elder community member, and the other who may be of any age, to sit on the Adult Protection Team. Upon notice to team members of a meeting, a decision may be made by a majority of the members in attendance at the meeting.

(b) All members of the Adult Protection Team must maintain confidentiality as to all matters involving elders or vulnerable adults that come before the team, except as necessary to carry out its functions as set out in this Title.

(c) The Adult Protection Team may report to a licensing agency any concerns that a person regulated by that agency has failed to comply with mandatory reporting requirements under LCL 5B.02.010 or has abused or neglected an elder or vulnerable adult. The Adult Protection Team may also report its concerns to the person’s employer.

(d) The Adult Protection Team may request the Lummi Police Department to assist in the investigation of allegations made of elder abuse or neglect. The Adult Protection Team shall advise the Lummi Police Department of allegations of criminal abuse or neglect of an

elder or vulnerable adult.

(e) The Adult Protection Team shall meet periodically and shall:

(1) direct investigations of reported elder or vulnerable adult abuse;

(2) review reports from adult protection workers and determine whether a Lummi elder or vulnerable adult is in danger of harm;

(3) recommend actions to adult protection workers and to the Court to promote the care of elders or vulnerable adults;

(4) determine whether a legal action regarding protection of an elder or vulnerable adult should be initiated by the Nation in Tribal Court;

(5) determine whether an elder or vulnerable adult should be removed from the person’s home either temporarily or on a longer basis;

(6) recommend where an elder or vulnerable adult should be placed if the elder or vulnerable adult cannot continue in the person’s own home;

(7) identify available community resources, programs, and services;

(8) promote cooperation, communication, and consistency between agencies;

(9) Assist in the development and implementation of plans to promote the long-term well-being of elders or vulnerable adults and their families.

(f) The Adult Protection Team will give priority to addressing a problem of abuse or neglect through the assistance of family members and the community, and may convene meetings with designated family and community members to accomplish this purpose.

(g) The Adult Protection Team has the authority to solicit and accept grants of funds from the federal, state, tribal, and local governments and any private sources to further

any of the purposes of this Title.

(h) The Lummi Elders Program shall act as the contact for the Adult Protection Team, assist in organizing meetings, and maintain the team's records.

5B.01.040 Civil Penalties

A person who commits a civil infraction under this Code may be fined up to \$5,000. The procedures set out for traffic infractions in 6.03.010 - 6.03.100 apply as appropriate, except that a mandatory court appearance is required. Nothing in this Code precludes a criminal prosecution in addition to a civil penalty if a crime has also been committed.

5B.01.050 Criminal Penalties

(a) A caregiver, or other person who is legally responsible for the welfare of an elder or vulnerable adult, who recklessly abuses or neglects the elder or vulnerable adult is guilty of abuse or neglect of an elder or vulnerable adult and, upon conviction, shall be sentenced to imprisonment for a period not to exceed 365 days, and a fine not to exceed \$5,000. For the purposes of this section, the abuse or neglect must harm or cause an imminent risk of substantial harm to the elder's or vulnerable adult's physical or mental health, welfare, or safety.

(b) A caregiver, or other person entrusted with the care of an elder or vulnerable adult, who knowingly leaves an elder or vulnerable adult without the means or ability to obtain one or more of the basic necessities of life, including food, shelter, clothing, or medically necessary health care, is guilty of abandonment of an elder or vulnerable adult and, upon conviction, shall be sentenced to imprisonment for a period not to exceed 365 days, and a fine not to exceed \$5,000.

(c) A person who knowingly takes or uses an elder or vulnerable adult's funds, property, credit, services, or other resources through improper or unauthorized means including coercion, force, deception, undue influence, violation of a fiduciary duty, or theft is guilty of exploitation of an elder or vulnerable adult and, upon conviction, shall be sentenced to imprisonment for a period not to exceed 365

days, and a fine not to exceed \$5,000.

(d) The Court shall consider the status of the victim in sentencing a person under this Title or Title 5 for a crime committed against an elder or vulnerable adult and impose a sentence that reflects the policies and purpose of this Code, but in no case shall the jail sentence be for a period less than 30 days.

(e) Nothing in this section precludes a prosecution under Title 5 if a crime has been committed under that Title, nor limits the application of other provisions under this Title for the protection of an elder or vulnerable adult.

(f) A criminal investigation and prosecution may proceed concurrently with an investigation or court proceeding under this Code.

5B.01.060 Withhold or Withdraw Life Sustaining Treatment

This Title does not apply to actions to withhold or withdraw life-sustaining treatment in accordance with a person's health care directive that is executed in compliance with state law.

Chapter 5B.02 Reporting

5B.02.010 Duty to Report Abuse or Neglect of an Elder

(a) Any person may report abuse or neglect to the Lummi Elders Program, the state aging and disabilities services program, the elder's or vulnerable adult's medical provider, the Lummi Police Department, the Lummi Victims of Crime Office, or the Adult Protection Team. Any report made to an entity other than the Adult Protection Team shall be forwarded by that entity to the Lummi Elders Program.

(b) The following persons must immediately report suspected abuse, sexual abuse, exploitation, neglect, or self-neglect to the Lummi Elders Program:

- (1) a caregiver for the elder or vulnerable adult;

(2) an adult who is a family or household member with the elder or vulnerable adult;

(3) an elected official of the Tribe;

(4) except when such reports are precluded by medical record privacy laws of the federal government, a health care provider including doctors, nurses, mental health care providers, home health care providers, Christian Science practitioners, pharmacists; and employees of an adult nursing home, adult care home, adult day care facility, home care agency, or hospice or home health care agency;

(5) a law enforcement officer, social worker, counselor, or professional school personnel;

(6) An employee of the Lummi Indian Business Council or its agents who provides services to tribal elders or vulnerable adults; or

(7) a person or agency, including its employees, with fiduciary duties to elders or vulnerable adults, including attorneys, accountants, property managers and financial institutions.

(c) A report must include the identification of the elder or vulnerable adult; the nature of the suspected abuse, sexual abuse, exploitation, neglect, or self-neglect; the name and contact information for the person making the report; and any other helpful information.

(d) A person who makes a report under this section has civil and criminal immunity for a report made in good faith. There is a rebuttable presumption that a report of suspected elder or vulnerable adult abuse or neglect was made in good faith.

(e) A person who is required to report under this section and fails to report has committed a civil infraction.

5B.02.020 Penalties for Bad Faith Report

A person who makes a report of alleged abuse, sexual abuse, exploitation, or neglect knowing

it to be false has committed a civil infraction.

Chapter 5B.03 Procedures

5B.03.010 Investigation

(a) An adult protection worker shall initiate an investigation, as required in (b) of this section, upon receiving a report of elder or vulnerable adult abuse or neglect.

(b) The adult protection worker shall investigate the report within 48 hours and prepare a written report for the Adult Protection Team within 10 days based upon:

(1) personal interviews of the alleged victim, the immediate family and caregivers, suspected abuser, employees of agencies that may be involved, and any other person who may have pertinent information;

(2) medical records and other evidence of physical or mental condition or acts of harm;

(3) an assessment 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 investigation of abuse or neglect is not limited to the allegations made in the initial report. If the investigation reveals other concerns of abuse or neglect, those matters should be investigated as well.

(d) The written report shall include:

(1) a description of the allegations made by the initial reporter;

(2) a description of the condition of the alleged victim;

(3) the conclusions made after the investigation pursuant to (b) and (c) of this section;

(4) other information helpful in

establishing whether abuse or neglect has occurred; and

(5) a conclusion whether abuse or neglect is substantiated or unsubstantiated.

(e) If the investigation shows that there is probable cause to believe that abuse or neglect has occurred, the report shall indicate that the abuse or neglect is substantiated. The adult protection worker shall provide a copy to the Adult Protection Team, Office of Reservation Attorney, and Lummi Police Department. The Adult Protection Team shall keep substantiated reports on file for five years following the completion of the report.

(f) When investigation does not reveal probable cause to believe that abuse or neglect has occurred, the report shall indicate that the abuse or neglect is unsubstantiated. The Adult Protection Team shall keep such reports on file for two years following the completion of the report.

(g) The Adult Protection Team shall meet within seven days after receipt of a report indicating that abuse or neglect is substantiated.

5B.03.020 Privileged Communication

Except for the attorney-client privilege between an attorney and a person who is alleged to have abused or neglected an elder, no evidentiary privilege may be raised as a defense for failing to report as required in 5B.02.010, to providing information as part of an investigation under this Code, or to testifying as a witness as to abuse or neglect of an elder or vulnerable adult.

5B.03.030 Emergencies

(a) 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 person is protected, the procedures set out in this section for an emergency protection order must be followed.

(b) A petition for an emergency protection order shall include the name and interest of the petitioner, the name and location of the respondent, a summary of the emergency that necessitates court action, the attempts to secure voluntary consent, and any other facts that will assist the Court.

(c) The Court may issue an ex parte emergency protection order authorizing emergency services or protective placement upon clear and convincing evidence that:

- (1) the respondent is at risk of immediate and serious harm;
- (2) no competent person is authorized by law or court order to take necessary steps to protect the respondent; and
- (3) the respondent is incapacitated and unable to consent to necessary services or to protective placement.

(d) An emergency protection order shall:

- (1) Set out the specific emergency services to be provided to remove the emergency;
- (2) Allow protective placement only if the evidence indicates that it is the least restrictive alternative under the circumstances; and
- (3) Enjoin any third party who is alleged to have abused or neglected the person as necessary to protect the person from harm pending further hearing; an injunction against a third party cannot extend beyond ten days without further hearing.

(e) The 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.

(f) All parties, and any attorneys that have been retained by a party, are permitted to attend the preliminary hearing for a protection

order. The sufficiency of the petition will be determined on a totality of circumstances.

(g) A person who acts in reasonable good faith pursuant to this section shall be immune from criminal or civil liability.

5B.03.040 Rights of Elders, Vulnerable Adults, Their Families and Caregivers

(a) Elders or vulnerable adults may refuse to accept protective services provided the Adult Protection Team finds there is good cause to believe that the person can take care of themselves and the elder or vulnerable adult knows of the services offered.

(b) Family members or caregivers may refuse services for themselves but cannot refuse services for the elder or vulnerable adult.

(c) Elders, vulnerable adults, or caregivers may refuse to allow investigators into their home, but the investigator may obtain court permission for entry by showing good cause for entry.

(d) When a petition is filed with the Court under this Code, the petitioner must make diligent efforts to make personal service of notice to the respondent, the primary caregiver, and any children or parents. In the absence of children or parents, notice must be provided to the closest known relative of the respondent.

(e) The respondent and the primary caregiver are parties to any court proceeding under this Code. A family member may also attend a court proceeding under this Code unless the Court determines that the person does not have sufficient ties with the respondent or that the attendance of the family member is not in the respondent's best interests.

(f) The Court may exclude a person, including a party other than the respondent, from court proceedings if the Court finds that the attendance of that person is not in the respondent's best interests, but may not issue an order against that person unless the person has had an opportunity to be heard.

(g) A family member may seek to intervene as

a party upon a showing that the family member has sufficient interest in the outcome of the case and that party status is necessary to protect the rights of the family member or would be helpful in protecting the best interests of the respondent.

(h) The Court may limit a party's access to medical or other confidential records as necessary to protect the health, safety, or welfare of the respondent. A party may petition the Court for the Court to order a medical, psychological, or psychiatric evaluation at the party's own expense.

5B.03.050 Procedures for Determining Capacity, Abuse or Neglect

(a) The tribe, a caregiver, or a family member may petition the Court to determine a respondent's capacity, degree of incapacity, or whether abuse or neglect has occurred.

(b) A petition shall contain:

(1) the name and interest of the petitioner;

(2) the name, age, residence and gender of the elder;

(3) the basis for the court's jurisdiction under this Code;

(4) a plain and concise statement of facts upon which the claim is made that the respondent is in need of protection, including date(s) time(s) and location(s) at which the alleged facts occurred; and

(5) the names of any person alleged to have neglected and/or abused the elder.

(c) The Court may order that the elder be evaluated to determine capacity or degree of incapacity upon a showing that there is reason to have concern.

(d) The Court may appoint a guardian ad litem to advise the court on the best interests of the elder or vulnerable adult; or may appoint an attorney to represent the position of the elder or vulnerable adult. The guardian ad litem shall meet, at a minimum, with the elder or vulnerable adult, family members, caregivers,

and other persons or agencies that may be designated by the Court. The Court shall set standards for the appointment of a guardian ad litem that shall include requirements that the person:

- (1) be familiar with the Lummi community;
- (2) have training or experience working with elders or vulnerable adults;
- (3) have demonstrated ability to exercise good judgment and discretion;
- (4) have no prior history of violent crimes or crimes of dishonesty; and
- (5) have no personal interest in the outcome of the proceeding.

(e) The Court shall conduct a hearing on the petition to determine whether the facts support a finding that the respondent is in need of protection. All relevant evidence that is reliable and trustworthy may be admitted and relied upon by the Court to the extent of its probative value, including hearsay that is corroborated by other evidence. The parties 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.

(f) The Court shall make a decision at the conclusion of the hearing. If the allegations of the petition are not sustained by clear and convincing 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 orders to protect the elder. An oral decision of the Court must be incorporated into a written decision within seven days. At the Court's discretion, a hearing to determine the provisions of an order under 5B03.060 may be conducted immediately or at an interval following the initial hearing.

5B.03.060 Elder and Adult Protection Order

(a) If the Court determines that a respondent is incapacitated or that a respondent has been neglected or abused, the Court shall issue a protection order that provides for the least restrictive alternatives while meeting the respondent's needs. The order may include among other provisions:

(1) removal of the respondent to a safe location;

(2) appointing a representative, guardian, limited guardian, or a protective payee for the respondent; and

(3) implementing a plan to deliver protective services that provides for the respondent's needs; the Court may order the Adult Protection Team to recommend a plan.

(b) If the Court determines that a respondent has been neglected or abused by a third party, the Court may make an order against the third party if that person has had notice and an opportunity to be heard at the hearing, including the opportunity to cross-examine individuals whose testimony is presented. As the Court deems appropriate, it may issue an order for the protection of the respondent, including:

(1) enjoining the abuser from committing further abusive acts;

(2) requiring any party having a fiduciary duty to the respondent to account for the respondent's funds and or property;

(3) requiring a person with a duty to the respondent to fulfill that responsibility so that the respondent's basic needs are met; and

(4) requiring compensatory damages to be paid by an abuser or neglectful person for injuries resulting from abuser's or neglectful person's wrongful act.

(c) Before appointing a person to be a

representative, guardian, limited guardian, protective payee, or guardian ad litem for an elder or vulnerable adult, the Court shall order that the person sign a release so that the person's history may be checked by Lummi Family Services and appropriate criminal history databanks. Any such person has a fiduciary responsibility toward the elder. The Court may set terms and conditions for a representative, guardian, limited guardian, or protective payee including an oath, bond, insurance, or other provisions to protect the elder or vulnerable adult. The court shall set documentation and reporting requirements for any person given authority to receive payments of funds, to secure the elder or vulnerable adult's funds, property, services, or other resources, or to expend funds.

(d) Review of the need to continue the protective order shall occur every 6 months or upon motion for good cause shown. The review shall include an accounting for the elder or vulnerable adults funds, property, credit, services, or other resources if the Court has designated a protective payee or guardian with responsibility for safeguarding or expending those items. The Court shall also review information about the elder or vulnerable adult including the services provided, mental and physical status, living conditions, and other information that may be helpful to the Court. At the review, the Court may extend or amend the protection order if cause is shown by clear and convincing evidence.

5B.03.070 Confidentiality of Reporter and Record

(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 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 limited to the extent necessary to protect the elder or vulnerable adult.

(b) Records of investigations and court

proceedings under this Code are confidential. Only the respondent, Adult Protection Team, Lummi Victims of Crime advocates, Lummi police officers, court officials, attorneys for the parties, the prosecutor, medical staff treating the elder or vulnerable adult, and any other person whom the Court determines to have good cause may view the records.

5B.03.080 Retaliation Prohibited

A person who retaliates against a person who reports or investigates abuse or neglect has committed a civil infraction. For the purposes of this subsection, "retaliation" means intimidating, threatening to cause or causing bodily, emotional, property, or financial harm.

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