Family Abuse Prevention Act (FAPA) Benchbook

ORS 107.700–107.735

Revised and updated in May 2018 by the Oregon Judicial Department. Revised and updated in 2012 by the F*APA Benchbook Revision Workgroup* of the State Family Law Advisory Committee's Domestic Violence Subcommittee, comprised of Amber Frye, Legal Aid Services of Oregon, Rebecca Orf, Oregon Judicial Department, and Robin Selig, Oregon Law Center. The Honorable Paula J. Brownhill, the Honorable Maureen McKnight, the Honorable Lorenzo Mejia, and the SFLAC Domestic Violence Subcommittee provided additional input and review. The work of contributors to previous versions of the Benchbook is acknowledged.

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Contents

I. THE PETITION

A. Venue

A Family Abuse Prevention Act (FAPA) petition must be filed in the county where either party resides. No minimum period of residence is required.

Until 2007, FAPA forms were promulgated by statute. ORS 107.718(7) now requires that the State Court Administrator (SCA) prescribe the forms described by FAPA.

ORS 107.728.

B. Showing Required

A Petitioner is entitled to relief under FAPA when

ORS 107.710; ORS 107.718.

1. "abuse," as defined in ORS 107.705(1), has occurred

ORS 107.705(1) (definition of abuse).

   a. within the preceding 180 days (see I.E.3. (pg. 4) regarding exceptions to this requirement)

ORS 107.710(1), (6).

   b. between "family or household members," as defined in ORS 107.705(4);

ORS 107.705(4) (definition of family or household members).

2. Petitioner is in "imminent danger of further abuse" by Respondent; **and**

ORS 107.710(1); ORS 107.718(1).

3. Respondent represents a credible threat to the physical safety of Petitioner or Petitioner's child/ren.

ORS 107.718(1).
See I.C.6. (pg. 3).

C. Definitions

ORS 107.705(1).

1. *"Abuse" is the occurrence of one or more of the following acts between family or household members:*

   a. attempting to cause or intentionally, knowingly, or recklessly causing bodily injury;

   b. intentionally, knowingly, or recklessly placing another in fear of imminent bodily injury; **or**

   c. causing another to engage in involuntary sexual relations by force or threat of force.

The test is whether a reasonable person faced with such behavior would be placed in fear of imminent bodily injury. *Fielder v. Fielder*, 211 Or App 668 (2007). The "placed in fear" element is established by consideration of the totality of the circumstances, and neither overt threats nor physical violence is required. *Fielder*, 211 Or App at 694. The Court of Appeals recently interpreted "imminent" to mean "near at hand," "impending," or "menacingly near." *Holbert v. Noon*, 245 Or App 328, 334-336 (2011). Evidence outside the 180-day window may be considered. *Strother and Strother*, 130 Or App 624 (1994) (abuse found where verbal statements Respondent made during six-month window were the same as those that preceded battering during much earlier period of the relationship). *See also Lefebvre v. Lefebvre*, 165 Or App 297 (2000) (behavior that is "erratic, intrusive, volatile, and persistent" may be sufficiently fear-inducing). *Compare Roshto v. McVein*, 207 Or App 700 (2006) (inundation of e-mail and phone messages and asking institutions to send Petitioner junk mail without threat of physical harm is insufficient).

Abuse may be claimed solely or partially on the basis of verbal threats placing one in fear of imminent bodily injury. Although the Oregon appellate courts have not held that the more rigorous scrutiny applied to speech-based conduct in stalking cases applies also to FAPA proceedings, footnotes in two Court of Appeals decisions signal appellate interest in the issue. *See Holbert v. Noon*, 245 Or App 328, 338 n 6 (2011), and *Roshto v. McVein*, 207 Or App 700, 705 n 2 (2006) (comments in both cases noting that Respondent did not assert such a constitutional claim).

ORS 107.705(4).

2. *"Family or Household Members" include*
   a. spouses;
   b. former spouses;
   c. adult persons related by blood, marriage, or adoption;
   d. persons who are cohabiting or who have cohabited with each other;

The statute does not define "cohabitation." A test of common residence and sexual intimacy should be assumed based on legislative history ("roommates" were not intended to be covered by FAPA) and related case law. In a recent juvenile court case, the Court of Appeals held that the definition of "persons cohabiting with each other," as used in ORS 135.230(3), (4), "refers to persons living in the same residence in a relationship akin to that of spouses." *State ex rel Juv. Dept. v. C. M. C.*, 243 Or App 335, 339 (2011) (interpreting the definition of "persons cohabiting with each other" in the criminal code for purposes of applying OEC 803(26), the domestic violence exception to the hearsay rule). The court also cited its holding in *Edwards and Edwards*, 73 Or App 272 (1985), that focused on a common domicile, shared living expenses, and a sexual relationship when interpreting the term "cohabitation" in a spousal support modification case.

   e. persons who have been involved in a sexually intimate relationship within two years immediately preceding the filing of the petition; **and**
   f. unmarried parents of a child.

See discussion regarding Paternity at III.D.5. (pg. 14).

ORS 107.705(2).

3. *"Child" means an unmarried person under 18 years of age.*

ORS 107.705(5) - (8).

4. *The terms "interfere," "intimidate," "menace," and "molest" are defined in FAPA. See definitions at III.A.2. (pg. 6).*

ORS 107.718(5).

The totality of the evidence heard is relevant to determining the element of "imminent danger of further abuse." Abuse outside the 180-day window may be considered. *Lefebvre v. Lefebvre*, 150 Or App 297 (2000) (previous obsession with killing employer is relevant to whether Petitioner is currently in immediate danger of further abuse). An overt threat of physical violence is not required. *Id.* at 303. *See Maffey and Muchka*, 244 Or App 308 (2011) (order upheld based on the past pattern of abusive behavior, now escalating, and Respondent's violation of the order before the contested hearing); *Hubbell v. Sanders*, 245 Or App 321 (2011) (Respondent chasing Petitioner in his car, persistent trespasses on her property, and a threat to her friend even after issuance of the order held sufficient). *Compare Baker and Baker*, 216 Or App 205 (2007) (lack of evidence of Petitioner's current fear of Respondent or his concern about a repeat of events fatal to the "imminency" element).

Two recent cases clarify that subjective assertions of fear alone do not establish the element of "imminent danger of further abuse." *C. J. P. v. Lempea*, 251 Or App 656 (2012); *Hubbell*, 245 Or App at 330.

5. "Imminent Danger of Further Abuse"

This requirement is met by a showing that may include, but is not limited to, recent threats of additional bodily harm.

6. "Credible Threat"

This element of a FAPA claim is very similar to the "imminent danger" prong. Evidence for one often satisfies the other. *See, e.g.*, *Hubbell v. Sanders*, 245 Or App 321, 327 (2011). The "credible threat" language was added to FAPA to harmonize Oregon law with federal law imposing criminal liability on a Respondent who possesses or uses firearms or ammunition while subject to qualifying protective order. 18 USC 922(g)(8). *See* III.B.1.d.1 (pg. 10).

D. When Minors May Petition

ORS 107.726.

1. A person under the age of 18 may petition for a FAPA restraining order if

a. Respondent is 18 years of age or older **and**

b. Petitioner is

1) the spouse of Respondent,

2) the former spouse of Respondent, **or**

3) a person who has been in a sexually intimate relationship with Respondent.

Note that a two-year limitation does not exist for minors who have been in a sexually intimate relationship with Respondent, as it does for adult Petitioners.

2. *The court will need to appoint a guardian ad litem if the minor is unemancipated.*

ORS 107.710(1), (6).

E. Time Frames

The petition must allege abuse in two time frames:

1. *that abuse occurred within 180 days preceding the filing of the FAPA petition (i.e., past abuse)* ***and***
2. *that Petitioner is in imminent danger of further abuse from Respondent (i.e., prospective danger).*
3. *ORS 107.710(6) excludes the following for purposes of computing the 180-day period:*
   a. any time during which Respondent is incarcerated **or**
   b. any time during which Respondent has a principal residence more than 100 miles from the principal residence of Petitioner.

ORS 107.710(1).

The location (*i.e.*, the state) of the abuse can be significant for purposes of determining whether sufficient minimum contacts exist to establish personal jurisdiction. However, for purposes of subject matter jurisdiction, the abuse need not have occurred in Oregon.

F. Specific Allegations Required

The petition must specifically allege that

1. *the petitioner is in imminent danger of abuse from the respondent,*
2. *the petitioner has been the victim of abuse committed by the respondent within the 180 days preceding the filing of the petition,* ***and***
3. *the petition must particularly describe the nature of the abuse and the dates it occurred.*

II. UNCONTESTED, IMMEDIATE (EX PARTE) HEARING

A. Ex Parte Hearing Required:

State ex rel Marshall v. Hargreaves, 302 Or 1, 5 (1986) (*ex parte* hearing required when FAPA petition filed).

ORS 107.718(1).

As the statute specifically authorizes *ex parte* appearances, application without notice to the adverse party – even with a parallel domestic relations proceeding pending – is allowable. *See* JR 2-102(B); ORCP 3.5(b).

1. in person or by telephone,

Note: ORS 107.718(1) states that the "circuit court *shall* hold an ex parte hearing in person or by telephone" (emphasis added). Most courts require in-person appearances at *ex parte* hearings and allow telephone hearings when appropriate. Some judges, however, grant or deny orders by reviewing the petition and proposed order without in-person or telephone contact with Petitioner. This practice may be efficient in some situations but has no grounding in the statute and deprives the judge of the opportunity to observe demeanor and ask questions.

2. **on the day the petition is filed** or the next judicial day.

ORS 107.710(2).

B. Standard of Proof is Preponderance of the Evidence

C. Required Showing

See I.B. (pg. 1) and III.A.1. (pg. 5).

III. RELIEF

A. Mandatory (Not Discretionary) Relief

ORS 107.718(1).

At the *ex parte* hearing, Petitioner is entitled to certain relief as long as he/she requests it and makes the required showing. At a contested hearing or exceptional circumstances hearing, however, the court has the authority to cancel or change any order issued *ex parte*. *See* ORS 107.716(3) and ORS 107.718(10).

ORS 107.710; ORS 107.718(1).

1. Required Showing

The court **must** order the relief described in subsections 2 through 7 below if requested by Petitioner and if the following showing is met:

a. Petitioner with an eligible relationship **requests** it **and**

b. the court finds at the hearing that

   1) Respondent abused Petitioner within the preceding 180 days (see I.E.3. (pg. 4) regarding exceptions to this requirement),

   2) Petitioner is in imminent danger of further abuse by Respondent, **and**

   3) Respondent represents a credible threat to the physical safety of Petitioner or Petitioner's child/ren.

2. Restraint from Abuse

ORS 107.718(1)(e), (f).

Restrain Respondent from doing the following to Petitioner and any child/ren in Petitioner's custody:

ORS 107.705(6).

a. **Intimidating**, defined as “act[ing] in a manner that would reasonably be expected to threaten a person in Petitioner’s situation, thereby compelling or deterring conduct on the part of the person.”

ORS 107.705(8).

b. **Molesting**, defined as “act[ing], with hostile intent or injurious effect, in a manner that would reasonably be expected to annoy, disturb or persecute a person in Petitioner’s position.”

ORS 107.705(5).

c. **Interfering** with, defined as “interpos[ing] in a manner that would reasonably be expected to hinder or impede a person in Petioner’s situation.”

ORS 107.705(7).

d. **Menacing**, defined as “act[ing] in a manner that would reasonably be expected to threaten a person in Petitioner’s situation.”

e. **Attempting** to intimidate, molest, interfere with, or menace.

ORS 107.716(2); ORS 107.718(1)(a), (2).

3. Temporary Custody and Parenting Time

NOTE: 2005 legislative changes provide a narrow exception to the previous mandate that the court award custody as requested by Petitioner upon the required showing. Now, if the court determines that a custody order should not be made at the *ex parte* hearing due to “exceptional circumstances,” a special hearing must be scheduled. The purpose of the “exceptional circumstances” hearing is to consider additional evidence regarding custody and parenting time and to provide Respondent with an opportunity to contest the restraining order. In the interim, the court has the authority to make appropriate orders regarding the residence of the child/ren and each party’s contact with the child/ren.

Award temporary custody to Petitioner, subject to reasonable parenting time unless parenting time is not in the best interests of the child/ren; or award temporary custody to Respondent, if requested by Petitioner, **except**

If the court determines that “exceptional circumstances” exist that affect the custody of the child/ren, the court

a. shall order the parties to appear at an “exceptional circumstances” hearing to determine custody and other contested issues **and**

Note: Although ORS 107.755(1)(c) requires that mediation be provided in any case in which child custody, parenting time, and visitation are in dispute, a specific statutory exception applies to FAPA cases. "Neither the existence of nor the provisions of a restraining order issued under ORS 107.718 may be mediated." ORS 107.755(1)(d)(B). Neither mediation nor mediation orientation can be encouraged or

b. may make interim orders regarding the child/ren’s residence and the parties’ contact with the child/ren that are appropriate to provide for the child/ren’s welfare and the safety of the parties pending the “exceptional circumstances” hearing.

provided in proceedings under ORS 107.700 to 107.732. ORS 107.755(2). *See also* ORS 36.185.

See also III.D.1. (pg. 12) and 2. (pg. 13).

ORS 107.718(1)(b).

4. Ouster

Require Respondent to move from Petitioner's residence if

a. the residence is solely in Petitioner's name,

b. the parties jointly own or rent the residence, **or**

c. the parties are married to each other.

ORS 107.716(7).

The order may not affect title to any real property.

ORS 107.718(1)(c).

A typical order might use a 150-foot limitation.

If the court requires Respondent to move from Petitioner's residence, the order can also restrain Respondent from entering or attempting to enter a reasonable area surrounding Petitioner's current or subsequent residence.

ORS 107.718(1)(g), (4).

A typical order might use a 150-foot "safety zone" surrounding listed premises or addresses, such as a parking lot that Petitioner uses.

When Petitioner requests restraint from a place where a party's faith is practiced, drafting the order as narrowly as possible, after inquiring into the availability and timing of services and any safety issues, is desirable. One option might be to reduce the "surrounding area" radius solely on such premises if both parties practice their faith at the same location and the timing of services is problematic.

5. Restraint From Entry Onto Specified Premises

Restrain Respondent from entering onto any premises and a reasonable surrounding area when the court considers such restraint necessary to prevent abuse. Such a surrounding area must be specifically described.

a. Specified premises may include

1) Petitioner's business or place of employment,

2) Petitioner's school,

3) a close relative's home that petitioner frequently visits.

A similar adjustment (perhaps 50 feet) might be practical for a child's school events if Respondent can safely attend.

b. The SCA forms anticipate that when children are involved, the following premises might be addressed:

1) the child/ren's school,

2) the child/ren's day care provider.

ORS107.718(1)(i).

The statute mentions bans on contact that is in person, by telephone, or by mail. The SCA restraining order to prevent abuse, however, includes options that forbid Respondent from having contact with Petitioner by e-mail or other electronic transmission, by cell phone, or by text message. In addition,

6. "No Contact" by Telephone or Mail

Specify what contact, if any, Respondent is banned from having with Petitioner. The court must order, if requested,

a. no contact in person,

options include prohibitions against Respondent having in-person and other specified contact with Petitioner through third parties. Such expansion of prohibited contact is authorized by the "other relief" clause at ORS 107.718(1)(h). *See* III.B.1. (pg. 8).

The SCA restraining order form states that nothing in the order prevents Respondent from appearing at or participating in a court or administrative hearing as a party or witness in a case involving Petitioner. The reference to administrative hearings was added to address the child support hearings handled by the Oregon Child Support Program. Respondent must stay a certain distance of feet from Petitioner as determined by the order (blank space provided in form) and is required to abide by any protective terms ordered in the other case.

b. no contact by telephone, **and**

c. no contact by mail.

Broader bans on contact are discretionary and would be authorized under ORS 107.718(1)(h) ("other relief the court considers necessary"). *See* III.B.1. (pg. 8). Banning written communication not otherwise addressed in the form order might be appropriate under this latter section.

ORS 107.718(1)(d).

7. Police "Standby" for Essential Personal Property

Order that a peace officer accompany the party moving from the residence when that party removes essential personal items (or property of the child/ren) from the residence.

ORS 107.718(1)(h).

a. Such items include clothing, diapers, medications, social security cards, birth certificates, tools of the trade, and other identification.

b. The court's only other authority to divide property between the parties under

c. FAPA is the section authorizing "other relief that the court considers necessary" to provide for the safety and welfare of Petitioner or any child/ren in Petitioner's custody. See III.B.1.b. (pg. 9).

ORS 107.719(1), (2).

d. The "standby" time is not required to exceed 20 minutes and usually does not in most jurisdictions. A police "standby" is required to be available on only one occasion.

ORS 107.718(1)(h).

B. Discretionary Relief

1. The court may order any relief it considers necessary to provide for the safety and welfare of Petitioner and any child/ren in Petitioner's custody.

SCA restraining order forms provide options that prohibit broader categories of contact by the Respondent directly and through third parties.

a. Expanded "No Contact" Provisions

As discussed in III.A.6. (pg. 7), a ban on *all* contact or all written contact might be appropriate in addition to the prohibition on in-person, telephonic, and mailed communication that is mandatory upon Petitioner's request. Similarly, no "third party" contact by Respondent with Petitioner might be appropriate. This would prohibit Respondent from communicating with Petitioner through Petitioner's friends, family, or co- workers.

Consider property division beyond essential items cautiously. If tensions surrounding control (or destruction) of personal property are precipitating contact or otherwise contributing substantially to safety concerns, such a temporary ruling may be appropriate. Otherwise, the issue is better left to a dissolution case or other court filing.

In addition, due process concerns limit the extent such relief should be ordered on *ex parte* application, and the issue, if appropriate at all, would be more properly addressed at a contested hearing. *See* IV. (pg. 19).

b. Property Division

While the statute specifically limits the property that a party may remove while a police officer stands by to "essential personal effects," more comprehensive property division arguably could be ordered by the court under the "other relief necessary" provision – assuming a nexus between such relief and the safety and welfare of Petitioner or any child/ren in Petitioner's custody.

ORS 107.718(1)(h).

While child support is not excluded by this language, an order of ongoing support is problematic, given the necessity for and time involved in applying the support guidelines, the lack of money award summaries or other Oregon Rules of Civil Procedure (ORCP)-compliant language in the statutory forms, and the temporary nature of FAPA relief, especially as it might intersect with the operation of ongoing support orders. Better practice may be for limited, one-time payments and referral of Petitioners to state-provided child support services (www.oregonchildsupport.gov) or government cash programs such as TA/DVS (Temporary Assistance for Domestic Violence Survivors).

c. Emergency Monetary Assistance

The statute authorizing "any relief the court considers necessary" specifically includes, but is not limited to, "emergency monetary assistance." Examples of such assistance might include money to change locks or to repair damaged doors or windows, to obtain an unlisted telephone number, or to move to a new residence. Responsibility for certain debts might also be addressed.

No SCA FAPA form is available to reduce an order of emergency monetary assistance to a money judgment with a separate money award. Arguably, the court has authority under the "other relief" section at ORS 107.718(1)(h) to enter an enforceable judgment if requested to do so and if provided with an appropriate document. Presumably, ORS 18.038, regarding the form of judgments, and ORS 18.042, regarding money awards to establish judgment liens, apply.

Due process concerns arguably support an effective date for an award of emergency monetary assistance that coincides or post-dates the opportunity for hearing by Respondent. For this reason, the SCA Restraining Order to Prevent Abuse provides for 45 days after service.

d. Firearm or Other Weapon Dispossession

For a detailed discussion of firearms prohibitions in domestic violence cases, *see* "Firearms Prohibitions in Domestic Violence Cases: A Guide for Oregon Courts"

Testimony and legislator comments at the legislative committee that considered and approved revisions to the statute in 1995 support reliance on the "other relief" section as authority for restrictions regarding Respondent's access to firearms and ammunition.

Current FAPA forms promulgated by the SCA allow Petitioners to request specific orders relating to dispossession of firearms and ammunition. *See* Restraining Order to Prevent Abuse.

1) The FAPA statute contains no specific reference to weapons. The "other relief" provision of ORS 107.718(1)(h), however, gives the court the discretion to restrict Respondent's access to or possession of firearms when such relief is necessary to protect the safety and welfare of Petitioner and any child/ren in Petitioner's custody.

   Violation of such a dispossession order would be punishable as contempt of court. *See* VIII. (pg. 32).

18 USC § 922(d)(8), (g)(8).

2) Federal law (the Violence Against Women Act (VAWA)) prohibits certain individuals from possessing or purchasing firearms or ammunition while a protective order is in effect. Violation of this statute exposes Respondent to federal criminal liability.

18 USC § 921(a)(33); 18 USC § 922(d)(8), (g)(8).

Oregon's FAPA orders protect more classes of Petitioners than those protected under the federal dispossession law. People who are sexually intimate who have not cohabited, for example, qualify for FAPA relief, but Respondents are not subject to the federal gun ban.

   i. The *relationships* that subject a Respondent to the federal law are: the person protected by the order is a spouse or former spouse of Respondent, the parent of Respondent's child/ren, a person who does or did cohabit with Respondent, or Respondent's child/ren or child/ren of an intimate partner of Respondent.

For a more detailed analysis of the elements of 18 USC § 922(g)(8), *see* Oregon Bench Sheet - Qualifying Order of Protection/Restraint.

18 USC § 922(g)(8)(A).

Oregon's *ex parte* FAPA orders probably do not qualify under the federal statute. Only those orders issued after a hearing of which Respondent received notice and had participatory rights (*e.g.*, a 5- or 21-day contest in Oregon) come under the federal gun law.

   ii. The types of orders that subject Respondent to federal liability are those that meet all of the following conditions:

      (A) issued after a hearing about which Respondent had actual notice and an opportunity to participate in the hearing;

18 USC § 922(g)(8)(B), (C)(i).

The FAPA statute requires, and the SCA forms contain, the "credible threat" finding. The federal statute allows an alternative basis to this finding (an

explicit prohibition regarding physical force), but Oregon did not codify this language, found at 18 USC § 922(g)(8)(C)(ii). It is, however, included in the federal firearms findings (Brady) in the SCA Order After Hearing.

(B) restrain Respondent from harassing, stalking, or threatening Petitioner or Petitioner or Respondent's child/ren **or** engaging in other conduct that places Petitioner in fear of bodily injury to Petitioner or Petitioner or Respondent's child/ren; **and**

(C) include a finding that Respondent represents a credible threat to the physical safety of Petitioner or Petitioner's or Respondent's child/ren.

Federal firearms findings are included on page 2 of the Order After Hearing that is used for 5- and 21-day, exceptional circumstances, modification, and renewal hearings.

iii. If the order meets all of the above requirements, judges should complete the Federal Firearms Findings (Brady) in the Order After Hearing. Court staff then should enter this information in OJIN.

ORS 166.291(1)(m); ORS 166.293(3)(a)

3) Revocation and Denial of Concealed Weapon Permits

Concealed weapon permits are issued and revoked by county sheriffs. Some sheriffs' offices have a process in place to revoke a permit when a restraining order is issued. Issuance of a restraining order against a permit holder is a ground for denial of an application for a permit, as well as revocation of an already-issued permit.

In 2011, the legislature amended FAPA to allow for the protection of pets, including service or therapy animals. ORS 107.718(1)(h)(B).

Orders concerning pets should be set out in the "Other Orders" section on page 5 of the Restraining Order to Prevent Abuse.

2. Protection of Pets

The court may order other relief it considers necessary to prevent the neglect and protect the safety of any service or therapy animal or any animal kept for personal protection or companionship. However, the court cannot make orders regarding animals kept for business, commercial, agricultural, or economic purposes.

See ORS 107.716(6).

18 USC § 2265.

C. Mutual Restraining Orders Only if Parties Separately Petition

In 1995, state legislation prohibited "mutual" restraining orders, **except** when each party files a petition and independently meets the statutory criteria. This requirement is consistent with federal VAWA law compelling full faith and credit only in such circumstance.

D. Custody Issues (See also IV.A.12.b. (pg. 24) and c. (pg. 25))

ORS 107.718(1)(a), (2).

1. Temporary Custody

a. The court **must** make a temporary custody award, except as discussed in paragraph 2, below, at the ex parte hearing if

The subject-matter jurisdiction requirements of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) apply. Even if Oregon is not the home state or does not have modification jurisdiction, it very probably can exercise temporary emergency jurisdiction because of the child/ren's presence here and the need to prevent abuse to Petitioner. ORS 109.751. Communication with a judge in another state may be required.

1) Petitioner has met the statutory criteria **and**

2) Petitioner requests it.

After considering Petitioner's safety needs, a FAPA order may be drafted narrowly to permit Respondent to be at restricted locations at specified times solely to exercise parenting time rights.

b. The court may grant custody to Petitioner or Respondent, whichever Petitioner requests.

c. The child/ren subject to the custody award must be the child/ren of both of the parties.

Reminder: Despite the requirement of ORS 107.755(1)(c) that mediation be provided in any case in which child custody, parenting time, and visitation are in dispute, neither mediation nor mediation orientation can be encouraged or provided in proceedings under ORS 107.700 to 107.732. *See* ORS 107.755(1)(d)(B) and (2).

d. The "immediate danger" temporary custody and mediation procedures in pre- and post-judgment dissolution of marriage proceedings do not apply to FAPA cases.

ORS 107.716(2); ORS 107.718(2).

See discussion of exceptional circumstances language at III.A.2. (pg. 6).

When an exceptional circumstances hearing is scheduled, Respondent is not entitled to request a contested hearing pursuant to ORS 107.718(10); *i.e.*, an additional hearing. If Respondent contests the issuance or other provisions of the restraining order, Respondent must raise these at the "exceptional circumstances" hearing. *See* ORS 107.716(2)(b) and IV.A.1. (pg. 20).

EXAMPLES of "Exceptional Circumstances" may include the following:

1. The petition reflects that the 4-year-old child of the parties has never resided with Petitioner. In response to the court's inquiries, Petitioner acknowledges seeing the child only rarely and for short periods of time.

2. The petition shows that the parties' two school-age children have lived with Respondent in an Oregon community that is 125 miles from the home of Petitioner since the beginning of the school year. School will be out in 6 weeks.

3. The petition alleges that the parties' child is six weeks old. Upon being questioned by the court, Petitioner states that Respondent is breast-feeding the baby.

4. Petitioner appears to be impaired by drugs at the *ex parte* hearing and acknowledges a problem with substance abuse. The children have lived with Respondent for the last 6 months.

ORS 107.722(1).

ORS 107.722(2).

ORS 107.722(2)(a) permits modification only if necessary to protect the safety and welfare of the child/ren or Petitioner.

2. Exceptional Circumstances Affecting the Custody of a Child

The court must make a temporary custody order at the *ex parte* hearing unless the court determines that exceptional circumstances exist that affect the custody of the child/ren.

a. If exceptional circumstances exist, the court must order the parties to appear and provide additional evidence regarding temporary custody and to resolve other contested issues.

b. Pending the hearing, the court may make any orders regarding the child/ren's residence and the parties' contact with the child/ren that are appropriate to provide for the child/ren's welfare and the safety of the parties.

c. The court must schedule the hearing within 14 days of issuance of the restraining order and issue a notice of the hearing at the same time the restraining order is issued.

3. Effect of Subsequent Domestic Relations Judgments and Orders on Preexisting FAPA Orders (See V. (pg. 29))

4. Modification of Preexisting Domestic Relations Orders or Judgments

a. The FAPA court may modify the custody or parenting time provisions of a preexisting order or judgment under ORS 107.095(1)(b), 107.105, 107.135, or 109.155, or similar order or judgment from another jurisdiction, if necessary to protect the safety and welfare of the child/ren.

ORS 107.722(2)(b).

b. If the court modifies the custody provisions of a preexisting order or judgment, the FAPA order must specify a period of time the court considers adequate under the circumstances during which Petitioner may obtain a modification of the preexisting order or judgment. Upon expiration of that period of time, if no modification has been obtained, the custody provisions of the FAPA order expire, and the provisions of the preexisting order or judgment become effective immediately.

c. If the court modifies only parenting time provisions of a preexisting order, the statute does not require that Petitioner seek modification of the preexisting parenting time order or judgment.

ORS 107.722(2)(c) makes clear that the UCCJEA applies if the court is modifying an order or judgment from another jurisdiction.

ORS 109.751(4).

In order to be compliant with the UCCJEA, a court of this state must communicate with a court of another state with custody jurisdiction upon being notified that the court has made a custody determination.

d. If the court modifies a preexisting order or judgment of another jurisdiction, ORS 109.701 to 109.834 (the UCCJEA) apply.

5. Paternity

ORS 109.094.

A male's rights as a legal father are contingent upon the establishment of his paternity.

If paternity is not established, but both parties are willing to stipulate to that finding in the FAPA case, statutory filiation procedures must still be met, including a verified writing. ORS 109.155(1). Given the temporary effectiveness of a FAPA "order," paternity establishment independent of the FAPA filing is desirable. Paternity can be resolved by voluntary acknowledgment (*i.e.*, voluntary acknowledgement of paternity form referred to in ORS 109.070(1)(e)) or referring the parties to the state child support program.

a. If paternity has not been established, the court has no authority to order custody or parenting time to the putative father.

b. The court may note on the restraining order that the reason no custody or parenting time order is being entered is because paternity has not been established.

6. Parenting Time (See also IV.A.12.b. (pg. 24) and c. (pg. 25))

ORS 107.718(1)(a).

A Safety-Focused Parenting Plan Guide is available on the Oregon Judicial Department website.

a. Once a custody award is made, the court **must** set a parenting time schedule **unless** the court finds that parenting time is not in the best interests of the child/ren.

See ORS 107.137(1)(d) and (2).

1) The fact that domestic violence has occurred in the family may go to the issue of the best interests of the child/ren.
2) The court is not limited to a "traditional" parenting time schedule.

ORS 107.718(6).

The Restraining Order to Prevent Abuse at paragraph 16 contains several options for addressing the issue of parenting time.

b. If the court awards parenting time to a parent who committed abuse, the court **must** include adequate provisions in its order to protect and provide for the safety of Petitioner and the child/ren.

After considering Petitioner's safety needs, a FAPA order may be drafted narrowly to permit Respondent to be at restricted locations at specified times solely to exercise parenting time rights.

The protections under ORS 107.718(6) include, but are not limited to, requiring one or more of the following:

1) exchange of child/ren taking place at a protected location;
2) parenting time being supervised;
3) perpetrator of the abuse attending and completing a program of intervention for perpetrators of domestic violence or other counseling program designated by the court;
4) perpetrator of abuse not possessing or consuming alcohol or controlled substances during parenting time and for 24 hours before;
5) the perpetrator of abuse paying the costs of supervision of parenting time and any other program designated by the court as a condition of parenting time; **and**
6) no overnight parenting time occurring.

ORS 107.732(1). Specific addresses identified by Petitioner where the child/ren might be found provide the particularity that supports the reasonableness of the seizure. *Waters vs. Williams, Huston, Treat, and Multnomah County*, No. 98-241-HA (U.S. District Court Opinion dated May 18, 1999) (unreported) (discussion of 4th Amendment issues in context of execution of writ of assistance in family law matter).

7. Recovery of Child/ren

On request of a party awarded custody, the court must include a provision ordering a peace officer to assist that parent in obtaining physical custody of the child/ren of the parties.

ORS 109.701 - 109.990.

8. Interstate Custody Issues

a. The UCCJEA applies to parenting time and custody orders in FAPA proceedings.

ORS 109.751.

b. When the child/ren may not be subject to Oregon court jurisdiction under the UCCJEA, the temporary emergency provisions may apply. This requirement may implicate a mandatory communication with a judge in another state.

E. Other Provisions

ORS 107.720(1)(a).

1. Security Amount

The order must specify the amount of security to be posted after arrest for violation of the restraining order. The SCA form specifies a $5,000 amount, but the court may impose a higher or lower sum. The order cannot be entered into the Law Enforcement Data System (LEDS) without a security amount.

ORS 107.718(3).

2. Duration of Relief

The order must provide that the court grant the relief until the sooner of

a. one year **or**

See V. (pg. 29).

b. the date the order is withdrawn, amended, or superseded under ORS 107.722.

ORS 107.718(7), (10)(a).

3. Notice

SCA form is Notice to Respondent/Request for Hearing.

A hearing request form must be served on Respondent with the order. The SCA form includes a notice of rights and procedures for this purpose. (*See* IV. (pg. 19)).

ORS 107.718(8)(a).

4. Copies for Petitioner

The clerk must provide Petitioner, at no cost, the number of certified copies of the petition and order necessary to effect service on Respondent. If Petitioner requests an exemplified copy (usually for registration in another state), up to two such copies must be provided without charge.

ORS107.718(12).

5. Service on Petitioner

Service of process or other legal documents on Petitioner is not a violation of a FAPA order if service is accomplished as provided in ORCP 7 or 9.

ORS 107.718(8)(c).

6. Fees

No filing fee, service fee, or hearing fee can be charged if the only relief ordered is that authorized by ORS 107.700 to 107.735.

F. Termination

ORS 107.720(2)(a).

It is common practice to refer to dismissing rather than terminating a restraining order. This terminology probably arises from the statutory reference in ORS 107.720(2)(b) to Petitioner's motion to dismiss.

The variation in judicial practice is the result of attempts to balance safety concerns with respect for victim-litigant autonomy. Termination of an order may enhance a party's safety in some circumstances. Practices to consider in this scenario – among the most challenging decisions in FAPA cases – include the following:

- maximum privacy for the discussion, to the extent recording and open-court procedures allow;
- exploration of intimidation and coercion issues;
- offering the opportunity to speak with a victim advocate;
- encouragement of safety planning and referrals to community resources;
- notice of alternatives to termination that might more effectively address a Petitioner's safety needs, such as simply liberalizing existing restrictions; and
- encouragement to return if Petitioner's safety needs change.

1. By Written Order

The court may terminate a restraining order at any time, but only by written order.

FAPA provides no specific standard or guidance for terminating restraining orders, and court practices vary considerably.

ORS 107.720(2)(b).

2. Notarized Signature Required

If Petitioner moves for dismissal of the restraining order, the request must include Petitioner's notarized signature.

G. Renewals

ORS 107.725.

Renewal petitions should be filed before the existing order expires. The statute refers to a "renewal" procedure rather than a "revival."

1. Renew an Order by Petitioner

The court may renew an order if the court finds that a person in Petitioner's situation would reasonably fear further acts of abuse by Respondent. The court may renew the order on the basis of a sworn *ex parte* petition.

a. Further Abuse Not Required

No further acts of abuse are required for the restraining order to be renewed.

b. Not Limited in Number

The statute does not limit the number of times a restraining order can be renewed.

ORS 107.725(1)(b), (3).

As a result of 2011 legislation, the now-18-year-old need not show abuse within 180 days or that he or she is in imminent danger of further abuse, only that he or she reasonably fears further acts of abuse if the order is not renewed.

2. Renew an Order by Formerly Protected Child, Now 18

A former minor child who was in the custody of the original Petitioner, who was protected under the restraining order and who is now 18 years old, may ask the court to renew the provisions of the restraining order protecting him or her for another year.

See OJD Website- Renewing a Restraining Order Involving Former Protected Child.

a. The court can issue the order regardless of whether the original Petitioner agrees to or seeks renewal of the order.

b. If the original Petitioner does not agree to or ask for renewal of the order concurrently with the request of the now-18-year-old, the court may exclude Petitioner as a protected person in the renewed order.

c. The now-18-year-old person is not required to file a petition under ORS 107.710.

ORS 107.725(4).

3. Hearing

a. ORS 107.716(5) and 107.718(8) to (10) apply when a renewal order is granted, (*See* IV.A. (pg. 20)) (Respondent may request a hearing within 30 days of being served with a renewal order), **except** that the court may hear no issue other than the basis for renewal unless requested in the hearing form and agreed to by Petitioner.

b. The court shall hold a hearing within 21 days of Respondent's request.

See IV.B. (pg. 27) for discussion of modification of FAPA orders.

H. Amendments

It is not clear if amendments (other than for clerical mistakes) are allowed before service or the response time has expired. ORS 107.730 addresses only the court's modification authority after the response time has lapsed. Adding an attorney fee claim before this deadline seems to be well-grounded, however, since it does not affect the *ex parte* order already issued. Also, courts that allow changes to the order prior to service or during the response period usually limit

them to less restrictive terms or situations of changed circumstance requiring additional protections. These courts provide Respondent with an opportunity to be heard if the *ex parte* order already have been served.

IV. THE CONTESTED HEARING PROCESS

Six types of contested hearings may be held after the court issues a FAPA restraining order:

ORS 107.716(2); ORS 107.718(2).

- The court may set an "exceptional circumstances" hearing to determine temporary custody and resolve other contested issues when there are exceptional circumstances affecting child custody.

ORS 107.716(1); ORS 107.718(10)(a).

- Respondent may request a hearing within 30 days of being served the order to object to the order or to its provisions.

ORS 107.730(1)(a).

- Petitioner or Respondent may request a hearing on an existing order after the 30 day response time has lapsed to modify child custody and/or parenting time, restrictions from certain locations (including ouster from the residence), or restrictions on contact with Petitioner.

Depending on local practice, courts either set a show cause hearing or require a written response from the opposing party before a hearing is set. The SCA forms allow for either practice.

- Thirty days after the restraining order is served on Respondent, Respondent no longer can request a hearing to object to the order itself. After that time period has passed, however, Respondent or Petitioner can ask the court to modify the order's terms regarding child custody and/or parenting time, restrictions from certain locations (including ouster from the residence), or restrictions on contact with Petitioner for good cause shown. The other party may contest this request at a show cause hearing.

ORS 107.730(1)(b). There is no explicit authority giving Respondent the right to a hearing on Petitioner's *ex parte* motion to make the order less restrictive. ORS 107.730(2) indicates that a notice of hearing must be included in service of modifications, and this section does not distinguish between *ex parte* modification and modification for good cause shown. If Respondent objects to the motion to make the order less restrictive, due process and fairness principles argue in favor of granting a hearing.

Since Petitioner's motion should benefit Respondent, objection is unlikely.

The SCA Notice to Respondent/Request for Hearing - Less Restrictive Order is served on Respondent along with Petitioner's Ex Parte's Motion for Less Restrictive Terms & Declaration in Support.

- Respondent may request a hearing objecting to Petitioner's ex parte motion to remove terms in the order or make the order less restrictive.

- Respondent may request a hearing to challenge the basis for renewing an order. *See* III.G. (pg. 17).

A. Hearings on Ex Parte Orders

1. *Exceptional Circumstances Hearings*

ORS 107.716(2)(a); ORS 107.718(2).
See III.A.3. (pg. 6).

An exceptional circumstances hearing should only be set if the court does not award custody as requested by Petitioner.

a. If there are exceptional circumstances that affect child custody, the court must hold a hearing to determine temporary custody. The hearing must occur within **14** days after issuance of the FAPA order. The court must set the exceptional circumstances hearing when it issues the restraining order and must contemporaneously issue a notice of hearing to the parties.

ORS 107.716(1).

Respondents contesting custody provisions in FAPA orders are entitled to a hearing within five days of their request, even if there is a later scheduled exceptional circumstances hearing. Some courts are avoiding the work of rescheduling by setting all exceptional circumstance hearings within five days of issuing the order.

b. Even when an exceptional circumstances hearing is set, Respondent may request a hearing contesting custody, and that hearing must be held within five days of the request.

ORS 107.716(2)(c).

c. When the court schedules an exceptional circumstances hearing, Respondent may not request an additional or separate hearing to contest the restraining order. Respondent's objections to the restraining order must be heard as part of the exceptional circumstances hearing.

2. *Respondent's Hearing Request*

ORS 107.716(2)(b); ORS 107.718(10)(a).
See also IV.A.1 (pg. 20).

a. Timing

Respondent must ask for a hearing within 30 days after being served unless an "exceptional circumstances" hearing is scheduled. Even if an exceptional circumstances hearing is scheduled, Respondent may ask for an earlier hearing.

ORS 107.718(11).

If Respondent fails to request a hearing within 30 days after being served, the restraining order is confirmed by operation of law.

ORS 107.718(7).

These forms are available on the Oregon Judicial Department Family Abuse Prevention Act webpage.

b. Forms

The SCA provides FAPA forms, including hearing request forms and an explanatory brochure about FAPA relief. The clerk of the court shall make these forms available.

3. *Scheduling the Hearing Requested by Respondent*

ORS 107.716(1).

For purposes of calculating when a hearing must be held, *see* ORS 174.120 (computation of time), not ORCP 10. Unlike ORCP 10, ORS 174.120 excludes the weekend days only if a weekend day is the last day of the period.

Timing

a. If custody is contested, the court must set a hearing within five days after Respondent's hearing request.

b. If custody is not contested, the court must set a hearing within 21 days after Respondent's request.

See Strother and Strother, 130 Or App 624, 630 (1994), *rev den*, 320 Or 508 (1995) (denying relief to Respondent who alleged that the trial court erred by holding hearing on the 33rd day, when Respondent had disqualified a judge, reducing by one-half the number of judges available to conduct the hearing, and Respondent's lawyer was not available on 10 of 21 possible hearing dates).

c. A hearing held outside the statutory time frame is not error when Respondent causes or contributes to the delay.

4. *Continuances*

ORS 107.716(4)(a).

If a party does not appear at a scheduled hearing, the court should review the file to ensure that the hearing notice went to the correct address and gave the party sufficient notice of hearing.

The court may also exercise its discretion to allow a continuance to give a party time to arrange for witnesses to appear.

a. If service of the notice of hearing is inadequate to provide a party with enough notice of either an exceptional circumstances hearing or a hearing on Respondent's objections, the court may continue the hearing for up to 5 days to permit the party to seek representation.

ORS 107.716(4)(b).

b. If one party is represented by an attorney at an exceptional circumstances hearing or a hearing on Respondent's objections, the court may continue the hearing for up to five days to enable the unrepresented party to seek representation.

ORS 107.718(10)(c).

c. If Respondent raises an issue at the hearing that was not raised in the hearing request form, or if Petitioner seeks relief at that hearing that was not granted in the original order, the other party shall be entitled to a reasonable continuance to prepare a response to the issue.

ORS 107.718(10)(b).

5. The Hearing Notice

a. Court Clerk's Duties

1) The clerk must notify Petitioner of the date and time of the hearing, **and**

2) the clerk must provide Petitioner with a copy of Respondent's request for hearing.

ORS 25.011.

b. Petitioner's Responsibilities

Petitioner must give the clerk information to allow the clerk to give notice of the hearing. A physical address is not required.

For more information on Oregon's address confidentiality program, *see* the Oregon Department of Justice Address Confidentiality Program webpage.

Some Petitioners participate in Oregon's address confidentiality program or use contact addresses, such as a local domestic violence services program, a friend or relative's home, or a post office box. Petitioners are responsible to ensure that they will receive notices delivered to the contact address.

ORS 107.716(6).

6. Settlement

The court may approve a consent agreement that will stop the abuse, with a few exceptions.

ORS 107.716(6).

a. The settlement may not restrain a party unless that party petitioned for and was granted an order under ORS 107.710. Thus, mutual restraining orders can only be part of the settlement if each party petitioned for and was granted an order under ORS 107.710.

ORS 107.716(7).

b. The settlement may not in any manner affect title to real property.

ORS 36.185; ORS 107.755(2).
See III.A.2. (pg. 6).

7. Mediation Prohibited

The court may not order mediation in a FAPA proceeding.

8. Discovery

ORCP 1A.

FAPA was meant to provide a speedy and straightforward remedy to domestic violence. Discovery may be inconsistent with the statutory purpose and result in protracted proceedings. Also, Respondents may use discovery to continue to harass or deter victims or to obtain information not otherwise discoverable in a pending criminal case stemming from the same acts of domestic violence.

a. Applicability to FAPA: The ORCP applies to special proceedings such as FAPA cases "except where a different procedure is specified by statute or rule." Given the conflicts between the timeframes set out in FAPA and many of the timeframes in the discovery rules, discovery in FAPA cases rarely is feasible. If a FAPA hearing is delayed for some legitimate reason and discovery can be fairly conducted before the next scheduled hearing date, it may be reasonable to permit discovery after considering the basis for Respondent's request and issues of safety.

In the unusual case where discovery is appropriate, limiting Respondent to telephonic participation in a deposition may be advisable.

Victims in criminal cases have a constitutional and a statutory right to refuse to submit to a deposition or other discovery requests by a criminal Defendant or any person acting on behalf of that Defendant. In a FAPA proceeding when a parallel criminal case is pending, this right arguably precludes the criminal Defendant/Respondent from deposing the victim/petitioner. Article 1, section 42, of the Oregon Constitution provides, in part, that a victim has "[t]he right to refuse an interview, deposition or other discovery request by the criminal defendant or other person acting on behalf of the criminal [defendant.]" *See also* ORS 135.970(3).

ORS 107.716(3); ORS 107.718(10)(c).

b. Protection Orders: To the extent discovery can be appropriately accommodated in terms of FAPA-mandated timeframes, courts may consider crafting protection orders to address safety issues, harassment of victims by alleged perpetrators, and possible restraining order violations (e.g., presence of Respondent at a deposition).

9. Scope of the Hearing

The court may cancel or change any order issued under ORS 107.718. The court may assess reasonable attorney fees and costs incurred in the proceeding against either party.

The hearing is not limited to issues raised in Respondent's request for hearing. Nor is Petitioner limited to the relief granted *ex parte*; different relief can be sought. The court must grant a reasonable continuance in either of these circumstances.

ORS 107.718(10).

10. The Contested Hearing

a. Hearing Procedures

FAPA statutes do not specify what takes place at the "contested hearing."

Miller and Miller, 128 Or App 433 (1994) (FAPA hearing to be similar to a trial, where each party presents evidence and findings of fact and law are made).

Nelson v. Nelson, 142 Or App 367 (1996) (parties to FAPA entitled to present evidence, including examination of witnesses).

Hemingway v. Mauer, 247 Or App 603 (2011) (parties to FAPA must be allowed a reasonably complete presentation of evidence, including cross-examination of witnesses).

Appellate decisions have held that the FAPA hearing should be similar to a trial, with both parties being allowed to testify, present evidence, and examine witnesses under oath.

ORS 45.400; ORS 107.717.

b. Telephone Testimony

1) *Ex parte* hearing: A motion or good cause determination are not required to hold the *ex parte* hearing by phone.

2) Contested Hearing: A party may file a motion asking to testify by phone or to have a witness testify by phone. The court should consider the expedited nature of the FAPA process in determining whether to allow a motion for telephone testimony with less than 30 days notice. In addition to the factors in ORS 45.400(3)(b), the court should consider the safety and the welfare of the party or witness in determining whether good cause for telephone testimony exists.

11. Evidentiary Issues

See Obrist v. Harmon, 150 Or App 173 (1997) (dismissal of a FAPA due to Petitioner's failure to appear at the contested hearing is not a decision on the merits or a final judgment for purposes of issue preclusion or claim preclusion).

a. If Petitioner fails to appear at the hearing and the court terminates the ex parte restraining order, Petitioner may file a second petition alleging the same occurrences, if the termination was not based on the merits.

See ORS 40.015(2).

b. Evidence: The Oregon Evidence Code applies to hearings held under ORS 107.716.

ORS 107.710(2).

c. Burden of Proof: Petitioner has the burden of proving a claim by a preponderance of the evidence.

d. Showing Required:

ORS 107.705(1) (definition).

1) "Abuse," as defined in ORS 107.705(1),

ORS 107.710(1).

i. within the preceding 180 days

ORS 107.705(4) (definition); ORS 107.710(1); ORS 107.718(1).

ii. between "family or household members," as defined in ORS 107.705(4);

Imminent danger includes, but is not limited to, situations in which Respondent recently has threatened Petitioner with additional harm. ORS 107.718(5).

2) "Imminent danger of further abuse";

See commentary to I.B.2. (pg. 1) and I.C.5. (pg. 3).

3) Respondent represents a credible threat to the physical safety of Petitioner or Petitioner's child/ren.

LeFebvre and LeFebvre, 165 Or App 297 (2000). *See also Strother*, *supra* at 630.

e. Prior Abuse History

Evidence of abuse that occurred prior to the 180-day limit cannot justify the issuance of the order, but it may be relevant to explain the existence or degree of current fear.

ORS 107.716(3); ORS 107.718(10)(c).

12. Available Relief

The court may cancel or change any order issued *ex parte*. Even if not granted *ex parte*, relief that is authorized under ORS 107.718 may be ordered by the court at a contested hearing. At a contested hearing, the court may do any of the following:

ORS 107.716(3).

a. Terminate the Restraining Order

Terminate the restraining order if the court finds from the evidence presented that Petitioner has not proven a claim for relief under the statute.

ORS 107.716(1), (3).

b. Award or Modify Temporary Custody

At the hearing, Respondent may contest the temporary custody award. The statutes do not specify a basis for awarding temporary custody at this hearing; courts generally follow the "best interests of the child" standard as in other custody matters.

ORS 107.716(1) - (3); ORS 107.718(1)(a).

c. Award or Modify Parenting Time

Respondent may request parenting time different from that provided for in the restraining order or request an order for parenting time if the court found earlier that parenting time was not in the best interests of a child.

ORS 107.718(1)(b).

The court may remove the ouster provision if Petitioner moves.

The court may want to consider the application of ORS chapter 90 in determining whether the residence is jointly "rented" by Petitioner and Respondent.

d. Require Respondent to Move Out

The court may require Respondent to move out of Petitioner's residence if the residence is solely in Petitioner's name or jointly owned or rented by Petitioner and Respondent or if Petitioner and Respondent are married.

ORS 107.716(3).

ORCP 68 rules regarding the pleading, proof, and recovery of attorney fees do NOT apply in FAPA cases, because FAPA relief is "granted by order rather than entered as part of a judgment." ORCP 68C(1)(b). Even though ORCP 68 does not apply, ORS 20.075 mandates a set of factors that the judge must consider whenever a request for attorney fees is authorized by statute.

e. Assess Attorney Fees and Costs

The court may assess against either party reasonable attorney fees and costs incurred in an exceptional circumstances hearing or a contested hearing within 30 days after service of the order or a hearing for modification of an existing order.

The statute only authorizes recovery of attorney fees and costs incurred for an exceptional circumstances hearing or the contested hearing within 30 days after service of the order. There is no statutory authority to assess attorney fees and court costs for a renewal hearing.

FAPA forms do not contain provisions requesting attorney fees, so frequently no notice is provided to the other party that, in the event of a contested hearing, attorney fees may be awarded. Best practice and statutory construction would appear to require that, at a minimum, a party requesting fees do so prior to the close of the hearing on the merits.

This position allows for two results if attorney fees are requested: (1) a set-over under ORS 107.718(10)(c) for an issue raised at hearing but not granted *ex parte* or mentioned in Respondent's hearing request form, or (2) a directive from the judge that ORCP 68 procedures will be followed regarding submission of fee statements and objections. Each choice allows a method for eliciting fee-relevant facts not tried at the hearing on the merits. The second choice is preferable from the standpoint of judicial efficiency, but the set-over is required if a party elects a postponement to address an issue not raised by the pleadings. *See* IV.A.12 (pg. 25).

ORS 107.835.

f. Allow Waiver of Later Personal Service

If requested, the court must allow a party to waive personal service in any subsequent contempt proceeding to maintain the confidentiality of the party's address.

ORS 107.718(1)(h).

g. Order Emergency Monetary Assistance

Although Petitioner's need may not be as urgent, both the evidentiary and due process bases for ordering financial awards would be stronger at the contested hearing stage. *See* III.B.1.c. (pg. 9)

h. Other Available Remedies

Any relief available under ORS 107.700 to 107.732 is in addition to any other available civil or criminal remedy.

ORS 107.730.

B. Modifying the Order

ORS 107.730(1)(b).

1. Ex Parte Modification for Less Restrictive Terms

After Respondent's 30-day period to request a hearing has lapsed, Petitioner may ask the court to remove or make less restrictive provisions concerning ouster, restraint from certain specified areas, or provisions regarding prohibited contact with Petitioner. Petitioner may do this by *ex parte* motion. Petitioner must show good cause for the request.

ORS 107.730(6)(a)(B).

a. Service of Order

ORS 107.730(2).

1) The court clerk must provide, without charge, the number of certified copies of the modified order and notice of hearing necessary to effect service.

ORS 107.730(6)(a)(B).

2) The sheriff must serve Respondent with the less restrictive order and notice to respondent/request for hearing by first class mail.

ORS 107.730(6)(b).

3) If the order recites that Respondent appeared in person before the court, the order need not be served.

b. Respondent may request a hearing on the less restrictive order. See IV. (pg. 19).

ORS 107.730(1)(a).

Within 30 days of service, Respondent may ask for a hearing on the order itself and/or custody and parenting time provisions in the order. *See* IV.A.2. (pg. 21).

2. Show Cause Modification

Once 30 days from service have passed, either Petitioner or Respondent can ask to change the order's terms regarding custody, parenting time, restriction from certain locations (including ouster from the residence), or provisions regarding contact. The party requesting the modification must show good cause to modify the order.

ORS 107.718(10)(a).

a. Limited Relief

Respondent cannot object to the order itself after the 30-day period has lapsed. Only modifications specifically authorized under ORS 107.730(1)(a) are allowed.

ORS 107.730(3).

b. Service of Request

ORS 107.730(2).

1) The court clerk must provide, without charge, the number of certified copies of the request for modification and notice of hearing necessary to effect service.

2) If requested by the party, the clerk must deliver the modification request and notice of hearing to the sheriff for service.

ORS 107.730(3).

3) The sheriff must personally serve the request for modification and notice of hearing unless the party elects to have service accomplished by a private party.

3. Hearings

The statute allows *ex parte* relief only when Petitioner wants less restrictive terms in the FAPA order. For all other modifications, the opposing party must be served a copy of the request for modification. The court must either set a show cause hearing or give the opposing party the opportunity to file a response and request a hearing.

Depending on local practice, courts either set a show cause hearing or require a written response from the opposing party before a hearing is set. The SCA forms allow for either practice.

ORS 107.730(7). *See also* IV.A.12.b. (pg. 25).

4. Attorney fees

The court may assess against either party reasonable attorney fees and costs that may be incurred in the proceeding.

V. EFFECT OF FAPA ORDERS ON DISSOLUTION OF MARRIAGE PROCEEDINGS

See III.D.4. (pg. 13) regarding Modification in FAPA Cases of Preexisting Order or Judgments (Domestic relations order or judgment first, then FAPA).

ORS 107.722.

A. FAPA Order Followed by Final Domestic Relations Judgment

ORS 24.115(1), (3).

Provisions of an original or modified judgment of dissolution of marriage under ORS 107.105 or 107.135, custody or parenting time order under ORS 109.103, or filiation judgment under ORS 109.155 supersede contrary provisions in a pre-existing FAPA custody or parenting time order.

Final domestic relations judgments from other states filed under ORS 24.105 *et seq.* also will supersede conflicting terms in an earlier Oregon FAPA order.

ORS 107.722(1).

B. FAPA Order Followed by Temporary Domestic Relations Order

A temporary custody or parenting time order made pursuant to ORS 107.095(1)(b) in a subsequent dissolution, annulment, separation, or unmarried parent's proceeding supersedes a contrary provision of a preexisting FAPA order **only if** the party requesting temporary relief in the dissolution action

1. consolidates the subsequently filed dissolution action with the preexisting FAPA proceeding **and**

2. provides the nonmoving party notice of the requested temporary order under ORS 107.095(1)(b) and an opportunity for a hearing in the domestic relations case.

VI. FOREIGN RESTRAINING ORDERS

A. Entitled to Full Faith and Credit; Registration not required

ORS 24.190(2)(b).
18 USC § 2265 (b).

1. Under the Full Faith and Credit provisions of VAWA and pursuant to Oregon statutes, a foreign restraining order is enforceable in Oregon if

a. the issuing court had subject matter and personal jurisdiction over Respondent;

b. Respondent was given notice and an opportunity to be heard under the law of the issuing state or, in the case of an ex parte order, Respondent will be given notice and an opportunity to be heard within a reasonable period of time; **and**

c. the order has not expired.

ORS 24.190(2).
18 USC § 2265(d)(2).

Protection orders entitled to Full Faith and Credit under VAWA may be civil or criminal and are not limited to those protecting intimate partners. "Foreign restraining orders" include those from other states, as well as orders of a tribal court. 18 USC §§ 2265, 2266; ORS 24.190(1)(b)(B).

2. A restraining order from another state or tribal court is enforceable immediately upon the protected person's arrival in Oregon. Registration with the court or law enforcement is not required. Federal law prohibits states from requiring registration as a condition of full faith and credit.

3. If the order restrains Petitioner as well as Respondent, the order will not be enforceable against Petitioner unless Respondent filed a separate pleading seeking a restraining order and the court made specific findings that Respondent was entitled to the order.

B. Optional Registration

A foreign restraining order is enforceable in Oregon without the necessity of filing with the court or any further action by the protected person. ORS 24.190(2)(a). *See* exceptions to enforceability in VI.A.2. (pg.). ORS

24.190(3)(a).

1. With Law Enforcement

The protected person may choose to register the foreign order with law enforcement. Entry into the Law Enforcement Data System (LEDS) ensures that all police agencies statewide have notice of the order and provide mandatory arrest protection. The protected person must provide a copy of the order and certify that it is the most recent order and that the restrained person has actual notice of the order. Federal law prohibits the state from notifying Respondent of the registration unless Petitioner requests this step.

18 USC § 2265(d)(1).
ORS 24.190(6).

2. With the Courts

The protected person may choose to file a certified copy of the foreign order with the court. Federal law prohibits the state from notifying Respondent of the filing unless Petitioner requests this notice. When filed, a foreign order is enforceable the same as an Oregon order.

C. Violation of Foreign Orders

ORS. 24.190(4). *See* VI.A.2. (pg. 30) regarding "qualifying" orders.

See ORS 107.728.

A "qualifying" foreign restraining order is enforceable by contempt. In general, venue for punitive contempt cases for violations of FAPA orders may lie in either the county of issuance or the county of violation. Given the fact of issuance outside of Oregon, contempt cases for violation of foreign restraining orders should proceed in the county of violation. The person initiating the contempt action must file a certified copy of the order with the court in which the contempt action is initiated.

ORS 133.310(3).

VII. MANDATORY ARREST FOR VIOLATION OF ORDER

A. Oregon Restraining Orders

Arrest is mandatory when a law enforcement officer has probable cause to believe that

1. a court has issued a FAPA order;
2. Respondent (called "Defendant" in the contempt proceeding) has been served with the FAPA order;
3. a true copy of the FAPA order has been properly filed with law enforcement and entered into the LEDS; **and**
4. Respondent has violated the restraining order.

B. Foreign Restraining Orders

Arrest is mandatory when

1. a protected person presents to a law enforcement officer a copy of the foreign restraining order that is entitled to full faith and credit (as defined by ORS 24.190);

ORS 133.310(4).

2. the protected person represents that the order is the most recent order in effect and that Respondent has been personally served with a copy of the order or has actual notice or the order; **and**

3. the law enforcement officer has probable cause to believe that the person to be arrested has violated the foreign restraining order.

4. Arrest also is mandatory if the protected person has filed a copy of the foreign restraining order with the court or has been identified by a law enforcement officer as a party protected by a foreign restraining order entered into LEDS or the National Crime Information Center database and the officer has probable cause to believe that Respondent has violated the terms of the order.

ORS 133.310(5)

ORS 133.310(6); ORS 135.250(2).

C. Mandatory Arrest for Violating Certain Release Agreements

See VIII.F.2. (pg. 37) regarding Release from Custody.

Arrest also is mandatory for violations of a release agreement entered into after a person has been charged with a domestic violence offense and there is probable cause to believe that the person has violated a no contact condition of the release agreement.

VIII. CONTEMPT – REMEDIAL AND PUNITIVE

A. Statutory Authority

State v. Reynolds, 239 Or App 313, 316 (2010) (citing *State ex rel Hathaway v. Hart*, 300 Or 231 (1985)). *See also Ferguson v. PeaceHealth*, 245 Or App 249, 253-4 (2011); *accord State v.Campbell*, 246 Or App 683 (2011).

FAPA restraining orders are enforced through contempt proceedings under ORS chapter 33 and UTCR chapter 19. Contempt proceedings are *sui generis*, being neither civil nor criminal.

ORS 33.055(2).

1. Remedial Sanctions Under ORS 33.015(4)

A party, city attorney, district attorney, or the Attorney General may seek remedial sanctions.

ORS 33.065(2).

2. Punitive Sanctions Under ORS 33.015(3)

Only a public prosecutor (city attorney, district attorney, or the Attorney General) may seek punitive sanctions.

B. Applicability of Procedural Rules

UTCR 19.040(1).

ORS 33.055(12).

1. Remedial Contempt

The Oregon Rules of Civil Procedure do not apply to remedial contempt proceedings unless specifically provided in statute or UTCR Chapter 19.

ORS 33.065(5), (6).

State ex rel Hathaway v. Hart, 300 Or 231 (1985).

2. Punitive Contempt

Generally, criminal procedure and Defendants' constitutional and statutory protections apply in punitive contempt proceedings; however Defendants are not entitled to a jury trial.

C. Venue

ORS 107.728.

A contempt proceeding may be filed in either the county of issuance or the county of violation.

D. Trial

See Couey and Couey, 312 Or 302 (1991).

Although private parties may bring remedial contempt proceedings (*see* VIII.A. (pg. 32)), these rarely are filed, as typically the district attorney will seek punitive contempt sanctions instead. Although most of the cases cited and some of the statutory references in this section specifically apply to punitive contempt, these may apply to remedial contempt by analogy.

1. Burden of Proof and Elements of Charge

To sustain a finding of contempt, the party initiating the contempt must prove that an order existed, that Defendant had knowledge of the order, and that Defendant willfully violated the order.

ORS 33.055(11); ORS 33.065(9).

a. The party initiating the contempt must prove contempt beyond a reasonable doubt if punitive sanctions or confinement are sought. If confinement is not sought, the burden of proof in remedial cases is by clear and convincing evidence.

State v. Trivitt, 247 Or App 199 (2011) (discussing meaning of "interfere with" in context of Defendant's actions in holding a sign at the end of a third party's driveway stating that Petitioner had genital herpes); *Gerlack v. Roberts*, 152 Or App 40 (1998) (Defendant coming within 150 feet of Petitioner in store not a violation, as FAPA order only prohibited Defendant from coming within 150 feet of Petitioner in certain other designated locations).

b. To sustain a finding of contempt, the party initiating the contempt must prove a violation of what the order actually prohibits.

OEC 803(8)(b), (d) (ORS 40.460(8)(b), (d)) allows proof of service to be established by introduction of a sheriff's return of service. (Note: OEC 803(8)(d) (ORS 40.460(8)(d)) was amended in 2011 to specifically allow introduction of a sheriff's return of service without necessity of officer testifying.) Return of service is sufficient to find that Defendant was served and to infer beyond a reasonable doubt that Defendant's violation of the restraining order was knowing. *Frady v. Frady*, 185 Or App 245 (2002). However, *see* commentary to VIII.F.4.d. (pg. 39) regarding applicability in punitive contempt proceedings.

c. Defendant's knowledge of the order may be proven by evidence that Defendant was served with the order.

Couey and Couey, 312 Or 302 (1991).

ORS 33.015(2)(b) (contempt includes "willful" disobedience of a court order or judgment).

State v. Montgomery, 216 Or App 221 (2007) ("mere accident" not "willful").

Note that service of process per ORCP 7 or 9 is not a violation of a FAPA order. ORS 107.718(12).

2. Willfulness

Defendant's conduct must be a willful violation of a court order. Voluntary noncompliance with the order is sufficient to establish "willfulness." "Bad intent" is not an element of contempt separate from the requirement of "willfulness." "Bad faith" is not required. However, "merely accidental" conduct does not establish "willfulness."

3. Defenses

See cases cited in VIII.D. (pg. 33).

Actions that may be prohibited by a FAPA order are set forth in ORS 107.718(1) and (2).

The definitions of "interfere," "intimidate," "menace," and "molest" are set forth in ORS 107.705(5) to (8). See also I.C. (pp. 1-3) and III.A.2. (pg. 6).

See, *e.g.*, *State ex rel Mix v. Newland*, 277 Or 191 (1977).

Only if Defendant has not had a meaningful opportunity to challenge the validity of the FAPA order might this defense be available. Such a situation appears unlikely, given that the 5- and 21-day hearings almost always would occur before adjudication of a contempt case.

ORS 33.055 (10); ORS 33.065(7).
State v. Keller, 246 Or App 105, 108 (2011); *State ex rel Mikkelsen v. Hill*, 315 Or 452, 459 (1993).

ORS 161.055(2).

a. Vagueness of Order

To sustain the finding of contempt, the party initiating the contempt must prove a violation of what the order actually prohibits.

b. Invalidity of Underlying Order

The fact that Petitioner's situation did not qualify for the underlying restraining order is not a defense to contempt, as that is an impermissible collateral attack when argued in the contempt case.

c. Inability to Comply

Inability to comply with the restraining order is an affirmative defense. Defendant has the burden of proof on this defense and must establish inability to comply by a preponderance of the evidence to prevail. In punitive contempt cases, Defendant must file and serve prior notice of the defense on the prosecutor not less than five days before trial.

d. Petitioner's Conduct Irrelevant

Although Defendants often raise it as a mitigating factor or defense, Petitioner's conduct is not relevant in a contempt proceeding.

e. Asserting Parenting Time Rights

Parenting time with minor children often puts Defendant in the vicinity of Petitioner, which may result in an arrest for violation of the restraining order if a disagreement arises. In such cases, Defendant may be found in contempt if Defendant's behavior exceeded the parameters of Defendant's parenting time or was otherwise intimidating, interfering, or menacing within the meaning of the FAPA statutes.

f. Mental Illness

Mental illness is a defense to the same extent that it would constitute a defense or mitigate liability in a criminal case.

E. Remedial Contempt

ORS 33.055(2) - (5).

1. Procedure

a. A proceeding for remedial sanctions is commenced by a motion with supporting affidavit or other documentation sufficient to give Defendant notice of the specific acts alleged as contempt.

b. The court may issue an order to appear that is specific enough to give Defendant notice of the acts of contempt.

c. The order to appear must be personally served unless

1) Defendant waives personal service under ORS 107.835 as part of the order allegedly violated;

2) the court orders substitute service; **or**

3) the court issues an arrest warrant upon motion, affidavit, and a finding that Defendant cannot be served.

UTCR 19.020(1).

d. The motion and order to appear must state the sanctions sought.

ORS 33.055(7), (8).
State ex rel Hathaway v. Hart, 300 Or 231 (1985).

2. Defendant's Rights

a. Defendant has only those rights afforded a Defendant in a civil action **unless** the sanction of confinement is sought.

b. Where the sanction of confinement is sought, the court must not impose confinement unless, **before** the hearing, Defendant is

ORS 33.055(8)(a).

1) informed that the sanction of confinement may be imposed **and**

ORS 33.055(8)(b).

2) afforded the right to court-appointed counsel, if eligible.

ORS 33.055(9).

c. If Defendant is not represented by counsel when coming before the court, then the court shall inform Defendant of the right to counsel. The court also shall advise Defendant of the right to have counsel appointed by the court if confinement is sought and Defendant qualifies financially for appointed counsel.

ORS 33.055(6).

3. Opportunity for Hearing

The court must afford Defendant an opportunity for a hearing before imposing sanctions unless Defendant waives the right to a hearing by stipulated order.

ORS 33.055(11).

a. Burden of Proof

1) Clear and convincing evidence unless confinement is sought, **and**

2) if confinement is sought, proof must be beyond a reasonable doubt.

b. Defenses

The same defenses may apply to punitive contempt and remedial contempt.

See VIII.D.3. (pg. 34).

ORS 33.105(1).

c. Available Sanctions

Sanctions should be imposed to change behavior or compensate for damage, not to punish. The court may impose one or more of the following sanctions:

1) restitution;

2) confinement, which may be imposed for so long as the contempt continues or six months, whichever is the shorter period;

3) a fine, which may be imposed as a compensatory fine of up to $500 or 1 percent of Defendant's annual gross income, whichever is greater;

4) an order designed to ensure compliance with the FAPA order that was violated, including probation;

5) payment of attorney fees; **and**

6) any other sanction that the court determines would be an effective remedy for the contempt.

F. Punitive Contempt

1. No Contact with Victim While Lodged

If Defendant is lodged, entering an order prohibiting Defendant from contacting the victim while in custody should be considered.

ORS 135.247.

The requirement that a no contact order be entered while a Defendant is in custody for a domestic violence crime is the result of HB 2925 (2011), codified at ORS 135.247. Although punitive contempt is not a crime (*State v. Reynolds*, 239 Or App (2010)), ORS 135.247 may apply to these proceedings pursuant to ORS 107.720(4) and ORS 33.065(5) (same requirements and laws applicable to an accusatory instrument in a criminal proceeding apply to punitive contempt cases).

2. Release from Custody

a. Pending a contempt hearing, a person arrested for a FAPA violation is subject to release decisions under ORS 135.230 to 135.290.

ORS 107.720(4).

b. Including a provision for “no contact” with the victim should be considered. If “no contact with the victim” is ordered, the court should consider waiving that provision if

1) the victim petitions the court for a waiver **and**

2) the court finds, after a hearing on the petition, that waiving the condition is in the best interest of the parties and the community.

ORS 135.245(3).

As with the requirement that a no contact order be entered while Defendant is in custody, it is an unsettled question as to whether ORS 107.720(4) or ORS 33.065(5) require the application of ORS 135.250(2)(a) and (b) re: imposition of no contact with victim and waiver of “no contact” provision by victim to punitive contempt proceedings. ORS 135.250(2)(a) **requires** a “no contact” provision if Defendant is charged with an offense that also constitutes domestic violence. The issue is whether a punitive contempt proceeding for violation of a FAPA order is “an offense that also constitutes domestic violence.” (*Note:* ORS 135.230(3) defines "domestic violence" as "abuse between family or household members." This definition of "family or household members" is similar to the definition for FAPAs found at ORS 107.705(4).)

ORS 135.250(2)(b) sets forth the considerations for waiver of the “no contact with victim” order if imposed pursuant to ORS 135.250(2)(a).)

ORS 107.720(4); ORS 135.245(3).

To release on recognizance, the court should review the record of any prior domestic violence arrests.

The court should consider working with law enforcement, release officers, and prosecutors to ensure that victims receive notice of the release hearing, their right to appear personally at the hearing, their right to reasonably express any views relevant to the issues in the hearing, and to ensure that victims are notified that Defendant will be released. *See* ORS 135.245(5)(a)(A)(B).

c. The usual security for violation of the restraining order is $5,000. The court may set a different amount, e.g., higher, if the court concludes that the higher amount will ensure that Respondent later appears and "does not engage in domestic violence while on release."

ORS 33.065(2).

3. Accusatory Instrument Required

An accusatory instrument is required to initiate a punitive contempt proceeding.

ORS 33.065(4).

a. The prosecutor may initiate proceedings on his or her own initiative or on the request of a party or of the court.

ORS 33.065(5).

b. The accusatory instrument is subject to the same requirements and laws applicable to those in criminal proceedings in general. For example,

1) Defendant must personally be served a copy of the instrument and be arraigned; and

2) Defendant may move against the instrument by demurrer.

UTCR 19.020(1).

c. In addition, the following information must be included in the initiating instrument:

1) the maximum sanctions sought;

2) whether those sanctions include incarceration; **and**

3) for each sanction sought, whether the moving party considers it punitive or remedial.

See ORS 135.711 to 135.743 regarding sufficiency of accusatory instruments in criminal cases.

d. The instrument should set out a separate count for each violation to be proved.

ORS 33.065(6).
State ex rel Hathaway v. Hart, 300 Or 231 (1985); s*ee also Bachman v. Bachman* (consolidated with *State v.Bachman), 171 Or App 665 (2000).*

4. Defendant's Rights

Except for the right to a jury trial, Defendant generally has all rights normally accorded criminal Defendants, including the following:

a. the presumption of innocence;

It is reversible error for the court to allow Defendant to represent himself without first determining whether Defendant's waiver of right to counsel is voluntary, knowing, and intelligent. *State v. Cervantes,* 238 Or App 745 (2010).

Failure of court to warn Defendant of risk and difficulties of self-representation warrants reversal of contempt adjudication. *Pearson and Pearson*, 136 Or App 20 (1995).

b. the right to counsel, including court-appointed counsel if indigent;

c. the right to a speedy trial; **and**

d. the right to discovery.

An unsettled question is the extent to which Defendant has confrontation rights in a punitive contempt case. ORS 33.065 (6) provides that, except for a jury trial, Defendant in a punitive contempt proceeding is entitled to the constitutional protections that Defendant is entitled to in a criminal proceeding. In *State v.Tryon*, 242 Or App 51 (2011), the Court of Appeals held that a return of service of a restraining order was admissible to prove Defendant's knowledge of the restraining order. The court's holding was premised on its finding that a return of service is not testimonial in nature, despite objection based on the federal confrontation clause. However, the issue of state constitutional confrontation rights was not preserved for appeal in *Tryon. State v. Copeland*, 247 Or App 362 (2011), then reached the state constitutional objection, holding that a return of service is a public record that falls into a historical exception to Article 1, section 11, of the Oregon Constitution. In October 2012, the Oregon Supreme Court granted review in *Copeland* on *both* the state and federal confrontation clause issues. *See also State v. Johnson*, 221 Or App 394 (2008) (discussing in a probation violation context the balancing test regarding confrontation rights required under federal due process).

5. Pleas and Sanctions

See ORS 135.335. Courts should enter pleas of "admit" or "deny", not "guilty" or "not guilty" to distinguish contempt cases from criminal cases in accordance with *State v. Reynolds*, 239 Or App (2010).

a. Admit, Deny and No Contest Pleas

The court may take an admission or a denial to allegations. Some, but not all courts allow a "no contest" plea.

b. Time for Imposition of Sanctions/Entry of Judgment

The time period between plea/adjudication and imposition of sanctions/entry of judgment is subject to the restrictions of ORS 137.020.

See Article I, section 15, of the Oregon Constitution.

c. Sanction Objectives:

1) protect victims and family members who are directly or indirectly affected by domestic violence;

2) hold offenders accountable for their behavior; and

3) reduce future violations through

i. strict supervision **and**

ii. effective offender treatment programs.

d. Maximum Punitive Sanctions

The maximum punitive sanctions are

1) a fine not to exceed $500 or 1 percent of Defendant's gross annual income, whichever is greater;

2) confinement of no more than six months;

3) forfeiture of any proceeds or profits obtained through the contempt;

4) probation, which may include a condition that Defendant attend and complete a batterer intervention program; **and/or**

5) community service.

ORS 33.105(2). Judgments for punitive contempt are not criminal judgments, therefore, using a criminal judgment form is reversible error. *State v. Reynolds*, 239 Or App (2010).

DECISIONS FROM THE OREGON APPELLATE COURTS CITING THE FAMILY ABUSE PREVENTION ACT (October 2017)

Oregon Supreme Court

In Re Jagger, 357 Or 295 (2015)

The court found that Accused, an attorney, had violated RPC 1.1 (failure to provide competent representation) and RPC 1.2(c) (counseling or assisting client to engage in conduct the accused knows to be illegal or fraudulent). Accused represented Respondent Mr. Fan, who Petitioner Ms. Yang had a FAPA restraining order against. At the time, Respondent was also in jail on a criminal complaint arising from the same incident that gave rise to the restraining order. Accused had arranged a time for Petitioner to come by his office at a later date, but Petitioner unexpectedly came by Accused's office at a time when Accused was on the phone with Respondent in a conference room. Accused invited Petitioner to speak with Respondent for the purpose of discussing the situation. Accused then left the conference room for several minutes while Ms. Yang and Mr. Fan spoke.

Based on Mr. Fan's participation in the conversation he was convicted of contempt of court for violating the contact provision of the restraining order. First, Accused contended that Petitioner voluntarily initiated the contact with Respondent, but the court found that the record did not support that contention. Second, Accused contended that he did not knowingly violate the law because the FAPA order prohibits the restrained person from taking affirmative action to contact the person who filed for the restraining order, and Respondent did not do so. The court disagreed with Accused's interpretation of the FAPA restraining order and suspended him from practicing law for 90 days.

Heikkila v. Heikkila, 355 Or 753 (2014)

The court held that the Court of Appeals lacked jurisdiction in an appeal because of a defect in service of process. Petitioner (wife) was granted a restraining order against Respondent (husband), and Respondent appealed. Respondent's attorney filed a notice of appeal, and sent a copy to Petitioner, but not to Petitioner's attorney, as required by ORCP 9 B. Respondent's attorney, citing ORS 19.270, argued that the plain text of the jurisdictional statutes requires that notice of appeal be served to other "parties" to the case. Respondent's attorney said that because Petitioner was the other party to the case, and she had been served with timely notice of the appeal, the court of appeals had jurisdiction.

The court said that while Respondent's interpretation was plausible, ORS 19.270 specifies that timely service is jurisdictional, but does not specify *how* such service must be accomplished to confer jurisdiction to the court of appeals. The court held that ORS 19.500 filled that gap by providing that when a document needs to be served or filed, that should be done so in compliance with ORCP 9 B, and therefore affirmed the order of the court of appeals.

State v. Copeland, 353 Or 816 (2013)

Defendant was charged with punitive contempt for violating the restraining order. To show the Defendant had been served the restraining order, the State offered a deputy sheriff's certificate of service. Defendant objected to the certificate claiming it violated his confrontation rights under

Article I, section 11 of the Oregon Constitution and the Sixth Amendment of the U.S. Constitution. The trial court admitted the certificate under the official records hearsay exception, OEC 803(8) and because the court did not find the certificate was "testimonial." The Court of Appeals and Supreme Court affirmed the trial court's ruling.

In re Knappenberger, 338 Or 341 (2005)

Where Husband consulted Attorney about representation in a divorce case but also discussed a history of Family Abuse Prevention Act (FAPA) restraining orders between the parties as well as Husband's thoughts about applying for new FAPA order, Attorney may not represent Wife regarding the divorce or a restraining order Husband later obtains against Wife. Attorney's advice to Husband on several substantive aspects of divorce, even if Attorney was not ultimately retained, rendered Husband a former client of Attorney for purpose of former client/same matter conflict rule and precluded representing Wife on the divorce.

Moreover, as Attorney also discussed with Husband the factual details regarding Wife's current restraining order and each spouses' motivation for obtaining such orders and also advised Husband on evidence a court would require from Husband if he sought a new FAPA order for himself, defending Wife on that new FAPA order that Husband later obtained *pro se* was precluded. Attorney's representation of Husband provided him with confidences and secrets the use of which was likely to damage Husband in the course of Attorney's defense of Wife.

State ex rel Marshall v. Hargreaves, 302 Or 1 (1986)

Defendant judge had no discretion to deny realtor a hearing for a restraining order because she had filed, withdrawn, and dismissed two previous restraining orders under Family Abuse Prevention Act. ORS 107.718 is mandatory, not permissive, and does not give judges discretion to deny hearings for restraining orders.

Hathaway v. Hart, 300 Or 231 (1985), aff'd 70 Or App 541 (1984)

A defendant in a criminal contempt proceeding (under former contempt statutes) charged with violating a restraining order under the Family Abuse Prevention Act is not entitled to a trial by jury. Criminal contempts are unique proceedings, not "criminal actions" within the meaning of state statutes requiring jury trials. Nor are criminal contempts "criminal prosecutions" within the meaning of the state constitution provision that guarantees jury trials, as disposition of contempts without jury trials was well established at the time the state constitution was drafted.

Nearing v. Weaver, 295 Or 702 (1983)

Police officers who knowingly fail to enforce Family Abuse Prevention Act restraining orders by arrest are potentially liable for resulting physical and emotional harm to persons protected by the order. The defense of discretion does not preclude liability, as officers are not engaged in a discretionary function when they must evaluate and act upon a factual judgment. Moreover, statutory immunity for good faith arrests under the Family Abuse Prevention Act does not immunize the failure to arrest.

(After the court issued plaintiff a restraining order prohibiting her husband from entering her home or molesting her, plaintiff's husband twice again entered plaintiff's home. Plaintiff reported the incidents to defendant officer and asked him to arrest plaintiff's husband. After confirming the restraining order and the damage plaintiff's husband caused, defendant declined to arrest husband because defendant had not seen husband on the premises. Husband later threatened and assaulted plaintiff's friend in plaintiff's presence.)

Oregon Court of Appeals

State v. Balero, 287 Or App 678 (2017)

Defendant appeals trial court's finding him in contempt of court for violating the FAPA restraining order. Defendant asserts that the state failed to present legally sufficient evidence that he 'interfered' or attempted to 'interfere' with the person protected by the FAPA order (Petitioner). While the FAPA order was in effect, Defendant sent an email to Petitioner's employer asserting that "petitioner had committed theft and fraud, and he expressed concern that she might use her position to steal personal information from other employees." The Court analyzed "interference" in this case as they did in *State v. Trivitt*, 247 Or App 199 (2011) finding that though the conduct may have been offensive, and it may have been 'taking part in the concern of others' it was not interference. Reversed.

M.D.D. v. Alonso, 285 Or App 620 (2017)

Respondent appealed the trial court's order continuing the FAPA restraining order against Respondent. Respondent assigned error to the trial court's issuance of the FAPA restraining order.

On appeal, Respondent argued that "the record does not support the trial court's finding that abuse occurred." Importantly, Respondent did not preserve the issue that either the second or the third elements necessary for a FAPA order to be upheld were held in error, and therefore those contentions were not considered on appeal. The Court did consider whether abuse occurred, but declined to exercise de novo review. The standard of review of a continuance of a FAPA restraining order is "whether any evidence supports the court's finding that abuse satisfying FAPA's criteria occurred." *See Patton v. Patton*, 278 Or App 720, 721, 377 P3d 657 (2016). In this case, Respondents argues that the facts he disputes were not sufficiently creditable to find abuse occurred. Given the standard of review, the Court of Appeals declined to engage in any "reweighing of the evidence." Affirmed.

J.V.-B. v. Burns, 284 Or App 366 (2017)

Respondent appealed the trial court's order continuing Petitioner's FAPA restraining order against him. Respondent argued that the trial court's decision was not supported by legally sufficient evidence to meet the necessary threshold: that he was a "credible threat" to Petitioner's physical safety.

The Court found that the trial court based its decision primarily on Petitioner and daughter's subjective fear of Respondent, and that since the time that Respondent and Petitioner stopped living together, there was no evidence regarding abuse or concerns of abuse. The Court held that, even if Petitioner proved a qualifying incident of abuse, there was insufficient evidence to support a conclusion that Respondent presented a "credible threat" to Petitioner's physical safety. Reversed.

T.K. v. Stutzman, 281 Or App 388 (2016)

Respondent appealed the trial court's order continuing the FAPA restraining order after a contested hearing. The FAPA arises from an incident between Respondent (aunt) and Petitioner (niece) where Respondent yelled at Petitioner, accused her of using drugs and being involved in pornography, grabs Petitioner's arm when she walked away, and told Petitioner "if we weren't at church you'd be dead right now." In Respondent's assignment of error, she contended Petitioner

failed to present sufficient evidence to demonstrate she was in “imminent danger of further abuse” and that Respondent was “a credible threat to [her] physical safety” ORS 107.718(1). Per the trial court’s factual finding, there is no evidence that Respondent had ever harmed or attempted to harm Petitioner (or another person).

The Court held that person’s subjective fear is insufficient to support a FAPA restraining order. *Hubbel v. Sanders*, 245 Or App 321, 326, 263 P3d 1096 (2011). During the single event that triggered Petitioner to seek this temporary restraining order, the court found that even if respondent’s actions were to be considered “abuse”, Petitioner still failed to establish the other two requirements: (1) that she was in “imminent danger of further abuse” and (2) that Respondent was “a credible threat to [her] physical safety”. Reversed.

***K.M.J. v. Captain*, 281 Or App 360 (2016); (EPPDAPA case)**

Respondent appealed the entry of an order for a temporary restraining order. Respondent assigned error to the trial court’s denial of an opportunity to question the only witness against him, Petitioner. Respondent was not represented by counsel in the trial court. During the outset of the hearing, the trial court announced it would not allow parties to ask questions of each other. The trial court allowed parties "to respond" and make statements, but did not ask questions on behalf of parties. Respondent did not object and so the error was not preserved. Respondent asked the Court to review the assignment of error anyway under plain error review.

Under the two-step plain error review analysis, "the error must be apparent on the face of the record." If error was committed, the Court must "decide to exercise . . . discretion to reach the error." Under step one, it was apparent on the record that the trial court did not give Respondent the opportunity to cross-examine Petitioner. Step two permits the Court to exercise its discretion to reach the unpreserved error. Balancing the "gravity of error" against the competing interests of the parties, and the additional burden of the trial court to allow cross-examination, Respondent's fundamental right to cross examination to ensure fair judicial proceedings was not outweighed by other factors. A trial court has limited discretion to control cross-examination, but cannot completely deny that right; doing so is a legal error. Reversed and remanded.

***C.R. v. Gannon*, 281 Or App 1 (2016)**

Respondent appealed a supplemental judgment denying him attorney fees and costs. Petitioner sought a restraining order. (ORS 107.710). The trial court granted the order after an ex parte hearing. (ORS 107.718(1)). Respondent requested a hearing (ORS 107.718(10)) to contest the factual basis of the restraining order; the hearing was held December 16, 2014, during which Petitioner asked the court to dismiss the petition and restraining order without prejudice and without an award of fees and costs. The court dismissed but postponed ruling on fees and costs until Respondent submitted a petition. Respondent filed his petition, but the court denied it, concluding because the December 16th hearing was not a contested hearing on the evidence concerning the restraining order, the court did not make a finding on the evidence, and consequently there was no legal basis to award fees.

Respondent appealed, arguing the trial court could award attorney fees under 107.716(3). The Court held that a hearing held pursuant to 107.718(10) is a hearing where parties have an opportunity to be heard on the issues of law or fact that are placed before the court in the requested hearing, limited to the relief available to a petitioner in ORS 107.718(1), which includes temporary custody orders, a restraining order, and other relief necessary to provide for the safety and welfare of the petitioner. Because the December 16th hearing did not reach any of the ORS

107.718(1) issues, the court did not hold a hearing pursuant to ORS 107.718(10) and correctly concluded it lacked authority to award attorney fees. Affirmed.

K.L.D. v. Daley, 280 Or App 448 (2016)

Respondent appealed an order continuing a FAPA restraining order against him after a contested hearing. Respondent argued that Petitioner failed to provide evidence satisfying the requirements of ORS 107.718(1). Under ORS 107.718(1), "a FAPA restraining order will be upheld only if the evidence established that the alleged conduct create[d] an imminent danger of further abuse and a credible threat to the physical safety of the petitioner." *Hannemann v. Anderson*, 251 Or App 207, 213 (2012). In this case, Respondent yelled at Petitioner to get out of the home and raised his hand "so he was close to her face" which, the trial court found, placed her in fear of imminent bodily injury. However there was no testimony that respondent 'raised his hand' during the incident. The Court held that, even if there was sufficient evidence to prove an incident of abuse, the evidence in the record was insufficient to find that there was an "imminent danger of further abuse" or that Respondent was a "credible threat to the physical safety of the Petitioner." Reversed.

G.M.P. v. Patton, 278 Or App 720 (2016)

Respondent and Petitioner were married in 2011 and do not have any joint children. On August 18, 2014, Petitioner and Respondent went to a marriage counseling session where they decided that they would separate temporarily and Respondent would remove his trailer from their property. The next day, the two had an argument when Respondent said he would not be removing his trailer that day. During the argument, Respondent threatened to smash Petitioner's car and destroy her belongings. Respondent also cornered Petitioner in a bedroom. Petitioner pushed and kicked Respondent and told Respondent she would not call the police, so Respondent left the bedroom. On August 22, Petitioner filed for a restraining order. Respondent requested a hearing.

At the hearing, Petitioner testified that Respondent had been moody and angry, that he stole Petitioner's prescription medication, and that he said that he was going to get a gun a few months previously. The restraining order was granted, and Respondent appealed.

Relying on *Hubbell*, the court said that the question to consider was whether the evidence suggested that Petitioner was in imminent danger of further abuse from Respondent and whether Respondent represented a credible threat the Petitioner's safety. The court concluded that Respondent's aggressive behavior, threats to destroy Petitioner's belongings, and statement that he was going to get a gun did not demonstrate that Respondent created or continued to create an imminent danger of further abuse or a credible threat to petitioner's physical safety. Reversed.

Decker v. Klapatch, 275 Or App 992 (2015); (EPPDAPA case)

Petitioner appealed an order dismissing a restraining order he obtained under the Elderly Persons and Persons with Disabilities Abuse Prevention Act (EPPDAPA). Petitioner argued that the trial court erred first, in denying his motion for a continuance in order to have time to present his witness, and second, in refusing to allow him to call his witness. The court limited its discussion to the first assignment of error only, and held that the trial court abused its discretion in denying Petitioner's motion for a continuance.

Respondent was Petitioner's former landlord. In his petition, Petitioner stated that he had disabilities relating to his speech, his left leg, his right hand, and that Respondent had harassed and abused him. Petitioner stated that he was in fear for his physical safety and that Respondent

had used “derogatory or inappropriate names.” At the contested hearing, Petitioner testified that Respondent had attempted to run him over, followed him, and reported him to the police over 150 times.

Petitioner’s testimony also included several references to a witness he had that would testify in support of his petition. Following a lengthy cross examination of Petitioner by Respondent’s attorney, the trial court denied Petitioner’s request to continue the matter to give him time to call his witness.

The court found that there was no indication Petitioner was dilatory in presenting his witness or was manipulating the judicial process; rather, Petitioner was testifying on his own behalf without understanding that there was a strict time limit being imposed on him. Based on the circumstances, the court concluded that the trial court abused its discretion in denying Petitioner’s motion for a continuance.

***F.C.L. v. Agustin*, 271 Or App 149 (2015)**

Defendant was charged with two counts of violating a FAPA restraining order that his longtime domestic partner had filed. Defendant was unable to read English and his primary language was Spanish. The Washington County Sheriff served defendant, and explained parts of the restraining order in English. Among other things, the Sheriff explained the distance and contact rules. Petitioner was stopped for a traffic violation a few months later. She called defendant and asked him to come by. Defendant drove to petitioner’s location to help petitioner, and was arrested to violating the restraining order.

At trial, the court indicated that it found the petitioner and the sheriff’s testimonies credible when they testified that the defendant understood the restraining order. After the state rested, Defendant’s lawyer called Defendant to the stand. Before he began to testify, the Court cautioned the Defendant about testifying. Among other things, the court said: “I should put it this way. If a middle class person with 35 years of legal experience thinks he’s lying, you may have a different result than if he exercises his right to remain silent.”

The court of appeals held that the trial court’s advice crossed the line from a permissible warning to impermissible coercion, which violated Defendant’s rights under the Fourteenth Amendment. The court said that the trial court’s colloquy caused Defendant not to testify, even though Defendant had planned to testify, and that precluded Defendant from presenting a defense. Reversed and remanded.

***T.P.O v. Jeffries*, 267 Or App 118 (2014)**

Mother and Father were not married, but had one child together. Father filed a FAPA petition for a restraining order, as well as a domestic relations petition for dissolution. In a hearing on March 9, 2012, the court consolidated the cases and continued the restraining order. On March 16, 2012, the trial court entered an Order After Hearing. Mother filed an appeal on July 2, and contended to the court that her appeal was timely because the trial court did not dispose of the FAPA case until the general judgement was entered on June 13. The court held that the proper date of reference for the 30-day window to file an appeal was the date which the Order After Hearing was entered, not when the general judgement was entered. The court affirmed the trial court’s judgement in the domestic relations case without a written discussion and dismissed the appeal in the FAPA case as untimely.

State v. Crombie, 267 Or App 705 (2014)

The court held that Defendant violated a FAPA restraining order when he used court documents to communicate with Victim. In a five-page document entitled "Addendem [*sic*] to Response and Counterclaim" Defendant disputed Victim's claim of irreconcilable differences in regard to their pending divorce and professed his love for Victim and their children. Defendant then proceeded to provide his account of events that had transpired in his and Victim's marriage, and, referring to Victim in the 3rd person, gave reasons the two should not divorce. In the concluding paragraphs, Defendant addressed Victim directly with phrases that included: "Bye Baby. ☺ I will ALWAYS love you!" The court held that the documents were a violation of the FAPA order because had Defendant expressed the content that was in the court materials in a letter written directly to Victim, Defendant would be in clear violation of the FAPA order, and the court would not allow Defendant to use the court system to accomplish the same aim.

C.M.V. v. Ackley, 261 Or App 491 (2014)

Petitioner and Respondent were in a three and a half year, live-in intimate relationship. The two also worked together. Respondent and Petitioner had a volatile relationship, which led Petitioner to obtain an *ex parte* FAPA limiting contact to emails. The parties continued to work together following a work separation plan. The Respondent ended the relationship over email and resigned from a music-event group both participated in over email. Petitioner testified that Respondent violated the *ex parte* FAPA on at least two occasions, once by entering her side of the building at work, and once by responding to a group email that he was planning on attending an event at which Petitioner was performing. However, Respondent did not end up attending the event.

The Court of Appeals held that a Petitioner's subjective fear is not enough evidence to show an imminent danger or a credible threat. Although the relationship was volatile, once it ended and the parties stopped living together, the volatility ended. The parties continued to work together and have common social circles and have not had an incident since. Thus the Court of Appeals reversed the trial court and the FAPA was dismissed.

N.R.J. v. Kore, 2013 Or App LEXIS 526 (2013)/ *N.R.J. v. P.K.,* 256 Or App 514 (Or App 2013)

Petitioner filed a FAPA against respondent. At the FAPA hearing, the court dismissed the FAPA petition and then issued a SPO under a new case number against the respondent. The respondent had no warning and was not given a chance to object to the SPO. The Court of Appeals reversed after noting the relevant statutes and the fact that the petitioner never requested a SPO and held that a circuit court does not have the authority to impose a SPO *sua sponte*.

S.K.C. v. Pitts, 258 Or App 676 (2013)* *Overturned on Reconsideration in *S.K.C. v. Pitts*, 259 Or App 543 (2013).

Defendant was found in contempt of court and ordered to pay attorney fees, a unitary assessment, and an offense surcharge. Defendant appealed and Court of Appeals held that the trial court erred in assessing a unitary assessment and an offense surcharge.

C.J.P. v. Lempea, 251 Or App 656 (2012)

Petitioner and Respondent lived together between March 2009 and December 2010. On January 4, 2011, Petitioner requested, and was granted, a restraining order preventing Respondent from entering Petitioner's property. This restraining order was dismissed on January 13, 2011. On January 23, 2011, Respondent and his son arrived at Petitioner's property to get his things. Petitioner refused him entry and called 911. On January 25, 2011, Petitioner sought a second restraining order. This restraining order was continued at the contested hearing. Respondent

appealed, contending that Petitioner failed to present sufficient evidence to support issuance of the order. The Court of Appeals assumed for sake of discussion that Petitioner's statement that "he squished me in doorway," constituted abuse under ORS 107.705. The Court held, however, that "there was no evidence that Respondent posed an imminent danger of further abuse to the Petitioner and represents a credible to threat to her physical safety." Thus, under the totality of the circumstances, the Court concluded that the trial court had erred in continuing the order. The Court of Appeals declined to exercise *de novo* review.

S.M.H v. Anderson, 251 Or App 209 (2012)

Petitioner obtained a FAPA in 2009 upon learning that after years without contact, the respondent had called a mutual friend and asked about her. Petitioner testified that she was afraid he would come to Oregon and kill her, based on past threats and acts of abuse, and the trial court granted the ex parte protective order and continued it in 2010. Petitioner's evidence was found to be legally insufficient to meet the "imminent danger of further abuse" requirement upon challenge by respondent, and the Oregon Court of Appeals reversed the trial court's grant of the original FAPA restraining order.

The court contrasted this case with cases (*Hubbell* and *Lefebvre*) where the respondent had made recent communication that "reasonably could be construed as threatening imminent harm" because their actions demonstrated an obsession with petitioner. (Respondent in *Hubbell* had trespassed on petitioner's property, chased her in his car, and made veiled threats to her directly; respondent in *Lefebvre* lurked near petitioner's house and called her describing the sleeping clothes she was wearing.) The court acknowledged this petitioner's genuine fear and the fact that "long- past acts or threats of violence, combined with evidence of a respondent's *present* overtly or implicitly threatening behavior may justify issuance of a restraining order." Although the court stated this was a "close case," they found no evidence on record "from which a factfinder reasonably could infer that petitioner is in *imminent* danger." Petitioner presented evidence of the phone call in 2009 and a letter sent to her in 2005 wherein respondent stated he wanted to come get his possessions from her. The court reasoned that because neither of these contacts contained overt or implicit threats, an inference of imminent danger "falls on the speculative side of the line," and therefore would not be reasonable. Because the court found that petitioner's evidence was insufficient to uphold the imminent danger prerequisite, the court did not decide the issue of whether the petitioner was a victim of abuse. (Petitioner was strangled by respondent in the late 1990s when they lived together, and argued that the FAPA tolling provision applied; respondent argued that ORS 12.140 applied.)

Hemingway v. Mauer, 247 Or App 603 (2012)

Wife and Husband, in the process of dissolution, were disputing the child custody provisions. Wife obtained a FAPA restraining order against Husband after he threatened to kill her over the phone and, on another day, struck the hood of her car. Husband denied ever threatening to kill Wife. At the FAPA hearing, a DHS social worker was allowed to testify against Husband; however, Husband, appearing *pro se*, was not allowed to cross-examine the social worker. The trial court continued the restraining order and temporarily ordered Husband not to have any contact with their children. Husband asked the trial court if he could ask the social worker questions, but the judge told him "You know what, we ran out of time, can't do it." Husband appealed, now represented by counsel, arguing the trial court abused its discretion when it did not allow him to cross-examine the DHS social worker. The Oregon Court of Appeals agreed with the husband, vacated the order continuing the restraining order, and remanded to the trial court.

The court cited *Howell-Hooyman and Hooyman*,113 Or App 548 (1992), concluding that a trial court has the authority to reasonably control the presentation of evidence and the examination of

witnesses – but this authority is only reasonable if it is fundamentally fair and allows opportunities for a reasonably complete presentation of evidence and argument. At the hearing, the trial court allowed the DHS social worker to make a statement, which appeared to affect the court's decision in favor of the wife. Husband was denied a "fundamentally fair" hearing when he was not allowed to cross-examine the social worker.

Also see Nelson v. Nelson, 142 Or App 367 (1996) and *Miller v. Miller*, 128 Or App 433 (1994) discussing the parameters of FAPA hearings and the right to call witnesses and present evidence.

***State v. Trivitt*, 247 Or App 199 (2011)**

Defendant was appealing a contempt of court conviction for violating a restraining order. The court found that Defendant's behavior did not fall under the definition of "interfering" contained in the statute.

While the FAPA order was in effect, Defendant went to Petitioner's current girlfriend's home and placed a small sign at the end of the current girlfriend's driveway. The sign read: "[Petitioner] has Genital Herpes[.] He won't tell you unless he has an outbreak[.] Ask his ex-wife she lives just up the street." The trial court found that Defendant had violated the restraining order "beyond any doubt." However, Defendant contended that the restraining order did not prohibit her from communicating with the current girlfriend or going to the current girlfriend's residence.

The State argued that Defendant's behavior was an attempt to "interfere" with Petitioner through a third party. The court examined the definition of "interfere" and agreed with Defendant that the purpose of a FAPA restraining order is to protect a victim from further abuse, and that Defendant's conduct, analyzed within the context of the statute, was simply "offensive." The court noted that the legislative history indicated that the word "bother" had been left out of the statute, and suggested that Defendant's behavior fell more squarely under that definition.

***Holbert v. Noon*, 245 Or App 328 (2011)**

In *Holbert*, Respondent told Petitioner, numerous times, that he would kill her if she "took [his] children and left." Respondent also sent several text messages, including "you f----- up bad this time, *I won't rest and neither will my resources*," and "one chance to set it right. No guy friends, no Wal-Mart, no cell phone, no old friends. Think hard if you want your life back and what you're willing to sacrifice for it. No more games. *Last shot or it's all over and not just us*." (Emphasis added).

First, the court provided a brief summary of the proper standard of review for FAPA cases – the court is bound by the trial court's finding of facts that are supported by *any* evidence in the record. A request to review a matter *de novo* must be requested pursuant to ORAP 5.40(8)(a) and should reference ORS 19.415(3)(b).

Next, the court focused on the interpretation of "imminent bodily injury". *See* ORS 107.705(1)(b), defining "abuse". Respondent alleged that Petitioner could not be in fear of imminent bodily injury using the totality of the circumstances. The Respondent's counsel relied entirely on how the Oregon Court of Appeals construed the word 'imminent' in a juvenile delinquency case, *Dompelling v. Dompelling*. 171 Or App 692 (2000). In *Dompelling*, "imminent" was defined as, "near at hand," "impending," or "menacingly near." The court concluded that this interpretation was appropriate for FAPA cases. Additionally, the court of appeals reviewed how it had construed

"imminent" in previous FAPA cases, concluding the totality of the circumstances may be considered when interpreting "imminent bodily injury". *See Lefebvre v. Lefebvre*, 165 Or App 297 (2000) and *Cottongim v. Woods*, 145 Or App 40 (1996). Viewed in the totality of the circumstances, the multiple death threats and text messages were enough to show obsessive conduct and threats towards the Petitioner. The court of appeals also included a "practical observation" that if they adopted Respondent's argument, an estranged spouse could tell the other "I'm going to kill you tomorrow" or "If you get custody, you're dead" and that would not be enough for a FAPA restraining order. "We would be sponsoring a parade of horribles . . . [w]e decline to do so."

Compare these facts and context of the text messages with *Sacoman v. Burns*.

Hubbell v. Sanders, 245 Or App 321 (2011)

In *Hubbell*, after their relationship had ended, Respondent was frequently seen in Petitioner's neighborhood and at one point arrested after he was found intoxicated in Petitioner's back yard. After the Petitioner obtained an *ex parte* FAPA order, Respondent chased her, at high speeds, in his car. Respondent challenged that there was sufficient evidence of 'imminent danger' even though he admitted his actions were 'creepy'. The court of appeals disagreed, concluding that the Petitioner was in fear of imminent bodily injury and upheld the FAPA restraining order.

The court cited *Lefebvre*, saying overt threats or physical violence are not required to establish a fear of imminent bodily injury. "For example, behavior that is 'erratic, intrusive, volatile, and persistent' conduct combined with an 'obsession with the idea of killing another person' may place a Petitioner in 'fear of imminent serious bodily injury and in immediate danger of further abuse'." *Lefebvre v. Lefebvre*, 165 Or App 297, 301-02 (2000). "Fear of imminent serious bodily injury" can be established by the totality of the circumstances. *Fielder and Fielder*, 211 Or App 688 (2007). If a Petitioner makes a subjective claim of fear, there must be sufficient evidence that the conduct creates an imminent fear of further abuse. *Roshto v. McVein*, 207 Or App 700, 704-05 (2006).

The court labeled Respondent's behavior as "chilling" and there was sufficient evidence establishing Petitioner was in imminent danger of further abuse by Respondent. The same evidence also showed Respondent's actions were credible threat to Petitioner's physical safety. Therefore, the court upheld the FAPA restraining order against Respondent.

Sacomano v. Burns, 245 Or App 35 (2011)

Petitioner and Respondent began a sexual relationship after Respondent swore to Petitioner she did not have any sexually transmitted diseases. Their relationship ended after Respondent contracted genital herpes. Petitioner then admitted she had genital herpes. Later, Respondent discovered that Petitioner was using a "swingers" website and not disclosing her disease. Respondent sent Petitioner several text messages, essentially threatening to inform her other sexual partners and co-workers that she had genital herpes and that "[her] payback is coming soon." Petitioner filed for a restraining order, which was granted by the trial court.

The Oregon Court of Appeals reversed, concluding that text messages sent by Respondent do not qualify as "abuse" that would support a restraining order under FAPA. *See* ORS 107.705(1). The court decided that sending a text message, threatening to tell others that one has genital herpes and "your payback is coming soon" did not meet the requirements for FAPA; specifically, there was no threat of physical violence that could have placed Petitioner in fear of imminent bodily injury.

Compare these facts and content of the text message with *Holbert v. Hoon*.

***Maffey v. Muchka*, 244 Or App 308 (2011)**

Petitioner and Respondent were in an 18-month relationship and the parents of a young child. Respondent has post-traumatic stress disorder, which causes him to occasionally act in a highly emotional manner, becoming "extremely angry" over "very small, little things." Respondent was also "extremely controlling" and had limited Petitioner's ability to access her money and contact other people. Respondent had made verbal threats to Petitioner, telling her that he could make her life "a living hell" and that he would take their child away from Petitioner "not because I want him but because I'm going to take what you love most." Respondent had previously pushed Petitioner into a wall in 2009. In 2010, Petitioner was preparing an Easter dinner when Respondent became angry and swore at Petitioner. Respondent pushed Petitioner against a wall told her to leave. Respondent became "eerily calm" and walked away, which he had previously told Petitioner was an indication that he was about to become violent. Petitioner and the child moved out, eventually to a safe house, and a temporary FAPA restraining order was issued against Respondent. Respondent violated that order by going near the safe house and having a friend call Petitioner. The trial court continued the FAPA restraining order against the Respondent.

The Oregon Court of Appeals affirmed the decision of the trial court, finding that the Petitioner had presented sufficient evidence, which was essentially not disputed, to support continuation of a restraining order under FAPA. The Court of Appeals provided a straight forward explanation of ORS 107.718(1). Respondent argued that Petitioner had failed to prove that he had either committed abuse or that there was an imminent danger of further abuse; however, the Court of Appeals quickly dismissed this argument, concluding under ORS 107.705(1)(a) and (b) "a person can commit 'abuse,' . . . even if the person does not actually cause bodily injury." Petitioner's testimony was completely credible; therefor there was sufficient evidence of abuse and imminent danger that Respondent would abuse Petitioner again.

***State v. Cervantes*, 238 Or App 745 (2010)**

Defendant was charged with contempt for violating a Family Abuse Prevention Act restraining order. The trial court permitted defendant to represent himself, but it did so without first determining whether defendant's waiver of his right to counsel was voluntary, knowing, and intelligent. This omission was legal error requiring reversal.

***Travis & Travis,* 236 Or App 563 (2010)**

In a modification of custody case in which the trial court had changed custody to Father, the Court of Appeals reviewing the record *de novo* disagreed with the trial court's determination that Mother was unfit due to abuse of the legal process (not related to the FAPA case) and false accusations resulting in police incidents. The Court of Appeals noted that the children were absent from these scenes of police involvement and no evidence existed of detriment to the children from these incidents. The appellate court also noted that mother had obtained a FAPA order against Father, thereby establishing a rebuttable presumption that it is not in the best interests and welfare of the child to award custody to Father. Because the other statutory factors weighed in favour of Mother, the Court did not decide whether the presumption had been rebutted.

***Martinez v. Martinez*, 234 Or App 289 (2010)**

Without explaining how the evidence was insufficient, the court held petitioner had not shown by a preponderance of the evidence that respondent committed abuse, as defined in ORS 107.705(1) against petitioner within 180 days preceding the filing of the petition.

Pavon v. Miano, 232 Or App 533 (2009)
Respondent did not preserve for appeal the argument that the circuit court lacked authority to include custody and parenting time restrictions in the restraining order. His request-for-hearing form conveyed to petitioner and to the trial court that he did not contest the parts of the order granting child custody to the petitioner or the terms of the parenting time order. Moreover, his factual assertion at trial that petitioner took the children does not place the custody provision at issue. Finally, his mere assertion of the claim that petitioner was not a biological parent does not, by itself, preserve challenges predicated on petitioner's legal relationship to the children.

Weismandel-Sullivan and Sullivan, 228 Or App 41 (2009)
Entry of a FAPA order against a respondent after an ex parte appearance by petitioner did not constitute a finding of abuse sufficient to trigger ORS 107.137(2) presumption that awarding custody to respondent was presumptively not in the best interests of the children. No hearing was held on the FAPA order because the parties reached a temporary settlement prior to a dissolution proceeding and petitioner agreed to vacate the restraining order as a part of that settlement.

Ringler and Ringler, 221 Or App 43 (2008), distinguished by *Weismandel-Sullivan*, supra.
Mother's FAPA order against father that was upheld at a contested hearing at which father was represented by counsel established the ORS 107.137(2) presumption that it was not in the best interests of the children to award custody to the father. Evidence presented at trial was insufficient to rebut the presumption.

State v. Montgomery, 216 Or App 221 (2007)
Merely accidental conduct was not wilful violation of a restraining order to sustain a contempt action.

Baker v. Baker, 216 Or App 205 (2007)
Where petitioner testifies that the respondent had not threatened him and there was no evidence he was afraid of her when applying for the restraining order or at the time of the hearing, there was not sufficient proof of imminent danger of further abuse to uphold an order.

State v. Dragowsky, 215 Or App 377 (2007), rev denied 343 Or 690 (2007)
The Defendant's conviction for willfully entering or attempting to enter within 150 feet of the petitioner was upheld in this contempt case. The evidence viewed in the light most favorable to the State and the trial court's findings that the Defendant was not credible allow a reasonable trier to disbelieve the Defendant's testimony that the victim attacked him and caused him to fall on top of her. Evidence was sufficient to support a finding that after discovering the victim in his residence, the Defendant approached and assaulted her, thereby willfully entering an area that he was prohibited from entering by the restraining order.

State v. Maxwell, 213 Or App 162 (2007)
Defendant was charged with burglary and assault for unlawfully entering and remaining in victim's home and assaulting her. Victim had obtained a FAPA restraining order against Defendant, and the court held that even if she had invited him into her house, because the FAPA order prohibited him from doing so, any invitation by her was unlawful and could not give defendant license to do so. Burglary conviction was upheld.

Hayes v. Hayes, 212 Or App 188 (2007)

Petitioner was not in fear of imminent bodily injury, where petitioner did not show that respondent made threats that put him in imminent fear. Threats were made to petitioner in November 2005 that respondent's brother would "kick his ass." Restraining order was sought in April 2006, after an incident where any threats made by respondent were only to petitioner's girlfriend. The court did not address whether threats against a third party (petitioner's girlfriend) could sustain an order.

Fiedler and Fielder, 211 Or App 688 (2007)

The Family Abuse Prevention Act does not require the petitioner to prove subjective fear when the claim of abuse is the respondent's "intentionally, knowingly or recklessly placing [the petitioner] in fear of imminent bodily injury." *Cottongim, below*. Nor are overt threats required. *Lefebvre, below.* The test is whether a reasonable person faced with the described behavior would be placed in fear. Here an incident in which an apparently intoxicated respondent kicked and punched petitioner and an additional situation in which she struck petitioner sufficiently hard to cause a black eye meet the articulated threshold under a totality of circumstances. Furthermore, the requirement of imminent danger of further abuse is satisfied by the evidence of direct and ongoing physical abuse correlated to respondent's alcohol consumption.

State ex rel DHS v. L.S. and J.L.W., 211 Or App 221 (2007)

This termination of parental rights case finds insufficient the State's claims that the father is unfit due in part to his history of criminal convictions and FAPA orders obtained by three of his former domestic partners. Noting father's engagement in anger management and domestic violence education programs and the lack of evidence that he had participated in any violent or abusive conduct since DHS became involved with the family more than 3 years earlier, the Court of Appeals found that he had sufficiently adjusted his behavior. The opinion addresses and finds lacking other claims regarding unfitness.

Magyar v. Hayes, 211 Or App 86 (2007)

This case involved the sufficiency of evidence needed to uphold a stalking protective order between an unmarried couple litigating claims to their jointly owned real property. The Court of Appeals found that the existence of a FAPA order between the parties not relevant for two reasons:

(1) the FAPA order had been issued for the protection of the stalking order respondent [X] rather than the stalking order applicant [Y] and (2) although the original FAPA order had ordered X to vacate certain jointly-owned property, the effect of a modifying FAPA order almost one year after the FAPA order was first issued was merely to reflect the ruling of a separate domestic relations court that Y was the sole owner of that property. The modification action was not a renewal of the FAPA order as X had made no renewal request and the court made no findings necessary for renewal. The modification order therefore did not extend the effective date of the original FAPA order past its original one-year duration so no FAPA order existed at the point X entered the home in a manner Y asserts caused him reasonable apprehension for his personal safety.

Rosiles-Flores v. Browning, 208 Or App 600 (2006)

Petitioner's sworn allegations (in petition for restraining order), along with her personal appearance at an ex parte hearing, satisfied the statutory requirements for obtaining an ex parte restraining order under FAPA. The existence of a restraining order by respondent against petitioner was not a proper basis for denying petitioner a restraining order, and the text and context of FAPA support the opposite conclusion. Each party must separately establish his or her eligibility for a FAPA order.

The petitioner need only make a "showing" that she has met the requirements for issuance of a FAPA order at the ex parte hearing. Because the allegations in the petition are sworn, they constitute evidence in support of the "showing" requirement. If, at the end of the ex parte hearing, there are no un-remedied deficiencies in the petition or contradictions between the petition and the petitioner's testimony, the trial court lacks discretion to deny the petition and "shall" issue the requested order.

Roshto v. McVein, 207 Or App 700 (2006)

An "inundation" of email and telephone messages, plus several uninvited visits to petitioner's house, did not amount to a credible threat to her safety. Without threats of physical harm or actual physical harm, the behavior was not enough to uphold a restraining order, despite petitioner's knowledge that respondent was "on medication," had "mental problems," and had erratic behavior such as leaving beef jerky in the yard for her dogs to eat and asking institutions to send her junk mail. This case was distinguished from *LeFebvre v. LeFebvre*, 165 Or App 297 (2000) because of the imminence of the threat and the credibility of respondent's behavior, *Lefebvre* involved behavior that was "more heightened, persistent, and alarming."

Pooler v. Pooler, 206 Or App 447 (2006)

Mother's unchallenged testimony about father's prior abuse, including violence in front of their children, imposed on the court a duty to put adequate safeguards in place. Where a parent has "committed abuse, the court shall make adequate provision for the safety of the child."

Edwards v. Biehler, 203 Or App 271 (2005)

The Legislature intended that the criteria for terminating unlimited duration Stalking Protective Orders be similar to the criteria for removing FAPA orders. This conclusion is based on the analogous nature of SPO and FAPA orders (both statutory schemes are directed at similar harms and address those harms through entry of orders requiring, among other things, that the respondent avoid contact with the petitioner) and the practical application FAPA termination procedures have for SPOs. Furthermore, legislative history supports the inference that legislators anticipated the terminability of unlimited SPOs. An SPO may be terminated on the respondent's motion when the Court finds that the petitioner no longer continues to suffer reasonable apprehension based on the respondent's past acts.

Wilson and Wilson, 199 Or App 242 (2005)

In Father's suit under ORS 109.119 for custody of Mother's non-joint child, Father did not overcome presumption favoring Mother as legal parent. Father alleged, among other factors, that Mother unreasonably denied or limited his contact with the non-joint child by obtaining a Family Abuse Prevention Act order that alleged physical abuse by Father's cohabitant-girlfriend and prohibited his parenting time until the child was interviewed by a child abuse team in a few days, after which point unsupervised contact could occur. Father ended up with no contact for one month. The Court found Mother's actions reasonable given that she had acted out of concern for the safety of the children and had intended the restriction to be resolved in a matter of days.

Housing and Community Services Agency of Lane County v. Long, 196 Or App 205 (2004)

Defendant prevailed against Housing Agency that was attempting to evict him for violating his lease by failing to disclose that Defendant's Wife was residing with him when not listed on lease (and was not just a guest). Defendant argued successfully that Agency had accepted rent while knowing that Wife was residing with Defendant, and therefore had waived its claim of lease violation. Agency argued unsuccessfully that it had only a suspicion Wife resided there until

Agency obtained copy of Wife's affidavit in support of FAPA order, which affidavit alleged the co-residence. Agency's position failed because Agency accepted at rent for at least 2 rental periods after its receipt of the affidavit, which is the minimum standard for such waiver under ORS 90.415.

Bergerson v. Salem-Keizer School District, 194 Or App 301 (2004), review accepted, 337 Or 616 (2004)

Fair Dismissal Appeals Board's reasoning was insufficient to support its determination reversing the dismissal of a third-grade teacher on grounds of immorality and neglect of duties. The Court found that the Board did not explain why dismissal was clearly an excessive remedy for an isolated incident in which depressed Wife, after ingesting medication in a suicide attempt after emotional confrontation with her estranged Husband, drove her vehicle into the back of his pick-up truck at his girlfriend's home where he was living and pushed it into the garage. The Court was unpersuaded, among other things, with the Board's notion that crimes committed against family members are less serious than crimes committed against strangers. The Court noted that teacher/Wife had damaged house of Husband's girlfriend (who was *not* a family member), that the incident regarding Husband was likely subject to FAPA law and mandatory arrest, and that the Oregon criminal code provided an enhanced penalty for assaults against family members. Case was remanded to Appeals Board for further proceedings.

Majka v. Maher, 192 Or App 173 (2004)

At hearing in which Respondent contested FAPA restraining order, undisputed evidence that Respondent assaulted Petitioner causing injury, for which Respondent was immediately arrested, and threatened both Petitioner and her husband, implying he had found someone to kill them, satisfied requirements for continuation of the restraining order.

Frady v. Frady, 185 Or App 245 (2002)

Although the trial court erred in taking judicial notice of the contents of the return of service of the restraining order, this error was harmless, as the document was otherwise admissible under OEC 803(8)(b). Because service of the order and the reporting of that service were routine, non-adversarial matters, the exclusion from the official records exception for matters observed by police officers was inapplicable. Based on the return of service, the trial court was entitled to find beyond a reasonable doubt that Defendant was served with the restraining order and to infer that Defendant's violation of the order was knowing.

Strother v. Strother, 177 Or App 709 (2001)

A minor applying for a FAPA restraining order must meet the criteria set out in ORS 107.726. A twelve-year-old child requesting a FAPA restraining order (through his mother as guardian ad litem) against his father for alleged physical abuse does not meet the criteria set out in 107.726.

State v. Bachman, 171 Or App 665 (2000)

Prosecution for violation of a restraining order must take place in the county that issued the restraining order. In this case, Defendant was subject to a restraining order issued by the Multnomah County Court. Defendant violated the order in a different county. The issuing county asserted venue for the prosecution, and Defendant appealed the denial of his motion to dismiss for improper venue.

The Court of Appeals decided the case on statutory construction and on state constitutional grounds, and affirmed the trial court's decision. The Court held that the sanctions for contempt are to provide legal teeth for enforcement of court orders and not to replace criminal sanctions. Criminal contempt is not a criminal prosecution within the meaning of Article I, Section II of the Oregon Constitution. Contempt is a violation of a court order, and the court that issued the order has the power to impose sanctions upon the defendant for violations.

State v. Ogden, 168 Or App 249 (2000)

Expert testimony concerning battered women's syndrome (BWS), offered to buttress victim's credibility by providing an alternative explanation for her behavior in continuing to see defendant, was irrelevant and inadmissible in prosecution for coercion, where state did not establish that victim *herself* suffered from BWS.

LeFebvre v. LeFebvre, 165 Or App 297 (2000)

The "totality of the circumstances" may be considered in support of Petitioner's assertion that Respondent has recklessly placed her in fear of imminent serious bodily injury and that she is in immediate danger of further abuse. "Remote" behavior (behavior which took place outside FAPA's jurisdictional window) is part of a "factual context" that may be considered in upholding a FAPA order, even if the remote behavior did not consist of physical violence or the threat of violence towards Petitioner.

In this case, the court considered the totality of the circumstances to uphold the issuance of a restraining order even though Petitioner alleged no actual or overtly threatened physical violence on the part of Respondent. The court considered the facts that within the six months preceding the filing of the petition, Respondent had screamed obscenities at Petitioner in child's presence, barricaded Petitioner out of her house, telephoned Petitioner's friends to tell disparaging stories about her, made numerous hang up phone calls to Petitioner's home, rummaged through Petitioner's possessions, and called her late at night to accurately describe the clothes he observed her wearing as he lurked outside her home. The court considered this information in light of Petitioner's testimony that Respondent had access to guns and that, nine years earlier, Respondent had been obsessed with the idea of killing his former employer.

The court upheld the issuance of the restraining order despite the fact that there was no history of physical or overtly threatened abuse between the parties because the totality of the circumstances and the ominous factual context (taking into account both recent and remote behavior) supported Petitioner's assertion that Respondent had recklessly placed her in fear of imminent serious bodily injury and in immediate danger of further abuse.

Note: Although the Court seemed to consider the remote behavior as relevant to both the issue of whether Respondent placed Petitioner in fear of imminent serious bodily injury *and* to the issue of whether Petitioner was in immediate danger of further abuse, it summed up its decision by saying only that remote behavior was relevant to the issue of whether Petitioner was in immediate danger of further abuse.

Heusel v. Multnomah County District Attorney's Office, 163 Or App 51 (1999)

Boyfriend brought claims for false imprisonment and negligence against the district attorney's office after he was arrested on a warrant for violation of a restraining order issued on behalf of his former girlfriend. The warrant was issued by the court upon the deputy district attorney's mistaken representation that the restraining order had not expired at the time of the abuser's purported violation. The victim told the district attorney that the "violation" had occurred just after she had renewed her restraining order. In fact, the victim had not renewed the restraining order. The boyfriend was arrested. The court ruled that the district attorney's applying for a warrant upon the mistaken belief that there had been a violation amounted to an "erroneous exercise of jurisdiction" and not a "total absence of jurisdiction" and therefore did not deprive the district attorney's office of total immunity from negligence and false imprisonment claims brought by Boyfriend.

Boldt v. Boldt, 155 Or App 244 (1998)

ORS 107.710 (2) (1999) overruled Boldt. The requisite burden of proof is now a preponderance of the evidence. Also see ORS 107.718 (1) (1999) requiring that Petitioner show the imminent danger of further abuse, rather than the previously required "immediate and present danger of further abuse."

In addition to showing that Respondent "abused" Petitioner within the meaning of the Family Abuse Prevention Act, the Petitioner must show that she is in immediate and present danger of further abuse. This showing must be made by clear and convincing evidence given the extraordinary nature of injunctive relief. Petitioner did not meet this burden where there was no evidence that Petitioner feared a repetition of the conduct in question or that it was part of a cycle of abuse likely to repeat and from which she could not extricate herself.

The facts of this case involved a relationship between a Russian immigrant and a respondent with whom she engaged in physically painful but consensual sexual acts throughout their marriage. In light of the holding on imminent danger, the court declined to address the question of whether and when consensual conduct may constitute abuse under the FAPA statute. The court stated that it was not prepared to declare that consensual pain-inflicting conduct necessarily constituted abuse, but noted that "notions of consent, agreement, or mutuality must be approached with particular care in domestic contexts" given the "complicated emotional dynamics that preclude free choice and voluntary behavior"

Fogh and McRill, 153 Or App 159 (1998)

In this action involving a real estate partnership, the Petitioner's obtaining of a Family Abuse Prevention Act restraining order ousting Respondent from their home constituted breach of that agreement where the Petitioner lacked sufficient cause for the restraining order. (The FAPA order was continued for 60 days at the contest hearing without objection by the respondent and then dismissed by apparent stipulation of the parties.) Regardless of whether the trial court improperly applied claim preclusion by excluding evidence of the facts behind the restraining order, a *de novo* review of the record of the FAPA proceedings supports the conclusion that petitioner lacked sufficient cause for the order and thus materially breached the agreement by the "eviction." Because Respondent incurred motel expenses as a direct result of Petitioner's breach, an award for those damages is proper.

Gerlack v. Roberts, 152 Or App 40 (1998)

"No contact within 150 feet" requirement in this restraining order followed language referring to listed types of premises (home, school, business, place of employment, Copperlight bar, etc.) and therefore should not be read as preventing Defendant from coming within 150 feet of Petitioner at *any* location. The provision corresponds to ORS 107.718(1)(g) allowing restraining from entering any premises and reasonable area surround the premises, and contempt can lie only for violation of what the order prohibits. Defendant's conviction for being in video store at same time Petitioner was, when Defendant said nothing to her, did not look or stare at her, left after she did without any contact with her, and did not discuss her presence with his passenger afterward must be reversed. Nor on these facts did Defendant interfere with, menace, or molest Petitioner.

Obrist v. Harmon, 150 Or App 173 (1997)

Where vacation of Petitioner's restraining order is due to her failure to appear at the contest hearing, issue preclusion does not bar a subsequent petition based on the same facts. The vacation was not a final decision on the merits of the first petition.

Nor does claim preclusion bar the second petition when defendant does not argue that the order of vacation is a final judgment and no other record from the first proceeding is provided. When the parties' testimony is irreconcilable on the question of whether Respondent struck Petitioner and each party offers witnesses providing some support, the issue turns on the credibility of the parties. Great reliance is placed on the trial court's determination of credibility in this circumstance, even on *de novo* review, and the implicit finding favoring petitioner will not be disturbed on this record.

Exclusion of testimony from Respondent's eight-year-old daughter was error where the Petitioner did not object and the offer of proof indicated the relevance of the evidence in possibly undermining Petitioner's testimony and touching on issues of self-defense.

Cottongim v. Woods, 145 Or App 40 (1996)

Expiration of Family Abuse Prevention Act restraining order during pendency of appeal does not render appeal moot when Respondent's career *may* be impaired by the judgment, even if no evidence is offered of actual consequence. Respondent was a second year law student and commissioned military officer; restraining order judgment could call into question his fitness to practice law or be suggestive of unlawful conduct.

Evidence is sufficient to support a FAPA restraining order when Respondent became verbally abusive after consuming alcohol; entered her home against her expressed wishes after they broke up, holding her down on the couch and trying to kiss her, leaving bruises on her arms; telephoned her repeatedly, once stating that he could not live without her and if he were going to die, she should too; stated he would do anything he could to make her life hell; sent her letter stating he despised her and wished her a long, slow, painful death; and harassed her at new boyfriend's home by repeatedly phoning and buzzing the intercom. Reasonable person would be "placed in fear of imminent serious bodily harm" and face an "immediate and present danger of further abuse."

State ex rel Langehennig v. Long, 142 Or App 486 (1996)
A Family Abuse Prevention Act restraining order is not a "no contact" order unless a specific term prohibiting contact is included. Mere contact is not otherwise a violation. [Import not discernible from per curiam decision but from State's concession in brief of insufficient evidence].

Nelson v. Nelson, 142 Or App 367 (1996)
Under ORS 107.718(8), a party contesting a restraining order is entitled to a full hearing on the merits as provided in *Miller v. Miller*, 128 Or App 433 (1994). Respondent argued that the court denied her such a full hearing by (1) not allowing her to introduce evidence and (2) by only briefly questioning the husband/petitioner as to the truthfulness of his allegations. However, wife had not made an offer of proof concerning testimony the judge disallowed in an off-record discussion in chambers, and did not clarify this ruling adequately on the record, so the record is insufficient to show error.

Hetfeld v. Bostwick, 136 Or App 305 (1995)
Ex-Wife's interference with ex-husband's visitation rights, encouragement of children calling their father by his first name, changing the children's last names, and insulting him did not constitute the tortuous intentional infliction of emotional distress because this conduct aimed at estranging the father from his children is not an "extraordinary transgression of the bounds of socially tolerable conduct." In substantiating the "prevalence of such conduct" by the ex-wife, the court cited the existence of the Family Abuse Prevention Act. If there is a statute, which responds to such conduct, the court reasoned that the conduct must not be that outrageous.

Pearson and Pearson, 136 Or App 20 (1995)
Court's failure to warn alleged restraining order contemnor of the risks and difficulties of self-representation warrants reversal of contempt adjudication.

Strother and Strother, 130 Or App 624 (1994)
An order entered after a twenty-one-day hearing under the Family Abuse Prevention Act is appealable. The standard of review is *de novo*.

"Immediate danger" can be proven by respondent's calling victim "incredibly stupid" where similar statements usually preceded battering during the marriage. It was not error to hold the hearing more than 21 days after the Respondent's request where he had affidavited the judge, his attorney was unavailable for numerous alternate hearing dates, and the Respondent did not object to the delay before or during the hearing.

Even though unsupervised visitation was ordered in a California divorce, monitored contact may be ordered in a Family Abuse Prevention Act case where police contact, alcohol, and the child's fears are present. (Decision did not mention any UCCJA issues and instead summarily stated that the FAPA statute gives the court the power to order temporary visitation.)

Miller and Miller, 128 Or App 433 (1994)
Contested hearings under the Family Abuse Prevention Act are similar to trials and parties have the right to be heard and have legal and factual issues determined. A respondent must be allowed to call witnesses.

(The opinion rejects without discussion two other assignments of error made by Respondent, the substance of which are identifiable only from the briefs: (1) abuse occurring before 180 days may not be considered in evaluating current fear and (2) a protective order prohibiting the deposition

of the Petitioner was error)

State v. Delker, 123 Or App 129 (1993)
Double jeopardy is not implicated after contempt adjudication (for presence at Petitioner's residence) is followed by criminal prosecution for arson. The charges have different elements and are not part of a continuous, uninterrupted course of conduct.

Pyle and Pyle, 111 Or App 184 (1992)
Under former contempt statutes, a defendant in Family Abuse Prevention Act contempt waives objections to imprecise allegations in the show cause affidavit when he neither demurs under ORS 135.610 nor moves to make them more definite and certain.

If a court of equity has subject-matter jurisdiction and personal jurisdiction over the parties, it may mandate or prohibit actions inside or outside the state. Thus telephonic harassment initiated when both the Petitioner and Respondent were out of state was properly enjoinable and thus properly contemptible.

Pefley v. Pefley, 107 Or App 243 (1991)
Under the former contempt statutes, contempt orders entered in Family Abuse Prevention Act cases must be vacated when the trial court failed to make findings of the defendant's bad faith.

State v. Stolz, 106 Or App 144 (1991)
The violation of a restraining order (for failure to leave premises) and resisting arrest are not the "same criminal episode" within the meaning of ORS 131.515(2), which bar two prosecutions the "same act or transaction."

State ex rel Emery v. Andisha, 105 Or App 473 (1991)
A father who telephones his 14-year-old step-son to tell him the mother/petitioner is sick and needs mental help and that the father wants to meet with the boy has acted in violation of a restraining order prohibiting him from molesting, interfering, or menacing the mother and her children. The prohibited conduct is not so vague that a reasonable person could not understand. The plain and ordinary meanings of "molest," "interfere," and "menace" apply.

State ex rel Delisser v. Hardy, 89 Or App 508 (1988)
A contempt judgment under Family Abuse Prevention Act must include the statutory basis for it. Former ORS 33.020 does not preclude enhanced penalties for violating a Family Abuse Prevention Act restraining order when the conduct, which constitutes the contempt, occurred before the show cause hearing. To support an enhanced penalty, however, a contempt judgment under the Family Abuse Prevention Act must contain the court's findings of fact respecting defendant's contemptuous conduct that defeated or prejudiced plaintiff's right or remedy.

State v. Steinke, 88 Or App 626 (1987)
Police officer, who received report of abuse prevention restraining order violation and saw a car matching the description in the report near the scene of the reported violation shortly after receiving the report, was justified in making an investigative stop of that vehicle.

If a police officer has probable cause to believe that a person has violated an abuse prevention restraining order, that officer is implicitly authorized under ORS 133.31(3) to stop that person, even if it's later shown that the restraining order is invalid.

State ex rel Streit v. Streit, 72 Or App 403 (1985)

A defendant cannot legally have been in contempt of court unless his violation of a Family Abuse Prevention Act restraining order was willful. Evidence that Defendant was very depressed and anxious about overwhelming personal problems and did not remember contacting his former wife is not sufficient to support a finding that his violation was willful or with bad intent.

Burks v. Lane County, 72 Or App 257 (1985)

This case involved the question of whether state law requires a county to appropriate a particular funding level for the sheriff's performance of law enforcement duties. Plaintiff - sheriff cited *Nearing v. Weaver*, *supra*, for his position that a "reasonable" level of funding was required by statute. The appellate court found that *Nearing* was not on point because the specific question in the case at hand did not involve the county's potential liability if its funding decision resulted in injuries attributable to the sheriff's inability to perform his duties.

State v. Smith, 71 Or App 205 (1984)

This case involved an appeal from a civil commitment hearing in which the appellant argued that his acute and chronic alcoholism did not constitute a mental disorder within the meaning of civil commitment statutes. The Family Abuse Prevention Act was cited in the opinion's discussion of the factual record below. The Appellant's father had filed for a restraining order under FAPA, which put the appellant out of the home because Appellant repeatedly fought with, hit, and knocked down his elderly father.

UNREPORTED DECISIONS

State ex rel. Evans v. Phillips, Supreme Court No. S50947, ordered 12/17/03. Linn County

Alternative writ of mandamus issued compelling compliance with mandatory ex parte custody provision of FAPA, or show cause for not doing so. Petitioner Danielle Rae Evans had filed a FAPA action alleging that respondent R. C. Phillips, the father of the couple's two minor children, had abused her. Shortly before initiating her action, petitioner had sent the children to live with respondent. Under the statute, upon a showing that a petitioner has been abused by a respondent within 180 days of instigating a FAPA complaint, a court must, if requested by the petitioner, grant the petitioner temporary custody of the parties' children. In this case, although the circuit court found that respondent had abused petitioner, it nevertheless declined petitioner's child custody request.

State ex rel. Wardell v. Abram, Supreme Court #S36430, ordered 9/7/89. Klamath County.

Alternative writ of mandamus issued compelling amendment of ex parte restraining order to award custody of minor child to Petitioner, or show cause with 14 days why such amendment was not made. Defendant judge complied by amending order.

***State of Oregon ex rel. v. Allen*, Supreme Court No. S31484, ordered 2/28/85. Lane County.**

Alternative writ of mandamus issued compelling amendment of Family Abuse Prevention Act ex parte restraining order to require respondent to move from and not return to the marital residence or show cause within 14 days why such amendment was not made. Defendant judge complied by amending order.

Prepared by: Oregon Law Center and Legal Aid Services of Oregon Updated: October 2017