Sixth Family Law Conference

Oregon Family Law: Change, Challenge, Opportunity

Protective Orders Ratatouille

Presenter:

The Honorable Maureen McKnight, Chief Family Court Judge, Multnomah County Circuit Court

Judge McKnight is the Chief Family Court Judge in Multnomah County, Oregon, handling family, juvenile, and criminal matters. Her legal career, both before appointment to the bench and afterwards, has focused on systemic family law issues affecting low-income Oregonians, including operation of the state's child support program, access to justice issues such as self-representation, and the response of Oregon's communities to domestic violence. Judge McKnight is the lead on the Family Court Enhancement Project, a member of the Oregon Judicial Department's Family Law Advisory Committee, the author of numerous CLE articles, and the recipient of awards from the Oregon State Bar, Oregon Women Lawyers, and the Oregon Child Support Program.

Restraining Order Ratatouille:

Oregon's Protection Orders -- Separately and Combined

Hon. Paula Brownhill – Clatsop County Circuit Court
Hon. Michael Newman – Josephine County Circuit Court
Elizabeth Vaughn – Clackamas County Facilitator
Hon. Maureen McKnight – Multnomah County Circuit Court

SFLAC Conference – March 16, 2017

"ratatouille"

- A casserole or stew in which the vegetables are cooked separately and even after combined for baking, retain an individual character

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What we're covering:

- Requirements to obtain different orders
- Remedies available in different orders
- Problematic areas 
- Technological developments:
  - Interactive FAPA applications
  - Odyssey forms for 5/21 day hearings

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Acronyms

- **FAPA** – *Family Abuse Prevention Act*
- **EPPWDAPA** – *Elderly Persons & Persons with Disabilities Abuse Prevention Act*
- **SPO** – Stalking Protective Order
- **SAPO** – Sexual Abuse Protective Order
- **EPO** -- Emergency Protection Order

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Oregon Restraining Orders --

FACT or FICTION

Get your Clicker!!

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Ingredients!!!!!

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FAPA

Actual, attempted, or threatened PHYSICAL INJURY

Sexual relations by force or threatened force

Eligibility	Current/former spouse, current/former cohabitant, sexual intimate w/in 2 years, parent of joint child, adult related by blood or marriage. + (teen) Minor vs. current/past spouse or adult sexual intimate
Showing	Abuse w/in last 6 months + imminent danger of further abuse
Relief Available	Restraint against abuse, child custody and parenting time, ouster from home if married or held by petitioner, civil standby, restraint from other premises, contact prohibitions, "other relief necessary" – pets, monetary assistance, firearms, etc.
Process	Ex parte order. Noticed hearing if respondent requests.
Duration of order	1 year, unless dismissed earlier
Modifiability	Custody, parenting time, ouster, restraint from premises. Ex parte only if Petr is seeking less restrictive terms
Renewability	Yes: if reasonable for person in petitioner's situation to fear additional abuse
Enforcement	Mandatory arrest. Contempt of court. C Felony if intentional violation + fear/risk of physical injury

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EPPWDAPA

Eligibility	65/+ or Disabled (*physical/mental impairment* substantially limiting a major life activity; *brain injury* affecting daily life
Showing	Abuse w/in last 6 months + immediate/present danger of further abuse
Relief Available	Restraint from abuse, ouster from home if married or held by petitioner, civil standby, restraint from other premises, "other relief necessary" including contact prohibitions
Process	Ex parte order. Contested hearing if Respondent requests.
Duration of Order	1 year
Modifiability	No
Renewability	Yes – if good cause.
Enforcement	Mandatory arrest. Contempt of Court.

BROAD: physical pain/injury, neglect, abandonment of duties, ridicule, harassment, misappropriating money

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Stalking Protective Order

Eligibility	No relationship requirement. Minor Petitioner can file thru GAL. Respondent may be minor and no GAL required.
Showing	*2 unwanted contacts w/in last 2 years* that alarmed/coerced the petitioner + reasonably so + reasonable apprehension re physical safety
Relief Available	Restraint against contact (broadly exemplified to include communication , following, coming into view, sending items, etc.)
Process	Ex parte order + mandatory noticed hearing. Warrant possible if Respondent FTAs.
Duration of Order	Unlimited duration. But due process limits under *Edwards v Biehler*, 203 Or App 271 (2005).
Modifiability	No
Renewability	N/A
Enforcement	Mandatory arrest. A Misdemeanor. C Felony if prior conviction for crime of Stalking or for Violation of SPO

If violation is communication, need reasonable fear re personal safety

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Stalking

Procedure – 2 routes:

Initiated by Police Citation:
- Victim Complaint form to police
- Officer Citation to Hrg in 3 days if probable cause
- Service of Citation
- Temporary Order if more procdng
- Otherwise SPO if showing made
- No damages this route

Initiated by Civil Complaint
- Complaint filed
- Ex parte application→ Temp SPO req'd if probable cause
- Service
- Longer Temporary Order if more prcdng
- Otherwise SPO if showing made
- Damages available where pled (not on court model form)
- Attorney fees available for Petnr (not on court model form)

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Where threats are strictly verbal:

State v. Rangel, 328 Or 294 (1999)

Must:

- Communicate a threat that instills in the petitioner a fear of imminent and serious personal violence
- Be unequivocal
- Be objectively likely to be followed by unlawful acts

Consider if threat is unequivocal to *this Petitioner,* based on past incidents. --

Is the meaning of the threat hidden to others but understood by this Petitioner?

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SAPO

Eligibility	Minor or adult petitioner. 12/+ can file on own. Respondent cannot be a "family or household member" or already be subject to another civil, criminal, or juvenile protective order. [Minors can file against adult related to by blood, marriage, or adoption, + stranger-abuser. And more?]
Showing	1/+ incident of sex abuse w/in last 6 months + reasonable fear for physical safety
Relief Available	Restraint from abuse, contact prohibitions. *Discretionary*: contact with Petitioner's children or family or interfering with same, restraint from Petr's home or other premises, "other relief neces'ry"
Process	Ex parte order. Noticed hearing if respondent requests.
Duration of Order	1 year
Modifiability	Yes – Petr can make ex parte request for less restrictive terms. Otherwise, either party can show good cause.
Renewability	Yes – objectively reasonable for person in petitioner's situation to fear for physical safety if not renewed
Enforcement	Mandatory arrest; Contempt of court

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EPO

Eligibility	Police officer seeks if the "family or household member" consents
Showing	Probable cause that (1) police responding to domestic disturbance + assault/menacing or (2) immediate dgr of abuse; + EPO is necessary to prevent abuse
Relief Available	Restraint against contact and abuse (menacing, interference)
Process	Officer signs declaration under penalty of perjury and transmits to court. Judge available 24/7 to sign and send back. Officer serves respondent and files.
Duration of order	7 days – no statutory challenge.
Modifiability	No
Renewability	No
Enforcement	Mandatory arrest. Contempt of court.

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Problem Areas ---

Just a selection

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"Disabled"

- EPPWDAPA engrafts definitions from other statutory sections
- A person having a physical or mental impairment that substantially limits one or more major life activities *ORS 410.040 (7)*
- A person having a brain injury caused by external forces where the injury results in the loss of cognitive, psychological, social, behavioral, or physiological function for a sufficient time to affect that person's ability to perform activities of daily living. *ORS 410.715*

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Minor Petitioners: FAPA vs. SAPO

Under FAPA, only minor who can file:
- is/was married to *or*
- has been in a sexually intimate rel'shp

w/ the adult Respondent

Under SAPO, a minor can file against ADULT
- Related by blood, marriage, or adoption
- Who is a "stranger"-abuser

Under SAPO, a minor can file against a sexually abusive parent

What about teen in dating/cohab relationship?

SAPO Respondent cannot be a "family or household member" of Petitioner, but do *minor sexual intimates or cohabitants* fall in group given the operation of the FAPA statute?

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Paternity: what if not established?

Distinguish:

Qualifying relationship
(unmarried parents of minor child)

Relief available
(authority to grant custody +/or parenting time)

If paternity is not established:

Maybe another qualifying relationship, such as cohabitation or recent sexual intimacy

No other way to order custody or parenting time

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Rangel: When the only abuse is a verbal threat

** Where threats are strictly verbal:* State v. Rangel, 328 Or 294 (1999)

The threat must:

- communicate a threat that instills in the addressee a fear of imminent and serious personal violence
- be unequivocal
- be objectively likely to be followed by unlawful acts

Consider if threat is unequivocal *to this Petitioner*, based on past incidents

(Is the meaning of the threat hidden to others but understood by Petitioner?)

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Abusive Speech in EPPWDAPA

Under EPPWDAPA, "abuse" includes use of

- Derogatory or inappropriate names, phrases or profanity
- Ridicule
- Harassment
- Coercion
- Threats
- Cursing
- Intimidation
- Inappropriate sexual comments or conduct

of such nature **as to threaten significant physical or emotional harm** to the applicant

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Residing in close proximity

- Under FAPA and EPPWDAPA, one cannot "oust" the respondent from the petitioner's home unless the parties are married or the residence is jointly or solely owned or rented by the Petitioner
- What if the parties live next door to each other?

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- If a Judge can't "oust" the respondent from the Petitioner's home,

Can a Judge nevertheless keep the Respondent away from his home under the authority to restrain the Respondent from entering "*any premises and a reasonable area surrounding the premises"* when necessary to prevent abuse to the Petitioner or children in Petitioner's care?

- If a Judge can, must she?

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Minors as Respondents in Stalking Cases

- ORS 30.866(5) – The Court *may* enter an order under this section against a minor respondent without appointment of a guardian ad litem
- No other statutory language re Oregon restraining order makes ORCP 27B inapplicable

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Personal jurisdiction

- To issue enforceable orders, Oregon has to have "minimum contacts" with the Respondent related to the legal action.
- The FAPA forms require the Petitioner to detail WHERE the abuse occurred in addition to what happened
- Is it the Judge's job to raise *on her/his own* this possible defense the Respondent might have?
  - *And deny the order if personal jurisdiction appears lacking? Or let the Respondent raise it when served?*

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UCCJEA issues

- If child not been in Oregon for last 6 months, or
- Another State entered an order and a parent still lives there (continuing exclusive jurisdiction)

  is there **Temporary Emergency Jurisdiction**?

  Child present in Oregon +
  Abandoned or
  Emergency = Child, Parent, or Sib threatened with mistreatment or abuse (*not* include neglect
- If so, Judge:
- MUST communicate with other state *if another order is pending or already entered elsewhere*
- MAY communicate with other state otherwise (as to determine most convenient forum, declining jdx, etc.)

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Discovery

- Do Judges in your county allow depositions, or other discovery, in FAPA and other restraining order cases??

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No discovery

FAPA statutes anticipate expedited processes and require hearings within timeframes inconsistent with the "reasonable notice" standard set out in ORCP 39

Discovery OK

Nothing in the FAPA statute removes this special statutory proceeding from ORCP applicability. ORCP 1

What have Oregon appellate courts said?

What have appellate courts in other jurisdictions said?

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"Other Relief Necessary"

. . .to provide for the safety and welfare of the petitioner and the children in the custody of the petitioner, including but not limited to:

- emergency monetary assistance"
- (firearms)
- (locks on doors; bus ticket to leave; ??)
- (personal property outside of essential items retrievable in standby)

. . ."to prevent the neglect and protect the safety of any service/therapy animal "or pet

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Firearms

Authority in Restraining Order ORS to order dispossession:

Any other relief necessary to provide safety & welfare

FAPA	√
EPPWDAPA	√
Stalking	X or ??
SAPO	√
EPO	X

Violation of this provision = Contempt of Court

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Possession of firearms or ammunition could also be a CRIME for a restraining order Respondent under:

State law (ORS 166.255)	Federal Law (18 USC 922(g)(8)
Order issued after actual notice	
With opportunity to be heard	
Respondent is: (1) current/past spouse, (2) current/past cohabitant (with sexual intimacy) or (3) parent of joint child	
Order contains credible threat finding	
Exception: firearms in public use	

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Electronic Forms

Interactive online queries for parties ➞ printed forms

Odyssey forms for 5/21 day hearings, with electronic signatures for Judges

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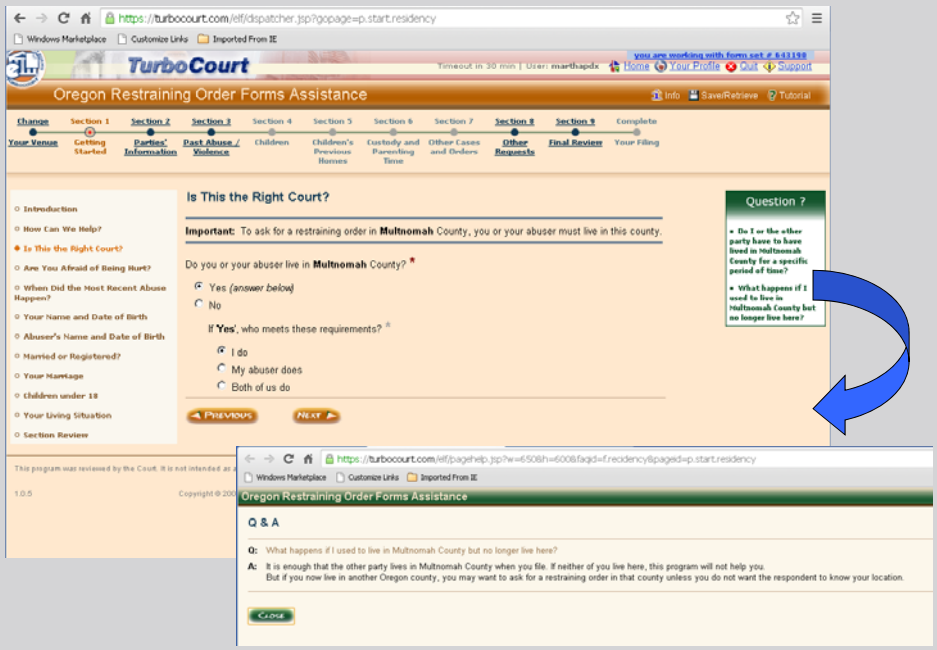

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Odyssey Form for 5/21 day hrg

Demonstration

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End – *THANKS!!!*

TYPES OF PROTECTIVE ORDERS AVAILABLE

***Petitioner* is the person wanting to be protected. The *Respondent* is the person you're getting order against.**

	FAPA *(Family Abuse Prevention Act Order)* ORS 107.700	**EPPDAPA** *(Elderly Persons and Persons with Disabilities Abuse Prevention Act Order)* ORS 124.005	**SAPO** *(Sexual Assault Protective Order)* ORS 163.760	**Stalking** *(Stalking Protective Order)* ORS 30.866
Who may ask the court for protection?	• Adults • Minors involved in sexually intimate relationship with Respondent • Minors under 18 need Guardian ad Litem	• Adults who are 65 years old or older • Adults or Minors with a disability • Minors under 18 need Guardian ad Litem	• Adults • Minors • Minors under 12 need Guardian ad Litem	• Adults • Minors • Minors under 18 need Guardian ad Litem
What is the required relationship between Petitioner and Respondent?	• Adults related by blood, marriage (including former spouses), or adoption • Adults who are/were in an intimate relationship within the past two years • Adults who are unmarried parents of a minor child	No relationship between Petitioner and Respondent required.	• Cannot be a member of family or household • Cannot have any other protective orders against the Respondent • Respondent must be an adult	Any person who knows you did not want contact, but continued to contact you anyway.
Duration of Orders:	• Good for 1 year from date signed • Can be renewed before expiration date	• Good for 1 year from date signed • Can be renewed before expiration date	• Good for 1 year from date signed • Can be renewed before expiration date	• Good for lifetime • Can be vacated on respondent's motion if circumstances change

What abuse must have occurred to qualify for the order?	• In the last 180 days*, Respondent injured you or tried to injure you; and/or • Respondent's actions or words placed you in fear that they would cause you injury very soon; and/or • Respondent caused you to have sexual contact with them by using force or threatening to use force AND • You are in immediate danger of further abuse by the Respondent	• In the last 180 days*, Respondent caused physical abuse, neglect, harassment (including inappropriate language and sexual comments that threatened significant harm), sexual abuse, keeping/taking your property, or financial abuse AND • You are in immediate danger of further abuse by the Respondent	• In the last 180 days*, Respondent made you have sexual contact without your consent (or to which you are/were unable to consent) AND • You are in reasonable fear of your physical safety (injury, threats, and use of physical force are not required)	Two or more unwanted contacts, in the past 2 years, that put you in fear for your or your family's physical safety. Contacts can include: • physical violence • threatening messages (mail, email, in person, text, phone) • following you • spying on you • coming to your work or home
What are some things the Court can order?	• Custody and parenting time orders • Removal from (legally) shared home • Restrict from going certain places • Restrict ability to have firearms • Limit or restrict contact	• Removal from (legally) shared home • Restrict from going certain places • Restrict ability to have firearms • Limit or restrict contact	• Removal from (legally) shared home • Restrict from going certain places • Restrict ability to have firearms • Limit or restrict contact	• No contact • No possession of firearms in certain family situations

*There are some exceptions. For more information speak to an advocate or go to: http://courts.oregon.gov/OJD/OSCA/JFCPD/Pages/FLP/FAPA.aspx

This is a summary of the orders and not a substitute for legal advice. Other handouts and resources have more information about each type order. You may qualify for more than one order.

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DECISIONS FROM THE OREGON APPELLATE COURTS CITING THE FAMILY ABUSE PREVENTION ACT
(May 2016)

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

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, pushed and kicked Petitioner, and told Petitioner she could not call the police. 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.

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.

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.

C.M.V. v. Ackley, 261 Ore. 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.

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.

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.

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.

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.

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 unremedied 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 terminabilty 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 Bolt. 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 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: July 2016

OREGON STALKING LAW
AND RELATED FEDERAL PROVISIONS

ORS 163.730	Definitions in Stalking Laws
ORS 163.732	Crime of Stalking
ORS 163.750	Crime of Violating Stalking Protective Order
ORS 163.735-744	Police Citation and Court Issuance of Stalking Protective Order
ORS 30.866	Civil Action for Stalking Protective Order
ORS 133.310 (3)	Mandatory Arrest for Violation of Stalking Protective Order
ORS 166.293 (3)-(6)	Revocation of Handgun License for Violation of Stalking Protective Order
18 U.S.C. §922(d) and (g)	Federal Prohibition Against Purchase or Possession of Firearms or Ammunition by Stalking Order Respondent

OVERVIEW

The basic statutory schemes for stalking protective orders are set forth in two separate areas of the Oregon statutes. ORS 30.866 provides authority for a petition to obtain a stalking protective order via an *ex parte*, civil-petition process. ORS 163.730-163.755 provide authority for issuing a stalking protective order after a law enforcement officer has issued a citation as a result of a citizen complaint. The citation does not charge a defendant with the crime of stalking under ORS 163.732 or prohibit contact but rather initiates a process that can lead to a court-issued stalking protective order.

Note that ORS 30.866(2) and (11) cross reference ORS 163.730 and ORS 163.742–statutes that are part of the officer citation process. Under ORS 163.732, stalking is a crime. While significant overlap exists, the elements for the crime of stalking differ slightly from those required for issuance of a stalking protective order. The mandatory arrest statute, ORS 133.310(3), applies to violations of stalking protective orders. Violation of a Court's Stalking Protective Order is a Class A Misdemeanor or a Class C Felony if the respondent has a prior conviction for Stalking or Violating a Court's Stalking Protective Order. ORS 163.750(2).

A summary of Oregon appellate stalking cases follows this outline and review of the summaries

is essential, as these cases are very fact-specific. The vast majority of these cases involve the issuance of civil stalking protective orders. **These cases make clear that the trial court record must contain facts that support each element of a claim for a stalking protective order to survive reversal.** Finally, Chapter 4 of the OSB Family Law BarBook at §4.9 provides an additional and more in-depth explanation and analysis of Oregon's stalking laws.

I. CRIME OF STALKING

A. ELEMENTS OF THE CRIME. ORS 163.732.

(Many of the cases cited in this section involve review of civil stalking protective orders.)

1. Knowingly

   "Knowingly" or with knowledge, when used with respect to conduct or to a circumstance described by a statute defining an offense, means that a person acts with an awareness that the conduct of the person is of a nature so described or that a circumstance so described exists. ORS 163.085(8).
2. Alarms or coerces
   a. "Alarm" means causing apprehension or fear resulting from the perception of danger
   b. "Coerce" means restraining, compelling, or dominating by force or threat

   ORS 163.730(1) and (2).
3. Another person or member of that person's immediate family or household
   a. "Immediate family" means father, mother, child, sibling, parent, spouse, grandparent, stepparent, and stepchild. ORS 163.730(5).
   b. "Household member" means any person residing in the same residence as the victim. ORS 163.730(4).
4. By engaging in **repeated and unwanted contact** with the other person
   a. "Repeated" means two or more times. ORS 163.730 (7); *State v. Jackson*, 259 Or App 248 (2013).
   b. Whether a contact is "unwanted" may be determined by considering all contacts in the context of the relationship between the parties. *See Tumbleson v. Rodriguez*, 189 Or App 393 (2003) (contact not unwanted when petitioner's mother, not petitioner, told respondent to stop calling petitioner or when Petitioner told respondent to leave but changed his mind and agreed she could stay the night); *Jones v. Lindsey*, 193 Or App 674, 680 (2002) (voluntary contacts not "unwanted" within meaning of stalking statute); *Wayt v. Goff*, 153 Or App 357 (1998) (contacts not unwanted when petitioner initiates them).
   b. "Contact" includes, but is not limited to:
      (1) Coming into the visual or physical presence of the other person

(2) Following the other person
(3) Waiting outside the home, property, place of work or school of the other person or a member of that person's family or household
(4) Sending or making written or electronic communications in any form to the other person
(5) Speaking with the other person by any means
(6) Communicating with the other person through a third person
(7) Committing a crime against the other person
(8) Communicating with a third person who has some relationship to the other person with the intent of affecting the third person's relationship with the other person
(9) Communicating with business entities with the intent of affecting some right or interest of the other person
(10) Damaging the other person's home, property, place of work or school, or
(11) Delivering directly or through a third person any object to the home, property, place of work or school of the other person

ORS 163.730 (3)(a-k).

This list is not exclusive. *Boyd v. Essin*, 170 Or App 509, 512-13 (2000).

5. When it is objectively reasonable for a person in the victim's situation to have been alarmed or coerced by the contact, ORS 163.732(1)(b), the element of "alarm" may be inferred from the petitioner's testimony in some circumstances. *See Soderholm v. Krueger*, 204 Or App 409 (2006) (nature of the contacts and the history of the relationship between respondent and petitioner and her family did not give rise to inference of alarm); *Boyd v. Essin*, 170 Or App 509, 517-518 (2000) (subjective alarm inferred); *Cress v. Cress*, 175 Or App 599, 601-602 (2001) (subjective alarm not inferred). Alarm or coercion cannot be inferred when there is no testimony to that effect. *See Travis v. Strubel*, 238 Or App 254 (2010).
6. The unwanted contact causes the victim reasonable apprehension regarding her personal safety or that of her immediate family or household members. ORS 163.732(1)(c*). J.L.B. v. Braude/K.P.B.*, 250 Or App 122 (2012) (because parties were not strangers to each other and were required to communicate periodically about parenting time and financial matters, seeing the respondent drive past would not have caused a reasonable person in petitioner's position to feel apprehension for her personal safety).
7. In both the criminal and civil context, Oregon case law has established that **expressive or communicative contacts** must meet a more stringent standard than what is set out in the statute, because speech is protected under Article 1, section 8 of the Oregon Constitution. The standard was enumerated first in *State v. Rangel*, 328 Or 294 (1999). The *Rangel* test requires proof that threats or contacts that involve expression: a) instill a fear of imminent and

serious personal violence; b) are unequivocal; and c) are objectively likely to be followed by unlawful acts. Numerous appellate cases have applied the *Rangel* test. *See e.g., C.J.L. v. Langford*, 262 Or App (2014); *State v. Sierzega*, 236 Or App 630 (2010); *Swarrington v. Olson*, 234 Or App 309 (2010); and *Putzier v. Moos*, 193 Or App 290 (2004). An objective standard applies to the court's determination of whether the respondent intended to carry out a threat. *See V.A.N. v. Parsons*, 253 Or App 768 (2012).

a. In a line of cases involving issuance of stalking protective orders, the Court of Appeals has held that expressive contacts may be considered contextually for purposes of determining whether other non-expressive contacts support issuance of an order. *Christensen v. Carter/Bosket*, 261 Or App 133 (2014); *Castro v Heinzman*, 194 Or App 7 (2004)

b. Contacts that involve both speech and coming into a person's visual presence or other contacts listed in ORS 163.370 are not purely communicative. The act of e-mailing and calling, regardless of content, may still alarm the victim even if it does not meet the higher standard for expressive contacts. *State v Maxwell*, 165 Or App 467 (2000); *Smith v DiMarco*, 207 Or App 563 (2006); *Habrat v. Milligan*, 208 Or App 229 (2006).

B. CLASSIFICATION. ORS 163.732 (2)

1. Class A Misdemeanor
2. Class C Felony if prior conviction for:
   a. Stalking
   b. Violation of court's stalking protective order
3. When a Class C Felony, stalking is a "person felony" and "crime category 8" under sentencing guidelines.

II. CIVIL REMEDIES -- OFFICER'S CITATION TO APPEAR IN COURT

A. ISSUANCE OF OFFICER'S CITATION

1. Complaint is presented by any person to any law enforcement officer or agency. ORS 163.744 (1).
   a. Complaint must affirm truth of facts stated, but a parent may petition to protect child, and a guardian may present a complaint to protect a dependent person. ORS 163.744(1) and (3).
   b. The Oregon State Police must develop and distribute the complaint form, in substantial conformity with the statute, and include in it "standards for reviewing the complaint and for action". ORS 163.744(2).
2. Issuance is *required* when the officer has probable cause to believe that:
   a. The respondent has intentionally, knowingly, or recklessly engaged in repeated [at least twice] and unwanted contact with another person or a member of that person's immediate family or household thereby alarming or coercing the other person; and

b. It is objectively reasonable for a person in the victim's situation to have been alarmed or coerced by the contact; and
c. The repeated and unwanted contact causes the victim reasonable apprehension regarding the personal safety of the victim or a member of the victim's immediate family or household. ORS 163.735(1).

3. An officer acting in good faith has immunity in civil actions for issuing and failing to issue a citation to appear in this context. ORS 163.753.
4. Results from any investigation must be reported to the District Attorney within three (3) days after the complaint is presented. ORS 163.738(7).

B. THE CONTENT OF THE OFFICER'S ORDER

1. The form of the citation must be uniform statewide and developed by the Oregon State Police in conformity with statutory minimums. ORS 163.735(2).
2. The citation must include:
   a. A copy of the stalking complaint
   b. Information regarding the date, time, and place the respondent must appear in circuit court for a hearing on whether a court's stalking order of unlimited duration should be entered
   c. Notice of the issuing officer's name, and the date, time, and place the citation was issued
   d. Notice that if the respondent fails to appear at the circuit court hearing, an arrest warrant will issue and a judicial stalking order will be entered. ORS 163.738(1).
3. The statutory form for the citation also includes notice that it has been alleged that respondent has alarmed or coerced the petitioner and if engaged in, will subject the respondent to arrest for the crime of stalking and further includes notice that certain federal laws relating to crossing state lines for certain purposes and possessing firearms may apply. ORS 163.735(2).
4. The officer must notify the complainant in writing of the date, time and place of the hearing. ORS 163.738(1)(b),

C. COURT HEARING ON OFFICER'S CITATION

1. The hearing must be held by the third judicial day from issuance. The court may allow a continuance for up to 30 days. ORS 163.738(2)(a); ORS 163.735(1).
2. The petitioner may appear in person or by telephone. ORS 163.738(2)(a). The respondent must appear in person; if he does not, an arrest warrant and a stalking protective order must issue. ORS 163.738(4).
3. At the hearing, the court:
   a. May enter temporary stalking protective orders pending further proceedings. ORS 163.738(2)(a)(A).
   b. May enter a stalking protective order of unlimited duration if the

court finds by a preponderance of the evidence that the respondent has engaged in stalking (see II.A.2. a-c above; see also II.A.7. above regarding expressive contacts). ORS 163.738 (2)(a)(B).

c. In the order, the court must specify the conduct from which the respondent is to refrain and may include all contact listed in ORS 163.730 and any attempt to make contact listed in ORS 163.730. ORS 163.738(2)(b).
This list is not exclusive. *Boyd v. Essin*, 170 Or App 509, 512-13 (2000).

d. May order the respondent to undergo a mental health evaluation, and if the evaluation indicates, treatment.
   (1) The court must refer the respondent to county mental health if the respondent is unable to pay for evaluation, treatment, or both. ORS 163.738(5).
   (2) Civil commitment procedures must be initiated on probable cause that respondent is dangerous to self or others or is unable to provide for basic personal needs. ORS 163.738(6).

e. If the respondent had notice and an opportunity to be heard, the court is required to include in the order, when appropriate, terms sufficient to restrict the respondent's ability to possess firearms under 18 U.S.C. §922(d)(8) and 18 USC §922(g)(8). ORS 163.738(2)(b). See discussion at III.K. below.

4. Except for purposes of impeachment, a statement made by a respondent at a hearing under ORS 163.738 may not be used to prosecute the crime of stalking or violation of a stalking order. ORS 163.738(8).

III. CIVIL REMEDIES -- INDEPENDENT ACTION FOR STALKING PROTECTIVE ORDER UNDER ORS 30.866

A. PETITIONER - Any person may petition for a court's stalking protective order or damages, or both. ORS 30.866(1). A relationship, familial or otherwise, between the respondent and the person to be protected is not required.

B. ELEMENTS OF THE CLAIM - The same as for issuance of an officer's citation (*see* II.A.2.(a-c) regarding statutory elements and II.A.7. regarding expressive contacts above). ORS 30.866(1).

C. FEES - No court or service fees can be charged. ORS 30.866(9).

D. TEMPORARY RELIEF - When a petition is filed, a court that finds probable cause of stalking based on the petitioner's allegations at an ex parte hearing, *must* enter a temporary stalking protective order. The petition and temporary order are served on the respondent along with an order to appear to show cause why the

temporary order should not be continued for an indefinite period. ORS 30.866(2).

E. SHOW CAUSE HEARING

1. Whether or not the respondent appears, the court may grant a 30-day continuance or enter a protective order and take other action available at hearings on officer's citations. ORS 30.866(3)(a); ORS 163.738. *See* II.C.3. above.
2. If the respondent fails to appear, the court may issue an arrest warrant. ORS 30.866(3)(b).

F. OTHER RELIEF - The petitioner may recover specific and general damages (including damages for emotional distress), punitive damages, and attorney fees and costs. ORS 30.866(4). Respondents are entitled to a jury trial on any claims for damages. *M.K.F. v. Miramontes*, 352 Or 401 (2012).

G. MINOR RESPONDENTS - The court may enter an order against a minor respondent without appointment of a guardian ad litem. ORS 30.886(5).

H. STANDARD OF PROOF - The petitioner must prove his or her case by a preponderance of the evidence. ORS 30.866(7).

I. STATUTE OF LIMITATIONS - The petition must be filed within two (2) years from the time the claim arose (i.e., from when the conduct occurred). ORS 30.866(6).

J. CUMULATIVE REMEDY - The protective order and damages available are *additional* to any other civil or criminal remedies the law provides for the respondent's conduct. (FAPA relief is available at the same time.)

K. FIREARMS POSSESSION- If the respondent had notice and an opportunity to be heard, the court is required to include in the order, when appropriate, terms sufficient to affect the respondent's ability to possess firearms under 18 U.S.C. §922(d)(8) and 18 USC §922(g)(8). ORS 30.866(10). 18 USC §922(g)(8) makes the possession of firearms by respondents who are subject to a qualifying court order a federal crime. Certain stalking protective orders are qualifying court orders.

1. For an explanation of the elements of a qualifying court order, see the "Qualifying Order of Protection/Restraint" (Federal Firearms Prohibitions – Oregon Benchsheet) at: http://www.courts.oregon.gov/OJD/OSCA/JFCPD/Pages/FLP/Firearms-Restrictions.aspx

2. The purpose of the requirement that the court include terms in the order is to ensure that respondents are apprised that they may be subject to the federal prohibition and to make it easier to identify disqualified

firearms purchasers under the Brady Handgun Violence Prevention Act. A firearms certification is incorporated in the model stalking protective order form that can be found at: http://www.courts.oregon.gov/OJD/OSCA/JFCPD/Pages/FLP/Stalking.aspx

3. For more information about federal firearms laws that protect victims of domestic violence, see the OJD publication, "Firearms Prohibitions in Domestic Violence Cases: A Guide for Oregon Courts" at: http://www.courts.oregon.gov/OJD/OSCA/JFCPD/Pages/FLP/Firearms-Restrictions.aspx

L. LIMITATION ON USE OF RESPONDENT STATEMENTS - Except for purposes of impeachment, a statement made by a respondent at a hearing under ORS 30.866 may not be used to prosecute the crime of stalking or violation of a stalking order. ORS 30.866(12).

M. FORMS – Model stalking protective order forms are available at: http://www.courts.oregon.gov/OJD/OSCA/JFCPD/Pages/FLP/Stalking.aspx

IV. SERVICE/ENFORCEMENT/TERMINATION OF STALKING PROTECTIVE ORDERS

A. SERVICE

Service on the respondent is by personal delivery of a copy of the order unless the order notes that the respondent has appeared in person before the court. ORS 163.741(1).

B. ENTRY INTO LEDS AS STATEWIDE NOTICE TO ALL LAW ENFORCEMENT

The person who serves a stalking order must deliver a true copy of the order and a proof of service to the county sheriff, as with Family Abuse Prevention Act Restraining orders, for entry into the Law Enforcement Data System (LEDS) and the database of the National Crime Information Center (NCIC) of the U.S. Department of Justice. Entry of the order into LEDS constitutes statewide notice of the order to all law enforcement agents. County sheriffs are required to cooperate with law enforcement agencies in other jurisdictions who request verification of or copies of existing orders. When a stalking protective order is terminated, the court must send the order to the county sheriff, and the county sheriff must immediately remove the original order from LEDS. ORS 163.741; ORS 30.866(11).

C. VIOLATION OF STALKING PROTECTIVE ORDER and MANDATORY ARREST

A peace officer *must* arrest and take a respondent into custody without a warrant when the officer has probable cause to believe:

1. A stalking protective order exists (whether it is the court's order subsequent to an officer's citation or an order resulting from an independent civil action);
2. A true copy of the order and proof of service has been entered into LEDS; and
3. The respondent has violated the terms of the order. ORS 133.310(3).

D. VIOLATION OF STALKING PROTECTIVE ORDER -- CRIMINALIZED

1. Violation of a court's stalking protective order is a crime. ORS 163.750
2. Elements:
   a. Intentionally, knowingly, or recklessly engaging in conduct prohibited by the court's stalking protective order after service of the order; and
   b. If the prohibited conduct is communicating or speaking with a protected person, even through a third party, or with a business entity, the conduct must have created reasonable apprehension regarding a protected person's personal safety. ORS 163.750 (1). When relying on expressive contact violations, the state is *not* required to present evidence of "an unequivocal threat of the sort that makes it objectively reasonable for the victim to believe that he or she is being threatened with imminent and serious physical harm," as required by *State v. Rangel*, 328 Or 294 (1999). Rather, the *Rangel* standard is only applicable at the time the underlying stalking protective order is obtained. *State v. Ryan*, 350 Or 670 (2011)
3. Classification -- Class A Misdemeanor, except is Class C Felony if prior convictions exist for stalking or violation of stalking orders. As Class C felony, stalking is a "person felony" and "crime category 8" under sentencing guidelines. ORS 163.750(2).

E. VIOLATION OF STALKING PROTECTIVE ORDER - HANDGUN LICENSE REVOCATION

Violation of a condition of a stalking order by a licensee subject to the order is cause for revoking a concealed handgun license. ORS 166.291 and 166.293.

F. TERMINATION OF STALKING PROTECTIVE ORDERS

The issue of whether stalking protective orders were permanent or subject to modification or termination had been a topic on which there was disagreement among the bench and bar. In *Edwards v. Biehler*, 203 Or App 271 (2005**),** the

Oregon Court of Appeals addressed for the first time the issue of whether a stalking protective order can be terminated. The Court of Appeals held that a court may terminate a stalking protective order under ORS 163.741(3). Such orders allow for termination by the court when, "on the respondent's motion, a court finds that the criteria for issuing the order under (the statute) are no longer present." In such situations, courts' inquiries shall focus on "whether petitioner continues to suffer 'reasonable apprehension' due to the past acts of the respondent under ORS 163.738(2)(a)(B)(iii)." *See also Stuart v. Morris***,** 231 Or App 26 (2009***)***; *Benaman v Andrews***,** 213 Or App 467 (2007).

V. EXEMPTIONS FROM STALKING REMEDIES/PROSECUTION

Stalking provisions are not intended to permit prosecutions for, or civil orders against, activities permitted by federal and state labor laws. ORS 163.755(1)(a). *But see, State v. Borowski*, 231 Or App 511 (2009) voiding similar exemption for activities connected with a "labor dispute" in ORS 164.887. Stalking orders cannot be obtained by persons who are in law enforcement custody or by anyone against certain law enforcement personnel acting within the scope of their duties. ORS 163.755.

DECISIONS FROM THE OREGON APPELLATE COURTS CITING OREGON STALKING LAW

(through September 2016)

Oregon Supreme Court

L.E.A. v. Taylor, 279 Or. App. 61 (2016)

Respondent appealed, claiming that the trial court erred in denying his motion to set aside a stalking protective order.

Respondent was never served the petition or the notice of that a temporary SPO had been entered, and he had not no notice regarding the hearing. Neither party appeared and the court entered a final SPO and judgement. Respondent filed a motion to set aside the final SPO, asserting that ORS 30.866(2) required service of the petition and temporary order on the respondent. He also asserted that entering the order without notice violated his due process rights. The lower court denied respondent's motion.

The Oregon Court of Appeals reversed and remanded. It found that entry of the final SPO was improper without service of the petition and temporary SPO. The court agreed with the respondent's argument on appeal that the court lacked personal jurisdiction to enter the final order without service.

M.K.F. v. Miramontes, 352 Or. 401 (2012)

Plaintiff filed a civil action pursuant to ORS 30.866, which authorizes issuance of a stalking protective order (SPO) as well as claims for compensatory damages and reasonable attorney fees. Over defendant's objection, the trial court conducted the trial on all three claims without a jury. Defendant did not seek review in the Supreme Court of the part of the trial court's order awarding attorney fees. The Supreme Court reversed the Court of Appeals determination on the claim for compensatory damages, holding that defendant was entitled to a jury trial on this claim. The court remanded the case to the trial court for a jury trial on plaintiff's claim for compensatory money damages.

State v. Ryan, 350 Or. 670 (2011)

Overturned Court of Appeals' decision in *State v. Ryan*, 237 Or.App. 317 (2010) (see below). Defendant had violated a stalking protective order by contacting victim through a third party and was found guilty at a jury trial. Defendant appealed the conviction for violating the order, though he conceded the validity of the underlying protective order. The Court of Appeals held that Article I, section 8, required that ORS 163.750 be judicially narrowed to require "an unequivocal threat of the sort that makes it objectively reasonable for the victim to believe that he or she is being threatened with imminent and serious physical harm." The Supreme Court reversed, holding that "because defendant's communications with the victim were already prohibited by the stalking protective order, the state was not required by Article I, section 8, to prove under ORS 163.750 that defendant had communicated an unequivocal threat to the victim." 350 Or. at 672.

The Court held that, because ORS 163.750 punishes a person for violating a valid court order, it is not an unconstitutional limitation on protected speech, nor is it impermissibly vague.

The same principles apply to a violation of a stalking protective order as to a criminal contempt finding; in both instances, a defendant must challenge the underlying order, rather than attacking the court's finding of a violation of that order.

Any restriction on defendant's speech rights occurred at the time of trial, when defendant was subjected to a stalking protective order that barred him from communicating with the victim. Because ORS 163.750 does not reach any speech not otherwise prohibited by a lawful order, a defendant who seeks to challenge a conviction under ORS 163.750 on free speech grounds first must successfully attack the underlying stalking protective order.

Delgado v. Souders, 334 Or. 122 (2002)

Affirmed lower court's decision in *Delgado v. Souders*, 146 Or. App. 580 (1997) (see below). The procedures set out in ORS 30.866 for obtaining a stalking protective order fall within an historical exception to Or. Const. Art. I, § 11, and, therefore, cannot be characterized as a "criminal prosecution" within the meaning of that provision. The respondent is thus not entitled to the constitutional safeguards set out in that provision, such as the right to a jury trial. The only "penalty" that results from ORS 30.866 is the entry of a stalking protective order that restricts a respondent from contacting the protected person. Such an order, by itself, cannot be considered a punishment that is criminal in nature for purposes of Or. Const. art. I, § 21. Consequently, a vagueness challenge under art. I, § 21 is without foundation.

The context of the stalking statutes as a whole demonstrates that prohibitions on contact must relate to the type of contact that gave rise to the entry of a stalking protective order in the first instance. The means of achieving the legislative purpose of preventing the commission of certain crimes set out in ORS 30.866(2), (3)(a), and ORS 163.730(3)(a) are sufficiently narrowly drawn so as to satisfy the Due Process Clause.

State v. Rangel, 328 Or. 294 (1999)

The court affirmed the lower court's decision in *State v. Rangel*, 146 Or App 571 (1997). (See below). As construed, ORS 163.732 was not facially overbroad under Or. Const. art. I, § 8, because under ORS 163.732, a contact based on communication is limited to threats that instill in the addressee a fear of imminent and serious personal violence, are unequivocal and unambiguous and are objectively like to be followed by unlawful acts.

In order to fall under activity proscribed by ORS 163.732, a threat must convincingly express to the addressee the intention that it will be carried out and that the actor has the ability to do so. Communications that reflect hyperbole, rhetorical excesses and impotent expressions of anger or frustration are excluded. This construction eliminated overbreadth while maintaining reasonable fidelity to the legislature's words and apparent intent. Similarly, when the court construed ORS 163.732 to require a genuine threat and intent to carry out the threat, the statute was not facially overbroad under the U.S. Constitution.

Oregon Court of Appeals

N.M.G. v. Jeffrey Scott McGinnis, 277 Or. App. 679 (2016)

Petitioner filed petition for stalking protective order (SPO) against respondent who was one of her customers when she worked as a lingerie model for individual customers. Respondent sent petitioner text messages and voice messages, to which petitioner never responded. Respondent appealed the trial courts entry of SPO, disputing trial courts basing the protective order on the text and voice messages which were constitutionally protected speech. The Court held that to establish the basis for a stalking protective order, speech-based contacts must be threats that instill a fear of imminent and serious personal violence that is objectively likely to be followed by unlawful acts. *See State v. Rangel*, 328 Or. 294 (1999). Since the messages were too ambiguous and could not be objectively construed to cause fear of imminent bodily harm, the Court reversed the trial court.

King v. W.T.F., 276 Or. App. 533 (2016)

Petitioner and Respondent were in a three-year romantic relationship while they were married to other people. After the relationship ended, they continued to be friends until late December of 2013 when Petitioner instructed Respondent via text message to cease contact with her. Subsequent to that request, Respondent continued to contact Petitioner via email, text, social media, and letters. During April of 2014, Petitioner received flowers she believed to be from Respondent. Around this time, Respondent was also viewing Petitioner's online dating profile daily. In August of 2014, Respondent accepted a job in the city where Petitioner lived. The two had several encounters at Starbucks.

On Petitioner's birthday, she arrived at Starbucks with her son. Respondent was sitting alone at a table and left without making eye contact with Petitioner. On her way out, Petitioner saw a card with her name on it and a bag of coffee. The card was signed by several Starbucks employees who worked at different Starbucks locations. Later that day, Petitioner filed for an SPO.

At the SPO hearing Petitioner testified that while Respondent never threatened her, she believed Respondent to be "capable" of hurting her. The trial court found that "an unwanted sexual relationship by definition is a danger to one's personal safety" and granted the SPO. The appellate court reversed, holding that Petitioner's fear for her personal safety was not objectively reasonable. The court stated that in the absence of inherently threatening contacts, something more must be present in order to justify issuance of an SPO. The court acknowledged that while Respondent had engaged in a series of unwanted contacts with Petitioner, there was no basis for finding that Respondent's behavior caused Petitioner objectively reasonable fear for her safety.

A.M.M. v. Hoefer, 269 Or. App. 218 (2015)

Petitioner and Respondent dated for several months before Petitioner broke off the relationship. Within about a month, Respondent had returned items to Petitioner that he had in his possession and set up a fake Facebook profile under the name "Shauna Blaze." Posing as Shauna Blaze, Respondent began a correspondence with a male friend of Petitioner. The male friend had invited "Blaze" to a nightclub where Petitioner was. In the nightclub, Respondent called Petitioner a "whore" and Petitioner asked for security, who asked Respondent to move

away from Petitioner. Petitioner testified that as she was leaving, Respondent followed behind "saying things trying to cause a disturbance." Later that morning, Respondent entered Petitioner's yard and took back the items he had returned to her. Also on that morning, Respondent sent five emails to one friend of Petitioner's, and a few other emails to an acquaintance of Petitioner's asking where Petitioner had been on New Year's Eve. Petitioner noticed that evening the items were again returned, this time placed at the end of her driveway.

Four days later Petitioner filed for an SPO. At the hearing on February 11, Petitioner testified that Respondent had continued to contact her friends "in order to to find out what I am doing or even like what [I] was doing."

On appeal, Respondent contends that his communications with Petitioner's friends and his communication with Petitioner at the nightclub do not constitute threats. The court agreed, saying that the communications amounted to little more than hyperbole, rhetorical excesses, and expressions of impotent frustrations. As to the contacts regarding the taking and leaving of Petitioner's personal items and the contact at the nightclub, the court found that those contacts were not sufficient to cause Petitioner objectively reasonable alarm or apprehension regarding her personal safety or the safety of her children. Reversed.

R.M.C. v. Zekan, 275 Or. App. 38 (2015)

Respondent appealed a SPO Petitioner obtained following instances where Respondent paced back and forth in front of Petitioner's restaurant in a rat suit. Petitioner, who had an SPO against Respondent's father, contended that Respondent had "picked up where his father left off in pursuit of closing down [her] business" and to that end, donned a rat suit and paced out in front of Petitioner's restaurant. Respondent did not deny Petitioners allegations; Respondent confirmed that it was something he did on four consecutive days for 30 minutes to three hours each day.

The court found that while Respondent's behavior was bizarre, the evidence did not support the issuance of the SPO because Petitioner did not have subjective apprehension in response to Respondent's behavior. The court held that in order to affirm the issuance of an SPO, there has to be a finding of repeated and unwanted contacts that cause subjective apprehension regarding personal safety or the personal safety of a member of one's immediate family or household, or that any such apprehension would be objectively reasonable. Further, the court found that the trial court proceeded as though Petitioner's allegations in her Petition were in evidence and unless a Respondent admits a petitioner's allegations at the SPO hearing, the allegations in a petition are not in evidence.

S.J.R. v. King, 272 Or. App. 381 (2015)

Petitioner and Respondent were co-workers who attended the same church and knew each other for approximately 5 years before Petitioner filed a SPO. Around August 8 or 9, Respondent sent Petitioner suggestive text messages and Petitioner sent back several messages asking Respondent to stop contacting her. Petitioner also asked for her house key back, which Respondent had to let Petitioner's dogs out while she was out of town. In response to the text messages from Petitioner, Respondent left several voice messages. One message said that Respondent was at Petitioner's home and would not leave until she came there. Petitioner was alarmed by the messages and went to a police station. A police officer contacted Respondent and told him that his actions toward Petitioner were unwanted, and that Respondent would be arrested for telephonic harassment if he made any more efforts to contact Petitioner.

On August 12, Petitioner saw Respondent at church, but they did not communicate. On August 13, Respondent texted Petitioner. On that day, Respondent was arrested for telephonic harassment and Petitioner filed for a permanent SPO.

The court held that under *Rangel,* Respondent's communications were not threats because they did not "instill in the addressee a fear of imminent and serious personal violence from the speaker"; they were not "unequivocal"; and were not "objectively likely to be followed by unlawful acts." The court found that the communication contained no evidence of a threat "so unambiguous, unequivocal, and specific to the addressee that it convincingly expresses *to the addressee* the intention that it will be carried out" and that the speaker has the ability to carry out the threat. Additionally, the court found that Respondent's actions at the church were insufficient to give rise to objectively reasonable alarm. Because the criteria for issuance of an SPO is at least two qualifying contacts, the court found that they did not need to evaluate the incident regarding Respondent being at Petitioner's home. Reversed.

K.M.V. v Williams, 271 Or. App. 466 (2015)

Approximately one year after Petitioner and Respondent's long term domestic partnership ended, Petitioner filed a lawsuit to divide their property. Approximately two years later, Petitioner filed for a SPO. The first contact alleged in the SPO occurred in September 2010, when the parties were still in a relationship. Petitioner alleged that Respondent struck him in the arm while he was sleeping. A week later, Petitioner learned his arm was broken.

The second contact occurred between 2010 and 2013, when, on several occasions, Respondent parked near Petitioner's workplace and watched him.

The third contact occurred when Respondent made an appointment with a Realtor who was showing the house Petitioner was renting. Petitioner left the house at that time so Realtor could show the home to interested persons, but returned because he was curious as to who was looking at the house. He saw Respondent's car in the driveway, and told Relator and Respondent to leave. Petitioner stepped outside to call the police, and when he returned, Respondent had left. Petitioner testified that he was not concerned for his physical safety until the third contact.

The court found that each contact must independently cause subjective and objective alarm. The subjective component necessitates that the Petitioner must be "alarmed or coerced by the contacts and that the contacts actually cause the petitioner reasonable apprehension regarding his or her personal safety or the personal safety of his or her family." (Quoting *Blastic v. Holm,* 248 Or. App. 414, 418, 273 P.3d 304 (2012)). The court held that the first contact took place outside the required two-year period, and that the second contact did not cause Petitioner subjective alarm. Because two contacts within the two-year period are needed, and neither of the first two contacts were qualifying contacts, the court held it did not need to analyze whether the third contact was a qualifying contact. Reversed.

State v. Meek, 266 Or. App. 550 (2014)

Defendant appealed his convictions for violating a Stalking Protective Order and for contempt of court.

Defendant and the complainant were previously in a relationship. After they separated, defendant sent complainant hundreds of emails and text messages, and once sat outside her house and refused to leave. Complainant sought an SPO which barred specifically defined contacts including "sending or making written communications in any form" to complainant or

"delivering directly or through a third person any object to [her] home, property, place of work or school." Defendant sent complainant a letter 10 months later, and she reported it to the police.

Defendant was originally charged with violating the SPO for sending written communication, but the state later filed an amended information that alleged that he violated it by delivering an "object" to complainant's home through a third party. Defendant argues that the letter is a written communication, which requires the state to prove that it created reasonable apprehension of danger to the protected person, and that complainant and her family had not experienced such apprehension. The trial court found that the letter was an "object" and did not require such proof.

The court concludes that a letter is a "written communication" rather than an "object" and that the state must prove that the complainant had reasonable apprehension regarding her safety. The court finds that allowing the letter to be an "object" and not a "written communication" with it's necessary apprehension elements would render the apprehension element surplus and would allow the state to prove guilt any time they could not prove the apprehension elements. In this case, the state did not prove any reasonable apprehension, so the court of appeals reversed the lower court's verdict.

S.L.L. v. MacDonald, 267 Or. App. 628 (2014)

Respondent was convicted of felony assault for beating and strangling Petitioner. Despite the no contact provision of Respondent's conviction, Respondent continued to contact Petitioner. On at least one occasion, Respondent told Petitioner over the telephone that if she reported him for initiating contact, he would "send his skinhead friends to come take care of [her]" and that Respondent was going to "fuck [her] up."

The court upheld Petitioner's SPO the assault was a qualifying contact. (ORS 163.730(3)(g): committing a crime against another person is a contact.), and the telephonic threats to send Respondent's skinhead friends and "fuck up" Petitioner were also qualifying contacts. The court found that the threats were repeated, credible, knowingly made, caused Petitioner reasonable apprehension regarding her personal safety, and it was objectively likely the threats would be followed by unlawful acts. Further, the court found that the threats were unequivocal and that they threatened imminent serious physical harm to Petitioner. In reviewing the meaning of "imminent" the court made a distinction between "immediate" and "imminent" and concluded that along with Respondent's past conviction for assaulting Petitioner and that Respondent actually knew skinheads from his work release program, the restraining order should be affirmed.

P.M.H., guardian ad litem for M.M.H. v. Landolt, 267 Or. App. 753 (2014)

Petitioner is a 13-year-old child whose guardian ad litem, her maternal grandmother, filed the SPO on her behalf. There is some evidence that Respondent is Petitioner's biological father. Petitioner was removed from her biological mother's care when she was very young and her grandparents adopted her in 2007. Respondent has a history of drug and alcohol abuse, a criminal, and abused Petitioner's biological mother at some point around Petitioner's birth in 1999. Any parental rights Respondent may have had were terminated in 2005.

There were a few contacts between Petitioner and Respondent in 2007 and 2008, including one where Respondent took pictures of Petitioner at a Halloween parade and posted them on his social media page. Petitioner testified she was "very surprised" and "very scared" about the Halloween parade encounter. In 2011, Petitioner and Respondent exchanged some

letters through Petitioner's classmate, but Petitioner originally believed it was the classmate who wrote the letters. Petitioner testified that once she realized it was Respondent, not the classmate, who was authoring the letters, she wished she had never replied to the letters because "if it was him [then] he would hurt me." When Petitioner received a fourth letter, she felt "really alarmed that day."

On Petitioner's 13th birthday, she was contacted by school personnel who said a woman was waiting for her in the school office. It was Respondent's girlfriend who had flowers, perfume, and a card signed "Love, [respondent]." Petitioner sought an SPO a few days later.

The court said that there were two difficulties with Petitioner's argument for an SPO: first, she never tied being "scared and alarmed" by Respondent's behavior to an apprehension for her physical safety; and second, that the record did not show evidence that Respondent had acted aggressively or intimidating, or had threatened Petitioner in any way. Respondent had not been in Petitioner's physical presence since the Halloween parade, several years earlier.

The court held that there was insufficient evidence to support the issuance of the SPO because the legislature has not authorized issuing SPO's for unwanted contact that is unsettling, unusual, or unpleasant. The legislature has authorized issuing SPO's only when the unwanted contacts have caused the petitioner objectively reasonable apprehension for her or her family's personal safety.

W.M. v. Muck 267 Or. App. 368 (2014)

Petitioner is a fourteen-year-old girl. One night, her father contacted the police to complain about Respondent, a neighbor, playing loud music at around 9:00 pm. The next day, Petitioner was playing basketball in another neighbor's driveway when Respondent checked his mailbox, which was near the driveway. Petitioner heard Respondent say over his shoulder that he would call the police on her for making noise by bouncing the basketball. Petitioner then went home. About 20 minutes later, Petitioner returned to the driveway where she had been playing basketball to retrieve some items she had left there. At that time, she overheard Respondent talking on his cell phone. Petitioner testified that Respondent was saying, among other things, "the war was on" and "what goes around comes around." Petitioner said she knew Respondent was talking about her father because of a profane and unflattering term he was using.

The court declined to address all of Respondent's arguments for reversing the SPO, and instead said it was necessary only to conclude that any apprehension regarding the personal safety of Petitioner or an immediate family member or member of household was not objectively reasonable under the circumstances. The court reasoned that a statement of intention to involve the police could prompt many reasonable reactions, but it would not objectively cause Petitioner to fear for her personal safety. As to Respondent talking on his cell phone, the court said that there was no evidence he left his property, made any threatening gestures, brandished any weapons, or even made eye contact with Petitioner. Finally, in reference to an objectively reasonable apprehension for her father's safety, the court said that Petitioner could only reasonably conclude that Respondent meant to make trouble for her father, not that her father's personal safety was in danger. Reversed.

L.M.M. v. Tanner, 265 Or. App. 644 (2014)

The court stated that a detailed discussion of the facts in this matter would not benefit the bench, bar or public. The court reversed a SPO between neighbors finding that the conduct did not satisfy the standards in *Rangel*:

"…[a] communication that instills in the addressee a fear of imminent and serious personal violence from the speaker, is unequivocal, and is objectively likely to be followed by unlawful acts…[t]he threat must be so unambiguous, unequivocal, and specific to the addressee that it convincingly expresses *to the addressee* the intention that it will be carried out… and that the actor has the ability to do so…[T]hreats do not include…'the kind of hyperbole, rhetorical excesses, and impotent expressions of anger or frustration that in some contexts can be privileged even if they alarm the addressee.'"

K.E.A. v. Halvorson 267 Or. App. 374 (2014)

Petitioner and Respondent divorced in 2009, and Petitioner sought a SPO against Respondent in 2012. The parties agree, despite a somewhat extensive history of contacts, that only three contacts occurred in the two-year period required by ORS 30.866.

The first encounter was in June or July of 2011, when Respondent, who had previously lived in Petitioner's neighborhood, drove in the cul de sac near Petitioner's home. Petitioner described Respondent "weaving again" around the cul de sac and that Respondent did so for "intimidation purposes."

The second encounter took place when Petitioner's husband saw Respondent and Respondent's wife in a car in a neighbor's driveway, but Petitioner's husband and Respondent had no contact at that time.

The third incident occurred when Petitioner's husband took a picture of Respondent's car in another neighbor's driveway for what Petitioner's husband said was documentation purposes to show "what you're [Respondent] doing here." Respondent and Petitioner's husband then had a verbal exchange and Respondent drove away. Three or four minutes later, Respondent was back in the neighbor's driveway and both Petitioner and Respondent had phoned the police. About ten days later, Petitioner sought the SPO.

The court held that any apprehension felt by Petitioner about her own personal safety, the safety of a member of her immediate family, or the safety of a member of her household was not objectively reasonable. The court said that in evaluating the reasonableness of the apprehension, they look at the cumulative effect of the unwanted contacts. Analyzing the contacts cumulatively, the court concluded that Petitioner's apprehension was not objectively reasonable because the first two contacts were relatively innocuous, and the evidence showed that the Respondent had not used threatening language during the third. Based on a lack of evidence that there was objectively reasonable apprehension, the court reversed.

V.L.M. v. Miley, 264 Or. App. 719 (2014)

The Court of Appeals reversed the trial court's granting of a SPO because the unwanted contacts did not cause Petitioner to fear for her personal safety or the safety of an immediate family or household member.

After the parties' divorce, Respondent repeatedly contacted Petitioner by phone, mail, and e-mail and began appearing on Petitioner's street. Respondent also began mailing letters saying horrible things about Petitioner to Petitioner's friends and acquaintances, including her boss. Respondent sent Petitioner a package with a box of condoms and a letter calling Petitioner "a slutty whore." Respondent e-mailed Petitioner telling her he had mailed her a birthday card and a letter. Petitioner did not testify that she was frightened and there was no history of violence or abuse in the relationship. The Court of Appeals held that although the contacts were upsetting and inappropriate, they were not threats. There was no indication that the contacts

caused Petitioner any fear for herself or her family, and nothing to indicate "that any such fear, in context, was objectively reasonable."

E.T. v. Belete, 266 Or. App. 650 (2014)

Petitioner, head priest of a church, resided in the same building as the church meeting hall where congregants gathered after services. A fight erupted between rival factions of the church, one side included Respondent and took issue with Petitioner, and the other side favored Petitioner. Respondent attempted to assault Petitioner while church members defended him. Petitioner did not engage in any physical confrontations. Respondent allowed Petitioner to continue to participate in and attend the church after this incident and attempted formal conciliation. A second incident occurred in the doorway to the petitioner's residence seven months later. Respondent yelled at Petitioner, picked up a 40-gallon plastic garbage can and threw it at Petitioner who was about three feet away. Respondent yelled at Petitioner saying either that the "devil is on you" or that he is "Satan." Respondent also told Petitioner, "You will depart this church either dead or alive." Petitioner obtained a SPO.

Respondent appealed the trial court's entry of a SPO, claiming that Petitioner was not objectively alarmed. Respondent argued that the contacts were merely harassing or annoying. She put forth four reasons to support this argument: (1) the parties knew each other for a number of years preceding the events with no history of violence, (2) the parties' relationship continued at church after the first event, (3) the contacts were related to church politics, and (4) Respondent and Petitioner were not alone during the contacts. Rejecting all four reasons, the Court upheld the SPO, finding Respondent's assaultive acts and statements were sufficient to show Petitioner was objectively alarmed.

C.J.R. v. Fleming, 265 Or. App. 342 (2014)

Respondent appealed the judgment granting Petitioner a permanent SPO. Respondent argued that the court erred in granting the SPO because none of his non-expressive contacts with Petitioner satisfied statutory requirements and that the heightened *Rangel* standard applied to any contacts. The Court agreed that the *Rangel* standard applied to any expressive contacts. However, the Court held that the trial court did not err as there was enough evidence to prove two or more qualifying contacts under ORS 30.866(1). The Court also found that Petitioner was not required to meet the *Rangel* standard because Respondent's non-expressive contacts were sufficient.

One such qualifying contact was when Respondent threw a toy wagon toward Petitioner while yelling at Petitioner and calling her a "bitch." This occurred during a parenting time exchange. A second qualifying contact happened when Respondent lunged at Petitioner and yelled in her face while Petitioner was trying to put her child in her car. The Court held that, though the statements to Petitioner during the contact were insufficient to satisfy Rangel, the nonexpressive conduct, taken "in the context of Respondent's aggressive behavior towards petitioner during their past relationship" when he was physically abusive with her, satisfied the statutory requirements.

C.J.L. v. Langford, 262 Or. App. 409 (2014)

The Court of Appeals reversed the trial court's granting of a stalking protective order (SPO), holding that the evidence at trial was insufficient to support a SPO.

Petitioner and respondent were previously in a romantic relationship and have a son, J. petitioner presented evidence of four separate contacts by respondent. In the first contact, respondent arrived at petitioner's home for a supervised visitation with J. Respondent engaged petitioner in "negative conversation" about J's haircut. She asked respondent to stop and retreated into the garage with J. Respondent followed them, yelling.

The second contact occurred when respondent repeatedly texted petitioner, and threatened to call DHS if she didn't respond. When she didn't respond, he drove by her house and called the police on the home.

The third contact occurred when respondent came to pick up J for a supervised visit. During an argument, respondent advanced towards petitioner and said that he wished she was dead before leaving at petitioner's command.

The fourth contact occurred when respondent issued a missing child report for J and left a voicemail with petitioner threatening to attempt to gain custody if she failed to return his calls in 15 minutes. Petitioner testified that these contacts alarmed her because of past incidents in 2003 and 2004 where respondent physically abused her. She repeatedly asked respondent not to contact her unless it concerned J.

The court considered the second and fourth contacts communicative, and they did not meet Rangel's more stringent requirement that the contact instill fear of imminent and personal violence and is objectively followed by unlawful acts. The court notes that respondent only threatened to use legal methods of ensuring the son's welfare. The court holds that the third incident also doesn't meet the Rangel requirement and that respondent's threat is more like an impotent expression of anger or frustration. The court does not address the first incident because two or more contacts are required.

D.W.C. v. Carter, 261 Or. App. 133 (2014) (consolidated with *Christensen v. Bosket*)

Petitioner appealed the dismissal of his petitions for stalking protective orders (SPOs) against two of his neighbors.

With respect to neighbor Bosket, petitioner presented evidence of two instances: one in which Bosket followed petitioner to his front step and as Petitioner went up the stairs to his condominium unit, Bosket yelled, "Come down here, motherfucker, and I'll show you." The second incident occurred when Bosket forcibly entered petitioner's residence, punched petitioner in the chest, pushed him backwards onto the stairs, and wrapped his hands around petitioner's neck. As he choked petitioner, Bosket yelled at him and addressed him using homophobic slurs. During this incident, the second neighbor, Carter, yelled that petitioner would "pay for what [he's] done" and told Bosket to stop.

The court found that the strangling incident was the only qualifying contact, and affirmed the lower court's dismissal of the restraining order. It found that Bosket's statement at Petitioner's front step did not meet the *Rangel* test for expressive contacts. The statement was only a vague invitation to fight, not an unequivocal threat of imminent and serious personal violence. Although Bosket shook his fist at petitioner, this non-expressive conduct did not give rise to reasonably objective alarm.

As to respondent Carter, Petitioner and his domestic partner, Kirk, were painting a fence outside their condominium when Carter "came out of his garage at a very rapid rate, very aggressively, stormed up to Kirk and started yelling at him" about the paint. Carter clenched his fists violently, leading petitioner to believe that Carter would hit Kirk. Petitioner tried to diffuse the situation, but Carter verbally attacked the couple with homophobic slurs. Later that evening,

Carter was biking on the sidewalk; when he saw petitioner walking there he accelerated towards petitioner, nearly hitting him. On August 12, HOA-contracted tree trimmers arrived outside of Carter's unit. Because Carter he yelled at the workers and petitioner for not getting proper notice of the project. Later that morning, Carter approached petitioner, who was standing in his carport, and started complaining about the HOA and the tree trimming. He said, "when I'm done, you [and Kirk] will be off the [HOA] board * * * by Sunday or you'll be dead."

The court found that at least two of Carter's nonexpressive contacts rise to the level of causing objectively reasonable alarm when considered in context with his use of homophobic slurs and vague expressions of violence. Carter's attempt to run down petitioner with his bike is the first qualifying contact. The court finds that it was objectively reasonable for petitioner to be alarmed for his personal safety. The court also found that when Carter approached petitioner in his carport with clenched fists and angrily yelling, Carter's actions constituted a nonexpressive contact. Although this last incident in isolation might not have met the objectively reasonable alarm requirement, the court analyzed Carter's actions in the context of his expressive contacts using homophobic slurs and expressions of violence.

State v. Jackson, 259 Or. App. 248 (2013)

In this appeal from a conviction for criminal stalking, the Court of Appeals reversed defendant's conviction based on an incident which the state conceded involved expressive speech under *Rangel*. Although there was evidence of a prior incident that may have amounted to a "threat" under *Rangel*, one incident is insufficient to establish the crime of stalking.

N.R.J. v. Kore, 256 Or. App. 514 (2013)

In this case, the trial court had dismissed a petition for a Family Abuse Prevention Act (FAPA) but at the end of the hearing on the FAPA, the trial court issued a stalking protective order (SPO) "[w]ithout any forewarning or an opportunity for respondent to object." 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 an SPO *sua sponte*.

D.A. v. White, 253 Or. App. 754 (2012)

This case involved a long history of incidents between petitioner and respondent, who had worked together at the Drug Enforcement Agency (DEA). The court held that respondent's actions were sufficient to justify the trial court's issuance of a stalking protective order (SPO) against him by "dry firing" his gun 10 or 15 times over the course of a minute or more while alone with petitioner at work, coupled with an incident where respondent drove his motorcycle to petitioner's house, stopped near the end of petitioner's driveway, and—seeing petitioner through a window—revved his engine and yelled at petitioner for over five minutes to come outside. Petitioner testified that he believed respondent was armed during the second incident, because he had known the respondent for approximately five years and had never seen respondent not carry his duty gun with him. The Court of Appeals upheld the trial court's granting of petitioner's request for a SPO, finding that respondent's behavior created both subjective alarm in the petitioner and an objectively reasonable fear that respondent would harm the petitioner.

V.A.N. v. Parsons, 253 Or. App. 768 (2012)

At some point, respondent developed a romantic interest in petitioner, who is married. In early December 2011, respondent sent petitioner flowers at work with a card signed "Santa Claus." At the stalking protective order (SPO) hearing, petitioner testified that when she discovered that the flowers were from respondent, she took the gift as a "romantic overture" and was "more or less in shock." Petitioner sent respondent a text message saying that she had valued their friendship but that it was "[b]est we keep the friendship in the past" because it was "no longer healthy." Respondent replied with two text messages saying that he was just being honest and telling her his true feelings. Petitioner did not respond to those messages. Respondent apparently suffered an emotional breakdown and voluntarily admitted himself to the hospital for psychiatric treatment. After he was released from the hospital, respondent sent petitioner a series of text messages over the course of the next month. The Court of Appeals reversed the trial court's granting of the SPO and found that none of respondent's texts could be considered "objectively likely to be acted upon," citing *Rangel*. The court explained at p. 775: "[N]othing in the record supports an *objective* determination that respondent intended to carry out any threat that was implicit in his messages to petitioner and probably was going to do so. Indeed, even if the escalating text messages would make it objectively reasonable to believe that respondent likely would follow through on his threat to 'confront' petitioner, no evidence suggests that such a confrontation probably would involve violence or other unlawful acts."

State v. Nahimana, 252 Or. App. 174 (2012)

Defendant appealed from a judgment convicting him of two counts of violating a final stalking protective order (SPO), ORS 163.750 (Counts 3 and 4), and one count of stalking, ORS 163.732 (Count 5), based on two electronic communications sent from defendant's MySpace account to the victim's account. Defendant argued that the trial court erred in denying his motion for a judgment of acquittal as to each of those counts on the ground the contacts were protected speech and did not constitute a "threat" as required under *Rangel*. Relying on *Ryan* (see above), the Court of Appeals affirmed the convictions, reiterating that a defendant who seeks to challenge a conviction under ORS 163.750 on free speech grounds must first successfully attack the underlying SPO.

State v. Nguyen, 250 Or. App. 225 (2012)

After reversal and remand in light of *State v. Ryan*, 350 Or. 670 (2011), upheld trial court's denial of defendant's motion for acquittal.

Defendant was convicted under ORS 163.750 for sending threatening text messages in violation of a stalking protective order. The victim had obtained an SPO prohibiting defendant from having any contact with the victim, including sending written or electronic messages. Despite that order, over a four-day period, defendant sent the victim several text messages, exemplified by the following two messages:

"U want me 2 pay child support? Fuk u! So u can use my muny 2 fuk sum one else! Fuk u! I give you something bitch!"

"And u want to better myself? But u want to fuk me? Ok! C u soon!"

The court found that the text messages sent by defendant were not protected speech. Under *State v. Ryan*, 350 Or. 670, 683 (2011), "a defendant who seeks to challenge a conviction under ORS 163.750 on free speech grounds first must successfully attack the underlying stalking protective order." Because, just as in *Ryan*, defendant in *Nguyen* did not bring a successful

challenge to the underlying stalking protective order, the court held that he was barred from challenging his conviction pursuant to ORS 163.750 on free speech grounds, and the trial court did not err in denying his motion for a judgment of acquittal.

J.L.B. v. Braude, 250 Or. App. 122 (2012)

Court of Appeals overturned trial court's grant of stalking protective order, holding that petitioner's apprehension at respondents' actions was not objectively reasonable. Petitioner obtained stalking protective order against her former husband and his current wife after respondents repeatedly drove past petitioner's house and photographed it. Respondents maintained that they were attempting to show that petitioner's boyfriend was residing at her home. The Court of Appeals found that respondents' behavior was "unwelcome and unsettling" but did not evince any threat to petitioner's safety.

The court emphasized that respondents did not enter petitioner's property, did not make threatening gestures or comments or indeed, they did not attempt to communicate at all, and did not wait at the end of her driveway for lengthy periods of time. The court also held that, because parties were not strangers to each other and were required to communicate periodically about parenting time and financial matters, seeing the respondents drive past would not have caused a reasonable person in petitioner's position to feel apprehension for her personal safety.

ORS 30.866(1) requires that respondent's contacts with petitioner cause objectively reasonable apprehension regarding her own personal safety or the safety of a member of her immediate family or household. The Court of Appeals held that petitioner's apprehension in this instance was not reasonable.

J.L.B. v. K.P.B., 250 Or. App.122 (2012)

This was a companion case to *J.L.B. v. Braude* (above). The Court of Appeals held that because the record did not support a determination that the incidents which occurred would have caused a reasonable person in petitioner's position to feel apprehension for her personal safety, the trial court erred when it entered the SPOs. The court specifically recognized that conduct that might appear benign when viewed in isolation can take on a different character when viewed either in combination with or against the backdrop of one party's aggressive behavior toward the other. In this case, however, the court found that the parties' past relationship was not so characterized by violence or abuse as to make the more recent contacts objectively threatening. Rather, respondent's past aggression toward petitioner involved only two isolated incidents that occurred almost five years before petitioner sought the SPOs, at the end of a long-term marriage that did not (as far as the record reveals) involve other abuse.

S.A.B. v. Roach, 249 Or. App. 579 (2012)

Reversed trial court's grant of stalking protective order against petitioner's neighbor, holding that at most one qualifying contact had occurred within the meaning of ORS 30.866.

Neighbors' relationship had become contentious during a dispute over property boundaries and building permits while petitioner was engaged in remodeling. The parties engaged in several shouting matches, including an incident in which respondent sprayed petitioners with a garden hose and shouted obscenities and threats. The court held that respondent's speech-related conduct in cursing and shouting at petitioners did not fall under the definition of "threat" as specified in *State v. Rangel*, 328 Or. 294, 303. Under *Rangel*, "a communication that instills in the addressee a fear of imminent and serious personal violence

from the speaker, is unequivocal, and is objectively likely to be followed by unlawful acts," and does not include "the kind of hyperbole, rhetorical excesses, and impotent expressions of anger or frustration that in some contexts can be privileged even if they alarm the addressee." Further, respondent's actions in spraying petitioners with a hose would not have created alarm or apprehension in a reasonable person. Concluding that the requisite two qualifying contacts for a stalking protective order had not been established as required by ORS 30.866, the court reversed.

C.L.C. v. Bowman, 249 Or. App. 590 (2012)

Reversed trial court's termination of a stalking protective order. The Court of Appeals held that the trial court erred in failing to consider statements that respondent had posted on his blog and on petitioner's boyfriend's social networking profile, and reversed and remanded the case for further proceedings.

The court held that the proper inquiry for the court on a motion to terminate an SPO is whether, in view of all of the circumstances, including the respondent's speech, the conduct that gave rise to the issuance of the SPO continues to cause the petitioner to have a subjective apprehension regarding personal safety and that apprehension continues to be objectively reasonable. Therefore, the respondent's speech on the internet should have been considered in determining whether petitioner's ongoing apprehension was reasonable.

The court concluded that a trial court can consider a respondent's speech when determining whether to terminate an SPO even if the speech does not constitute a threat under *Rangel*. Therefore, the trial court erred in concluding that it could not consider respondent's Internet postings. Accordingly, the court reversed.

Reitz v. Erazo, 248 Or. App. 700 (2012)

Reversed lower court's grant of a stalking protective order, holding that respondent's conduct did not meet the statutory requirements for an SPO under ORS 30.866.

Petitioner and respondent, both resellers of used books, clashed repeatedly in the heated and competitive environment of the Hillsboro Goodwill outlet. The trial court based its grant of an SPO on its findings that respondent repeatedly pushed petitioner, on one occasion made a verbal threat to petitioner to the effect that "you should be afraid of me, they're not going to stop me, I can do whatever I want," and on one occasion punched petitioner.

The court of appeals held that only the incident in which respondent punched petitioner was a qualifying contact for the purposes of the SPO. The respondent's verbal conduct did not meet the *Rangel* standard for speech-based contacts. Because only one qualifying contact had occurred, the court held that the "repeated" contacts required by ORS 30.866 were not present, and accordingly reversed.

Blastic v. Holm, 248 Or. App. 414 (2012)

Court of Appeals upheld trial court's issuance of stalking protective order, holding that two actionable "contacts" took place.

Parties were tenants at the same housing complex, and were involved in a dispute involving the homeowner's association. The court upheld the trial court's finding that on two occasions, respondent engaged petitioner in unwanted contact sufficient to support an SPO under ORS 163.738(2)(a)(B). The first incident occurred when respondent, riding on a lawnmower, followed petitioner, who wears a leg brace and walks with the assistance of a cane. Despite petitioner's repeated requests to be left alone, respondent continued to pursue petitioner with the

lawnmower, telling petitioner "If you don't stop it, things will get worse for you," and telling petitioner's wife "I'm going to tell you what I told your husband. You leave us alone, and we'll leave you alone." The second incident occurred at a public meeting.

The court held that under *Delgado v. Souders*, 334 Or. 122 (2002), no culpable mental state was required to maintain an SPO, and thus it was not relevant whether respondent knew that petitioner was afraid when respondent was following him on a lawnmower.

Johnson v. McNamara, 240 Or. App. 347 (2011)

Reversed lower court's grant of a stalking protective order, holding that respondent's conduct did not meet the statutory requirements for an SPO under ORS 30.866(1).

The court found that where the letters that respondent sent to petitioner did not contain any communications that could have "instill[ed] in the addressee a fear of imminent and serious personal violence from the speaker," the letters were not qualifying "contacts" under ORS 30.866(1). *Rangel,* 328 Or. at 303. The only qualifying contact was held to be an incident in which the respondent briefly blocked the door of a classroom with his arm, preventing the petitioner from leaving. Without the letters, only one qualifying contact had occurred. Therefore, the court the requirements of ORS 30.866(1) had not been satisfied.

Gunther v. Robinson, 240 Or. App. 525 (2011)

Reversed trial court's grant of stalking protective order. The court held that the record did not support a finding of two or more threats of imminent and serious and personal violence from neighbor within two years prior to petition as required by ORS 30.866.

The record indicated that respondent neighbor had thrown garbage onto petitioner's driveway, yelled "Heil Hitler" at petitioner, and had thrown rocks at bedroom window of petitioner's daughter. The court found that the rock-throwing incident was the only incident that could support issuance SPO, and thus petitioner had not shown the requisite two contacts within two years. Shouting "Heil Hitler," although offensive, did not constitute a threat, and petitioner did not testify that he felt alarmed or coerced by respondent's throwing garbage on his driveway. Accordingly, the court reversed.

**State v. Nguyen*, 238 Or. App. 715 (2010)

*Decision vacated, 351 Or. 675 (2012); on review, *State v. Nguyen*, 250 Or. App. 225 (2012) (see above)

Overturned trial court's denial of defendant's motion for judgment of acquittal, holding that defendant's text messages to victim did not violate stalking protective order.

Defendant was prohibited by terms of SPO from having any contact with the victim, including sending written or electronic messages. Despite that order, over a four-day period, defendant sent the victim several text messages, including "U want me 2 pay child support? Fuk u! So u can use my muny 2 fuk sum one else! Fuk u! I giv u something bitch!"; and "And u want 2 better myself? But u want to fuk me? Ok! C u soon!" The court found that, while the text messages could be read as veiled threats, under *Rangel*, defendant's statements did not express an unequivocal intent to carry out the threats. The court held that the evidence as a whole did not support a finding that the violations of the SPO constituted an unequivocal threat of imminent and serious personal violence.

*_State v. Ryan_, 237 Or. App. 317 (2010)

*Overturned by *State v. Ryan*, 350 Or. 670 (2011) (see above)

Defendant appealed conviction of the crime of violation of a stalking protective order (SPO). In the hearing resulting in the SPO of unlimited duration the evidence showed that the defendant was a stranger to the victim, that he sent her over two dozen letters expressing a delusional belief they were in romantic relationship, he located the victim's parents' home and went to their home, he went to the victim's workplace and he left numerous messages at her office and home. Within two months of the SPO hearing, the defendant sent two letters to the victim's father, which included delusional statements about his relationship with the victim and expressed a desire to meet with the father. The letters contained nothing that could be construed as a threat.

In reversing the defendant's conviction, the Court of Appeals held that when examining violations of SPOs that involve expressive conduct, the heightened standard enumerated in *Rangel* applies. The court also cited *State v. Maxwell, 165 Or App 467 (2000)* in finding that in prosecutions under ORS 163.750, like in prosecutions for the crime of stalking (and indeed, like in cases concerning the issuance of SPOs), expressive "contacts" must be evaluated in light of the constitutional protections provided by Article I, section 8 of the Oregon Constitution. The court did not find that the defendant made unequivocal threats that instilled a fear of imminent and serious personal violence that were objectively likely to be followed by unlawful acts, and therefore reversed the conviction.

Judge Rosenblum authored a concurring opinion in which she agreed that the court is bound by the decision in *Rangel*. However, she stated that the facts of this case demonstrate that *Rangel* is too restrictive of the protection offered by the stalking statutes and she does not believe Article 1, section 8 of the Oregon Constitution limits the legislature's ability to protect Oregonians from fear of physical violence to the extent that the Oregon Supreme Court has held.

State v. Sierzega, 236 Or. App. 630 (2010)

The Court of Appeals reversed the defendant's convictions for violation of a stalking protective order.

This case was an appeal from two consolidated stalking cases involving one offender with different victims. In the first case, the trial court erred in convicting the defendant of three counts of violating a stalking order based on one incident of telephonic contact and the case was remanded for resentencing. In the second case, the Court of Appeals reversed the trial court's conviction of the defendant for the crime of stalking.

The alleged victim, "A," worked at the Marion County Courthouse and the defendant was a stranger to her. The evidence showed that the defendant was romantically obsessed with A, was mentally unstable, and disregarded the reasonable requests of law enforcement to leave A alone. The state cited six incidents of unwanted contact, including initiating correspondence by mail and fax, approaching A in the courthouse, and making phone calls to the offices where A worked. The Court of Appeals agreed with the state that physically approaching A at work was an unwanted non-expressive contact, but found that the remaining incidents were not actionable contacts because they were expressive contacts subject to the heightened scrutiny required by *Rangel*. While the court found the defendant's behavior disturbing, it did not cross the threshold of constitutionally protected expression and the defendant's conviction was reversed.

Falkenstein v. Falkenstein, 236 Or. App. 445 (2010)

The Court of Appeals reversed the trial court's issuance of a stalking protective order (SPO), finding that the respondent's actions in texting the petitioner (his former wife), running the license plate of the car belonging to the petitioner's boyfriend, or showing up uninvited to the home of the petitioner's mother, were not predicate contacts of the sort necessary to support issuance of a SPO of unlimited duration against the respondent.

Petitioner did not testify as to all of the incidents alleged in her SPO petition, as the court asked her if she had anything to add to her petition and she presented limited testimony. The Court of Appeals noted that the petition was not evidence and found nothing in the record to support the conclusion that it was objectively reasonable for the contacts to cause alarm, coercion, or apprehension, as required by ORS 30.866(1) Without evidence showing how the contacts were explicitly threatening in any way, the contacts did not constitute stalking.

Foster v. Miramontes, 236 Or. App. 381 (2010)

The Court of Appeals affirmed the trial court's issuance of a stalking protective order (SPO) and award of attorney fees without discussion. Rather, the court focused on the respondent's contention that because the petitioner sought an award of damages, the trial court erred in denying him a jury trial. The court reviewed statutory text and context and concluded that the civil stalking statue does not confer a right to trial by jury. Furthermore, the court found that the ORS 30.866 action was not "of like nature" to common-law actions seeking damages for the torts of assault and battery, and therefore the respondent was not constitutionally entitled to a jury trial.

State v. Baker, 235 Or. App. 321 (2010)

The Court of Appeals reversed the trial court's extension of defendant's probation, finding that extending the defendant's probation from one year to five years without stipulation from both parties constituted an abuse of discretion when it functioned as a means of avoiding a SPO hearing.

On April 2, 2009, the defendant pled guilty to telephonic harassment of her former husband's girlfriend and was sentenced to one year of probation. Eighteen days after sentencing, the defendant and her former husband (petitioner) attended a hearing for a stalking protective order of unlimited duration. At that hearing the trial court asked the petitioner if he would agree to extend the defendant's probation from one year to five years in lieu of a SPO hearing. Defendant objected, but the trial court refused to hear evidence and extended her probation.

McGinnis-Aitken v. Bronson, 235 Or. App. 189 (2010)

The Court of Appeals reversed the trial court's issuance of a stalking protective order (SPO), finding the evidence did not meet statutory requirements.

Petitioner and respondent had known each other for some time before the petitioner obtained an SPO which cited several unwanted contacts. The Court of Appeals found that when the petitioner sent a text message stating, "…being away from you is the kind of thing I could do," the respondent was not sufficiently put on notice that there was a substantial risk that future contact was unwanted. There was no evidence that the respondent's subsequent verbal and non-verbal contacts caused the petitioner alarm or concern for her safety or the safety of her family. The court therefore reversed the trial court and vacated the SPO.

Swarringim v. Olson, 234 Or. App. 309 (2010)

The Court of Appeals reversed trial court's grant of a stalking protective order, holding that threats made by respondents did not satisfy the *Rangel* requirement that threats be unequivocal and objectively likely to be followed by unlawful acts.

Petitioners obtained stalking protective orders against two respondents, who are father and son and are the petitioners' neighbors. The evidence presented against Matthew Olson (the son respondent) included an incident of pushing the petitioners' 14-year old son to the ground, parking his car in front of the petitioners' driveway and blocking their car, yelling obscenities, telling the petitioner that he could have the 14-year old son beat up and saying that he knew people at his school who would slit his son's throat, and cursing at the petitioner's 9-year old daughter and telling her he would find someone to beat her up.

The court found that the petitioners could reasonably be fearful for the safety of their children based upon the incidents with the children. However, the threats to beat up the daughter and beat or slit the son's throat were expressive contacts and did not satisfy the *Rangel* test. The court found that the petitioners did not present evidence that they or their children feared imminent violence from Matthew Olsen; therefore, the remaining contact of bullying the 14-year old son was insufficient to impose an SPO. The court found that even if it applied the less-stringent standard for non-expressive contacts, the evidence did not prove that the petitioners or their family members had a reasonable apprehension for their personal safety and the trial court erred in issuing either SPO.

Pike v. Knight, 234 Or. App. 128 (2010)

The Court of Appeals reversed the trial court's issuance of a stalking protective order.

Petitioner and respondent were friends for several years, before the petitioner became annoyed with the respondent's persistence that she was having an affair with another man. Petitioner testified that the respondent began following her and hired a private investigator to follow her. As a result of those contacts, the petitioner told the respondent that she wanted to end their relationship.

There was no evidence that the non-expressive contacts, such as lurking near places she was known to frequent, caused the petitioner apprehension for her personal safety. Also significant to the court was the petitioner's testimony that she was annoyed and irritated by the respondent's behavior, but she did not testify that she was alarmed or coerced by the respondent's actions.

Giri v. Doughty, 232 Or. App. 62 (2009)

The Court of Appeals reversed the trial court's issuance of two stalking protective orders (SPO) prohibiting contact between the respondent and the petitioners.

Petitioners, who were husband and wife, were the respondent's neighbors. The petitioners relied on five incidents to establish the required unwanted contacts: (1) the respondent yelling obscenities at petitioners and telling petitioners' children, "your parents are evil parents"; (2) the "pretty bad messages" that the respondent left on petitioners' voice mail; (3) the respondent's behavior on her front porch when she played loud music and yelled obscenities into the air; (4) hang-up phone calls; and (5) spraying the petitioner's children with a hose.

The court found the first three contacts to involve speech and they were therefore subject to the higher standard imposed by *Rangel*. The petitioners did not present evidence that they felt

threatened by the respondent's conduct; rather, they testified that they were concerned for their children and respondent's behavior affected their quality of life.

The court found that none of the first three contacts were predicate contacts needed for an SPO. The court found there was nothing in the record to establish that the hang-up calls caused the petitioners reasonable apprehension for their own or their children's safety, and therefore contact four was not a predicate contact. The court did not determine if the water-spraying incident sufficed, as one qualifying contact would not have been sufficient for the issuance of an SPO.

Stuart v. Morris, 231 Or. App. 26 (2009)

Upheld trial court's denial of respondent's motion to dismiss a stalking protective order entered in 2001.

Respondent had been in jail since the order was issued and had never violated the order. In June 2007, respondent filed his first motion to terminate the order, arguing that the bases for the issuance of the order no longer existed. At the first hearing petitioner testified that she was afraid of respondent despite his incarceration and that friends of respondent had threatened her. The trial court denied respondent's motion, finding that petitioner was credible and that she suffered "reasonable apprehension" due to the respondent's past acts. Respondent did not appeal.

In April 2008, respondent again moved to terminate the 2001 order. The trial court denied his motion based on issue preclusion. Respondent argued on appeal that the trial court's decision based on issue preclusion was error. Based on *Edward v. Biehler* and *Benaman v. Andrews* (see cites and summaries below), the Court of Appeals reiterated that the primary inquiry is whether the petitioner continues to suffer reasonable apprehension due to the past acts of the respondent and that the respondent has the burden to show that the concerns underlying the issuance of the original order have sufficiently abated. The Court of Appeals side-stepped the issue of whether the label of issue preclusion was appropriate and upheld the trial court's decision because there was no new evidence since the first hearing to support respondent's assertion that petitioner no longer suffers reasonable apprehension as a result of the conduct that was the basis of the order.

Wood v. Trow, 228 Or. App. 600 (2009)

Court of Appeals upheld issuance of stalking protective order.

Petitioner and respondent were neighbors. Respondent made multiple unwanted contacts with petitioner and her fiancé. Those incidents included the respondent being observed wandering in the petitioner's yard late at night carrying a huge knife, stealing mail from the petitioner's mailbox and parking in petitioner's driveway. In addition, the respondent made communicative contacts. These included leaving voice messages late at night, sending a card referring to a romantic relationship that was apparently fantasy, threatening to beat up petitioner's fiancé and later threatening to kill the fiancé or himself. The next day the respondent was observed masturbating in his front yard.

The Court of Appeals found that the communicative contacts, while not overtly threatening (aside from the threats to petitioner's fiancé), provided a context for the non-communicative contacts. Taken together they gave Petitioner cause for alarm. The stalking protective order was upheld.

Osborne v. Fadden, 225 Or. App. 431 (2009)

Court of Appeals reversed trial court's issuance of stalking protective order, holding that none of the contacts between petitioners and respondents would cause petitioners to have a reasonable apprehension about their personal safety.

Petitioners were a married couple as were the respondents. Petitioner wife was formerly married to respondent husband. The petitioners alleged that the respondent wife had sent 2,000 e-mails and e-mail solicitations to them, made harassing telephone calls to petitioners and petitioners' families and friends, opened credit accounts in petitioners' names and signed petitioners up for subscriptions and mail order services. The trial court found that the respondents entered into a civil conspiracy to stalk petitioners and issued stalking protective orders against each respondent.

The Court of Appeals agreed that the respondents acted in concert. The court, however, reversed the SPOs, applying the less stringent standard for non-expressive contacts and finding that while troubling and offensive to the petitioners, none of the contacts would cause petitioners to have a reasonable apprehension about their personal safety.

Goodness v. Beckham, 224 Or. App. 565 (2008)

Court of Appeals reversed stalking protective order as legally insufficient.

Petitioner and respondent were former spouses and had one child. Respondent had been physically abusive to petitioner during the marriage resulting in at least two restraining orders. Petitioner alleged one incident that alarmed her when respondent came to her home rather than to a restaurant as agreed.

The parties' versions of events differed, but the Court of Appeals declined to decide whether that non-expressive contact was qualifying, because it determined that the remaining contacts were legally insufficient and reversed the trial court. The remaining contacts involved multiple emails and allegations that respondent had committed several crimes against petitioner. The opinion provides an extensive evaluation of these remaining contacts.

Ross v. Holt, 224 Or. App. 405 (2008)

Court of Appeals reversed stalking protective order as legally insufficient.

Petitioner and respondent were the estranged parents of two children. Respondent was accused of touching their daughter in a sexually inappropriate way. The allegation was investigated but not prosecuted. The Court of Appeals determined that several expressive communications were insufficient under *Rangel*: calls where respondent demanded to see the children (not a threat); a statement made by respondent in petitioner's front yard that he was going to take the children and get custody (not a threat involving personal violence likely to be followed by unlawful acts) and a statement before the hearing on the stalking protective order where he asked whether the children "had all their fingers and toes" (disconcerting, but not an unequivocal threat objectively likely to be followed by unlawful acts.)

In reversing the trial court, the Court of Appeals determined that the remaining two contacts — coming into petitioner's visual presence in her front yard and at the courthouse — were not contacts that would alarm an objectively reasonable person or cause reasonable apprehension regarding one's own personal safety or the safety of her children. The court noted that there was no evidence that respondent had a history of violence or testimony that petitioner was in fact alarmed by his presence or knew that his presence was unwanted.

Valerio v. Valerio, 224 Or. App. 265 (2008)

The Court of Appeals reversed the trial court's issuance of a stalking protective order.

The parties were involved in a disagreement over money paid by respondent on behalf of petitioner. Four contacts were raised at trial. The trial court determined that two of the contacts did not meet the statutory requirements, and the Court of Appeals agreed. (Respondent walked up to petitioner's car and petitioner backed away; voicemail messages that included a threat by Respondent that she was not going to leave petitioner alone until she left the country.) The Court of Appeals determined that one of the other contacts where respondent came to Petitioner's work and screamed that she wanted to be repaid and that she was not going to leave her alone until she paid or left the country was insufficient under *Rangel.*

The Court did not decide whether the remaining contact (respondent picked petitioner up at the airport, at petitioner's request, and then became angry at petitioner and drove at high speeds) could be considered an "unwanted contact," because two qualifying contacts are required.

Edwards v. Lostrom, 224 Or. App. 253 (2008)

The Court of Appeals reversed the trial court's issuance of a stalking protective order.

Petitioner obtained a stalking protective order on behalf of her daughter against paternal grandfather based on three contacts. Each incident involved petitioner observing respondent in a car — at a stop light, near a transit bus stop and from the window of a friend's house. Respondent was a repair worker and made house calls throughout Eugene. He testified that was not aware that he had driven close to granddaughter.

The Court of Appeals reversed the trial court, finding that petition had not demonstrated the required mental state. While there was some evidence from which one could infer that respondent was aware that granddaughter did not want to have contact with him, the court concluded that there was a lack of evidence that respondent was "aware of, and consciously disregarded a risk that his conduct would result in the unwanted contact."

Farris v. Johnson, 222 Or. App. 377 (2008)

The Court of Appeals reversed the trial court's issuance of a stalking protective order because no more than one of the contacts of which petitioner complained qualified as the basis for an SPO.

On appeal, petitioner conceded that two expressive contacts did not meet the *Rangel* standard ("you're a liar" and "you have a conflict of interest"). The Court of Appeals went on to analyze three other contacts, using the expressive contacts as relevant context.

Based on a single instance where respondent slowed down and looked while driving past petitioner's house, the court could not infer that the respondent was aware that his contact was unwanted. The second was an incident at the courthouse where respondent confronted petitioner's husband. The record did not show that petitioner was even aware of this contact before husband testified about it at the hearing. The final contact involving an altercation between petitioner's son and respondent was discounted, because issuance of a stalking protective cannot be issued based on one contact.

Note that the Court of Appeals considered contacts that occurred after the filing of the stalking petition based on petitioner's argument that the respondent failed to object to this evidence.

Matthews v. Hutchcraft, 221 Or. App. 479 (2008)

The trial court entered a general judgment dismissing Petitioner's stalking protective order and awarding attorney's fees and costs in an amount to be determined after submission of a petition for attorney fees per ORCP 68C. The Petitioner filed a notice of appeal of the general judgment a month before the supplemental judgment containing the amount of attorney fees and costs was entered. Apparently, petitioner was only appealing the issues of fees and costs. Petitioner did not appeal the supplemental judgment. The Court of Appeals dismissed Petitioner's appeal, because Petition appealed the wrong judgment — a non-final judgment as to the issue of attorney fees and costs.

Sparks v. Deveny, 221 Or. App. 283 (2008)

The Court of Appeals reversed the trial court. In this factually complicated case involving numerous phone calls and letters sent to petitioner and at least three non-expressive contacts, the Court of Appeals looked first at the expressive contacts and determined that none of them satisfied "the exacting constitutional standard announced in *Rangel*." In also rejecting the non-expressive contacts (phone hang-ups, attendance at gym class and once following petitioner in car), the court did not question that the contacts caused the petitioner real apprehension and alarm but held that the petitioner did not establish any apprehension relating to her or anyone else's personal safety. The court noted that the contacts were not inherently threatening, comparing the facts in *Delgado v. Souders*, and that there was no testimony that the respondent had a history of violence.

Crop v. Crop, 220 Or. App. 592 (2008)

The Court of Appeals affirmed the issuance of a stalking protective order based on non-expressive contacts.

Petitioner, respondent's estranged wife, complained of multiple incidents in which respondent sent her text messages indicating that he had overheard conversations taking place within petitioner's house. The court held that the evidence demonstrated that respondent spied on petitioner and continued to lurk near her residence while she was inside. The text messages, when considered in context with respondent's actions in lurking and spying on petitioner, comprised conduct that amounted to more than expression protected under Article I, section 8. The court concluded that the trial court did not err in denying respondent's motions for dismissal.

T. Webb v. Lovette and D. Webb v. Lovett, 217 Or. App. 165 (2007)

The Court of Appeals, relying on *Hanzo v. deParrie*, 152 Or. App. 525 (1998), affirmed T. Webb's case against respondent based on respondent's statements that he would terrorize her and a statement that intimated he intended to enter her house to commit robbery. The Court of Appeals reversed D. Webb's case against respondent determining that respondent's statements that he would "take care of things" were not "sufficiently specific, unambiguous, and unequivocal to cause an objectively reasonable person to fear for his personal safety." In these consolidated cases, the petitioners were neighbors of the respondent, who was on parole and considered a high risk to the community. Contacts were a series of threatening statements.

Benaman v. Andrews, 213 Or. App. 467 (2007)

The Court of Appeals affirmed the trial court's supplemental judgment denying the respondent's request to modify or vacate a permanent stalking protective order (SPO).

The facts underlying the original issuance of the issuance of the SPO and respondent's violations of that order are somewhat bizarre. When denying respondent's motion to vacate, the trial court noted that the respondent was "one of the least credible people I have had occasion to see in court." This case is important, however, in that it is the first case to construe *Edwards v. Biehler*, 203 Or App 271 (2005), establishing that a permanent SPO may be terminated when the criteria for issuing the order are no longer present and the petitioner no longer suffers reasonable apprehension due to the past acts of the respondent.

Jennings v. Gifford, 211 Or. App. 192 (2007)

Court of Appeals reversed trial court's issuance of a stalking protective order, holding that the order was not warranted under ORS 163.738(2)(a)(B).

Petitioner applied for and obtained a stalking protective order against her daughter's former high school boyfriend. Subsequent to a break-up, respondent sent daughter many text messages referring to her as a "hypocritical bitch" and telling her to "go to hell," even after being told to stop by her father. Respondent also attended a school play at which daughter was working; however, he did not try to contact her. Later, respondent went to daughter's school and asked daughter's friend if she was there and appeared to follow her after she became frightened and moved to a different part of the building.

The court concluded that none of the text messages met the *Rangel* standard in that the daughter was not alarmed or imminently threatened by them and that daughter was not alarmed by respondent's attendance at the school play. While the court acknowledged that the final contact may have been alarming, at least two qualifying contacts are required.

Middleton v. Tully, 211 Or. App. 198 (2007)

The Court of Appeals held that facts adduced at the hearing were legally insufficient to support the issuance of an SPO, and the trial court's issuance of a stalking protective order was reversed.

The Court of Appeals held that the following verbal communications that occurred after petitioner told respondent that she wanted to break up with him did not meet the standard set out in *State v. Rangel*: respondent called petitioner sixteen times while she was undergoing a medical procedure, respondent called and asked her to go to the coast for the weekend, and respondent left a message apologizing for his previous calls and asked that she call him that weekend.

The court concluded that there was no evidence in the record that respondent communicated a threat to petitioner such that she was objectively put in fear of imminent and serious personal violence as a result. The court held that the trial court erred in entering the permanent SPO.

Maygar v. Weinstein, 211 Or. App. 86 (2007)

The Court of Appeals reversed the trial court's issuance of a stalking protective order, finding that the evidence did not establish that petitioner reasonably feared for his personal safety as a result of two unwanted and alarming contacts.

The parties were co-owners of a townhouse that the petitioner was occupying exclusively. Twice the respondent entered the townhouse when she believed the petitioner was not at home. On one occasion, petitioner's arm was bruised when respondent swung open the door. The court held that the evidence did not establish that petitioner, as a result of the two unwanted and alarming contacts, reasonably feared for his personal safety.

DiCarlo v. McCarthy, 208 Or. App. 184 (2006)

The Court of Appeals held that sufficient evidence supported issuance of SPO.

Respondent was a former co-worker of petitioner's boyfriend who had lent petitioner's boyfriend money to buy new tires and had never been repaid. Respondent confronted petitioner when she was driving her boyfriend's truck, yelling threats, slamming his hand on the windshield, and damaging the truck while she was sitting inside. Petitioner also testified that respondent subsequently drove by her house five times over a two-day period and that she was frightened by this conduct.

The court pointed out that the confrontation over the truck tires was more than a mere verbal communication but found nonetheless that the speech was overtly threatening and reasonably put the petitioner in fear of immediate and serious personal violence. The court also found that respondent's drive-bys caused petitioner fear and that her fear was objectively reasonable, particularly in light of respondent's earlier threat in which he stated, "I'll get you, I'll find you, it's a small town." Issuance of the stalking protective order was affirmed.

Habrat v. Milligan, 208 Or. App. 229 (2006)

The Court of Appeals affirmed the issuance of a stalking protective order.

The respondent was a mail carrier, and petitioner worked in a hair salon on his route. The court found that a series of non-expressive contacts (respondent parking directly in front of the salon and watching petitioner for long periods of time, respondent glaring menacingly at petitioner, respondent attempting to flag down petitioner when she was alone in her car, etc.) that followed a call by petitioner's co-worker to respondent's employer were repeated, unwanted contacts. The court also found that petitioner was subjectively apprehensive for her safety and that her alarm was objectively reasonable.

Smith v. Di Marco, 207 Or. App. 558 (2006)

The Court of Appeals affirmed the trial court's issuance of a stalking protective order.

The respondent was the father of petitioner's former girlfriend. Petitioner testified to numerous contacts. The court determined that one incident was outside the two-year statute of limitation and that two involved speech that did not meet the standard established in *Rangel*. The court found that two other contacts involved physical confrontation of the petitioner by the respondent and that, with respect to each, the petitioner testified that he was afraid for his safety. A final series of contacts that involved respondent following petitioner by car and watching him with binoculars were found to qualify under the statute.

Courtemanche v. Milligan, 205 Or. App. 244 (2006)

The Court of Appeals reversed the trial court's issuance of a stalking protective order where petitioner failed to show that respondent was aware that contacts were unwanted.

Respondent was a mail carrier, and petitioner lived on his mail route. Over an 18-month period, mostly while delivering mail, respondent engaged petitioner in a number of conversations. The court described some of them as "strange, boorish and offensive." Petitioner never told respondent that the contact was unwanted. After a series of unanswered phone calls, including one voicemail message, petitioner's husband told respondent to stop contacting petitioner; respondent immediately complied.

The court, citing *Delgado v. Souders*, 344 Or 122 (2002), acknowledged that a petitioner is not necessarily required to object to an unwanted contact and that other evidence can establish the respondent's awareness that his repeated presence or activities are unwanted. The court found, however, that in this case the petitioner failed to establish respondent's subjective awareness that at least two of the contacts were unwanted and reversed the trial court.

Provost v. Atchley, 205 Or. App. 37 (2006)

The Court of Appeals reversed the issuance of two stalking protective orders due to a complete absence of evidence that either respondent "had engaged in two or more unwanted contacts that actually alarmed petitioner and reasonably put her in fear of her personal safety, much less the sort of fear of imminent and serious personal violence that is required when the unwanted contacts consistent of speech."

Petitioner was a high school student who claimed that one of the respondents had harassed her by calling her names, that both respondents had once blocked her car and vandalized the hood of the car, and that both the respondents had flipped her off and called her vulgar names at school.

The court concluded that that the record was legally insufficient to support the issuance of the stalking protective orders.

Soderholm v. Krueger, 204 Or. App. 409 (2006)

The Court of Appeals reversed the trial court's issuance of a stalking protective order; the court found that the evidence in the record did not meet the statutory requirements regarding the petitioner's subjective state of mind. Under the statute, petitioner must prove the contact causes her to experience "alarm," such that she feels apprehension or fear resulting from the perception of danger.

This case involved a series of contacts between the petitioner and the respondent who were neighbors and shared a driveway. The court determined that petitioner provided sufficient evidence that she was apprehensive about her personal safety with respect to only one incident. This contact was an incident during which respondent followed petitioner to school; petitioner testified that she was frightened during the incident. While opining that some of the other contacts might have caused petitioner to be apprehensive for her safety, the court noted that the statute requires that the petitioner *prove* she felt apprehension or fear resulting from the perception of danger. Citing *Cress v. Cress*, the court noted that being tearful or upset is insufficient proof of this element of stalking claim.

Hollon v. Wood, 204 Or. App. 344 (2006)

The Court of Appeals reversed the trial court's issuance of a stalking protective order, finding that the expressive contacts upon which the petitioner relied were insufficient to meet the standard established in *Rangel*.

Here, the petitioner "did not describe any of the expressive contacts as instilling in her a fear of imminent personal violence." Petitioner's own statements demonstrated that she did not fear for her personal safety as a result of the contacts. Petitioner's lack of specificity as to the contacts themselves and her apparent ambivalent reactions to them presented insufficient grounds to issue a stalking protective order, failing both the subjective and objective prongs of the *Rangel* standard. In addition, the court found that the petitioner only presented evidence of

one instance of non-expressive contact, less than the statutorily required "repeated" contact (defined as two or more).

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

The Court of Appeals reversed the trial court's denial of a motion to terminate a stalking protective order of unlimited duration.

The trial court found there are "no statutory provisions for modifying or vacating permanent stalking orders." The Court of Appeals disagreed and held that a court may terminate a stalking protective order under ORS 163.741(3). Its decision was based on an analysis of ORS 163.738(2) and ORS 163.741 together with relevant legislative history. The court went on to acknowledge that there are no specific provisions in the stalking statutes dictating the procedures for terminating a stalking protective order and looked to the Family Abuse Prevention Act (FAPA) for guidance in light of its similarity to the statutory stalking scheme. Such orders allow for termination by the court when, "on the respondent's motion, a court finds that the criteria for issuing the order under (the statute) are no longer present." In such situations, courts' inquiries shall focus on "whether petitioner continues to suffer 'reasonable apprehension' due to the past acts of the respondent under ORS 163.738(2)(a)(B)(iii)."

Hulburt v. Delaney, 197 Or. App. 437 (2005)

The Court of Appeals reversed the trial court's entry of judgment for a permanent stalking protective order.

The trial court found "probable cause" to believe that the elements of a stalking action as set forth in ORS 30.866 (1) had been established. The judgment was held to be defective because probable cause is not the correct standard. The trial court was required to find by a preponderance of the evidence that defendant actually engaged in the unwanted contact; accordingly, the trial court's judgment was reversed.

Lomax v. Carr, 194 Or. App. 518 (2004)

The Court of Appeals reversed the trial court's issuance of a permanent stalking protective order and remanded for further proceedings.

This case was an appeal from a permanent stalking protective order initiated by a citation in the form specified in ORS 163.744(2). The trial court denied several motions filed by respondent testing the adequacy of the complaint and found that the ORCP 21 provisions relied on as a basis for those motions do not apply in a proceeding to obtain a SPO. The Court of Appeals agreed, relying on ORCP 1A, which states that the rules of civil procedure do not apply when a different procedure is specified by statute or rule. The court found that the statutory form of citation precluded application of Oregon Rules of Civil Procedure that would require a complaint to contain more or different information or allegations.

At the hearing phase of this case, the trial court ruled without permitting the parties to present their evidence. The Court of Appeals inferred that the trial court's basis for doing so was a belief that the complaint was an adequate basis on which a permanent order could be issued and that an evidentiary proceeding was not required. The Court of Appeals found that the trial court was in error on both counts. The averments of the statutory citation do not allege all the elements required for issuance of a permanent stalking protective order nor do they conclusively prove those elements. Also, the statutory scheme provides for an evidentiary hearing, which the trial court did not hold. The case was reversed and remanded.

Castro v. Heinzman, 194 Or. App. 7 (2004)

The Court of Appeals affirmed the trial court's issuance of a stalking protective order pursuant to ORS 30.866.

The facts involved a series of unwanted emails and in person contacts by the respondent. On appeal, the respondent asserted that the trial court had based the stalking protective order primarily on the emails that he asserted were not overtly or implicitly threatening. The Court of Appeals acknowledged that potential constitutional problems can arise when the contact relied on by the petitioner involves expression and cited *Rangel* and *Hanzo* for the proposition that expressive contact must meet a more stringent standard than set out in the statute.

The court agreed with respondent's argument that his statements did not constitute an overt threat of physical violence. However, the court determined that the statements in some of the emails (expressing some coercive fantasies and a desire to resume a sexual relationship with the petitioner) together with his in person contacts would alarm a reasonable person.

Most important, the court found that respondent's expressive contacts provided a context for his nonexpressive contacts (repeated unwanted contact at work and a gym). The court did not reach the question of whether the expressive contact alone satisfied the *Rangel* test. Instead the court evaluated the nonexpressive contacts and found them to be overt and intrusive, especially in a light of an admission by the respondent that he had abused a prior spouse. In evaluating the nonexpressive contacts, the court found that respondent's acts were more overt and intrusive than the respondent's acts in *Delgado v. Souders*.

Jones v. Lindsey, 193 Or. App. 674 (2004)

The Court of Appeals reversed the lower court judgment granting a permanent stalking protective order, finding that the evidence was insufficient to support the issuance of the order.

First, the court addressed petitioner's argument that the allegations of the petition were part of the evidentiary record. The court rejected petitioner's argument and held that the facts alleged in a SPO petition do not constitute evidence. The court went on to consider eight contacts on which the petitioner produced evidence at the hearing. The court reviewed the alleged incidents and determined that the most serious occurred outside the two years preceding the petition and could not be considered. In reversing the trial courts decision, the court found a lack of evidence of unwanted contact that reasonably alarmed or coerced the petitioner. Finally, as to the purely expressive contacts, the court held that there was no evidence of an "unequivocal threat that instilled an objectively reasonable fear of imminent and serious personal violence."

Lopus v. Glover, 193 Or. App. 481 (2004)

The Court of Appeals reversed the trial court's issuance of a permanent stalking protective order pursuant to ORS 30.866.

The petitioner's evidence was based on one incident involving the return of children during a parenting time exchange. During the exchange, the respondent refused to give the child to the petitioner and walked towards her car with the child. The court found that the petitioner did not establish more than one unwanted contact or that any contact had caused her a reasonable apprehension of physical harm.

Sabados v. Kempa, 193 Or. App. 290 (2004)

The Court of Appeals, *per curiam*, affirmed the trial court's entry of a permanent stalking protective order under ORS 30.866. The court chose not to include a detailed description of the facts and deferred to the trial court's findings in light of its opportunity to view the witnesses firsthand. The court assumed that the trial court believed petitioner's testimony that the respondent pointed or waved a gun at her.

Putzier v. Moos, 193 Or. App. 80 (2004)

The Court of Appeals reversed the trial court's issuance of a permanent stalking protective order, holding that two of the three incidents cited at trial were insufficient to serve as the basis for the order.

Expressive contacts must satisfy the test set out in *Rangel* in order to qualify as stalking contacts. The *Rangel* test requires that in order for communicative contact protected by the first amendment to qualify as a stalking contact, the communication must be (1) a threat that "instills in the addressee a fear of imminent and serious personal violence," (2) "unequivocal," and (3) "objectively likely to be followed by unlawful acts."

In this case, there were three incidents of stalking alleged, two of which were expressive contacts. The first expressive contact was a letter from the respondent to petitioners, which did not threaten them with any kind of physical harm. The second was contact between the individual and petitioner's employer reporting alleged employment-related misconduct. Neither of the expressive contacts satisfied the *Rangel* test. Because more than one incident is required, the court reversed.

Michieli v. Morgan, 192 Or. App. 550 (2004)

The Court of Appeals reversed the trial court's issuance of a stalking protective order, holding that respondent's repeated emails and letters to petitioner did not satisfy the *Rangel* test for expressive contacts.

Written communications must satisfy the test outlined in *Rangel* in order to qualify as stalking 'contacts.' Repeated notes attempting to convince the petitioner to agree to date the respondent did not satisfy the *Rangel* test when the communications did not threaten or allude to violence, and when the Respondent had no history of violence. Though clearly unwanted and reasonably alarming, the communications did not satisfy the *Rangel* test.

Bryant v. Walker, 190 Or. App. 253 (2003), *rev granted* May 2004

Stalking order upheld even though respondent's contacts all occurred in a public place where petitioner was not alone, and no overt threats occurred.

Petitioner's fear was objectively reasonable for a person in her situation. The court cited Caroline A. Forell and Donna M. Matthews, *A Law of Her Own: The Reasonable Woman as a Measure of Man* 133 (2000): "[B]ased on the realities of men's and women's lives, reasonable women are likely to experience fear in situations where reasonable men would not. * * * [I]n our culture, men and women are not similarly situated when it comes to being able to defend and protect themselves from others."

The court found that respondent was aware of a substantial risk that further contact was unwanted after Petitioner told Respondent "You don't need to stare." Respondent argued that he had not received an adequate hearing. The court found that he had received an adequate hearing as required by *Miller v. Leighty*, and had not preserved his error if he had not received an

adequate hearing. Respondent argued that he had been cut off and prevented from questioning. The court found it permissible to infer from the record that when the court asked "anything further?" that question was directed at both parties. Because respondent did not respond, he chose not to take advantage of the opportunity offered him.

Dissent: The dissent felt strongly that fundamental fairness had not been met because a more thorough examination of the record revealed that the respondent was not specifically given the opportunity to respond to petitioner's evidence. The dissent felt that this was such a basic problem that no preservation was required under the circumstance or, alternatively, that this case should have been reviewed as error apparent on the record. Review was granted (May 18, 2004) but subsequently dismissed as improvidently granted (November 12, 2004).

Tumbleson v. Rodriguez, 189 Or. App. 393 (2003)

The Court of Appeals reversed the trial court's issuance of a stalking protective order, holding that the trial court erred in issuing an SPO in absence of evidence of two or more contacts that were unwanted.

When respondent arrived uninvited at petitioner's home, was told to leave, and then granted permission to stay for the night, the contact was not unwanted. The Court specifically noted that there was no evidence that petitioner was afraid of respondent during this incident, or that petitioner was coerced into allowing respondent to stay.

State v. Shields, 184 Or. App. 505 (2002)

Conviction for stalking upheld.

Phone calls made by the defendant during which he did not speak were not expressive acts and therefore did not have to satisfy the 'actual threat' standard set out in *Rangel* (*see above)*. The list of "contacts" set out in ORS 163.730(3)(a)-(k) is illustrative and not exhaustive, and can include making telephone calls without speaking. The court referred to its decision in *Boyd*, 170 Or App 509 (2000) and reiterated that it is sufficient for conduct to be a "contact" for purposes of ORS 163.730 if the act gives rise to an unwanted relationship or association between the victim and the defendant.

Pinkham v. Brubaker, 178 Or. App. 360 (2001)

The Court of Appeals upheld the trial court's issuance of a stalking protective order.

The following behavior of respondent constituted unwanted contact within the meaning of ORS 163.730(3): taking petitioner's child from school to respondent's home without permission; shredding petitioner's dresses; waiting outside petitioner's home; and picking petitioner's child up on the way home from school without permission.

The court held that it was immaterial that petitioner's fear resulting from the shredding of the dresses arose when she learned of that contact, even though it had taken place months before. While petitioner did not explicitly describe herself as subjectively "alarmed," the court inferred from her testimony that she was so alarmed. The court looked at the totality of the circumstances, including the context of the parties' entire history, to determine whether petitioner's subjective alarm was reasonable. Contacts that might appear innocuous when viewed in isolation often take on a different character when viewed in context.

O'Neil v. Goldsmith, 177 Or. App. 164 (2001), *rev den* 333 Or 595 (2002)

The Court of Appeals affirmed without discussion the trial court's issuance of a stalking protective order. The court did modify the scope of the order.

Where petitioner and respondent live in very small town, it was overly burdensome to prohibit respondent from "intentionally, knowingly, or recklessly" coming into petitioner's physical or visual presence. The court modified the stalking order to prohibit only "intentionally" coming into the petitioner's presence. All other terms of the order were upheld.

Schiffner v. Banks, 177 Or. App. 86 (2001)

The Court of Appeals reversed the trial court's issuance of a stalking protective order, holding that while respondent's actions constituted unwanted contact, petitioners were not entitled to SPO, as they did not experience "alarm" from that contact.

Respondent repeatedly waited outside petitioners' home and took photographs of petitioners. This contact was repeated and unwanted contact within the meaning of ORS 163.730. However, petitioners' alarm did not arise as a result of this contact. Petitioners knew of this contact and there was no evidence that they were alarmed by it. Instead of being alarmed by respondent's contacts, petitioners were alarmed as a result of conversations between respondent and third parties, as relayed to petitioners by the third parties. Respondent's conversations with third parties were not 'contacts' within the meaning of ORS 163.730. While instances may arise where the other person initially believes a contact to be innocuous and later understands the contact in a new light and only then becomes alarmed, this case did not present those facts.

Cress v. Cress, 175 Or. App. 599 (2001)

The Court of Appeals reversed the trial court's issuance of a stalking protective order, holding that while the requisite number of contacts existed for issuance of an SPO, the contacts did not cause daughter the requisite apprehension regarding her personal safety.

Petitioner testified that she was "unnerved" and "extremely upset" by her father's repeated contacts, which he knew were unwanted. The court held that this did not satisfy her burden of proving by a preponderance of the evidence that she was subjectively afraid for her physical safety. In this case, the petition contained an allegation that the respondent had sexually molested the petitioner as a child. There was no further evidence presented to the court on this issue. The allegation in the petition, without more, was not a basis from which to infer a subjective fear of current physical harm.

K.H. v. Mitchell, 174 Or. App. 262 (2001)

The Court of Appeals upheld the issuance of a stalking protective order, modifying its scope to prohibit only intentional contact.

The filing of a law enforcement citation to initiate a court proceeding to determine whether a stalking order should be entered is procedurally correct. ORCP 3 does not apply to stalking protective order proceedings. ORCP 1A identifies that the Oregon Rules of Civil Procedure do not apply when a different procedure is authorized by statute.

Respondent was an adult male who lived next door to petitioner, who was a high school student. Respondent's anonymous phone calls to petitioner when she was alone in the house, identifying his desire to perform certain sex acts and indicating that he would be right over were not benign requests for consent. Rather, these phone calls conveyed a threat of serious personal assault and reasonably instilled in petitioner a fear of serious personal violence.

However, because respondent lived next door to petitioner, a stalking order prohibiting respondent from all contact defined in ORS 163.738 was overly broad. A court should weigh the need to protect the victim against the restrictions placed on the respondent when exercising its discretion in choosing what sorts of contact to prohibit in a stalking order.

The Court of Appeals modified the order to prohibit the respondent from contacting petitioner by *intentionally* communicating by any means with Petitioner, either directly or through a third person, *intentionally* initiating visual contact with Petitioner, *intentionally* following petitioner, going onto petitioner's property, her place of work, or her school, and waiting outside of her place of work or school.

Boyd v. Essin, 170 Or. App. 509 (2000)

The Court of Appeals upheld issuance of permanent stalking protective order.

Petitioner had FAPA temporary restraining order against respondent. Petitioner also alleged that respondent had made numerous phone calls to her home, some at odd hours; that he had followed her out of church and blocked her way; called her names; and that he had driven by and observed her home. After the temporary restraining order was entered, respondent was seen 1000 feet from the home looking at it with binoculars. Some contacts occurred before the parties separated. The court analogized the facts in this case to *Delgado v. Souders* and found that driving by the family home and watching it with binoculars were reasonably alarming contacts in this context.

Dissent: Judge Armstrong dissented and did not accept driving past the house as reasonably alarming. He points out that there was no testimony supporting petitioner's subjective level of alarm. He points out that it is not clear from the record if some of the incidents occurred before or after separation.

Weatherly v. Wilkie, 169 Or. App. 257 (2000)

The Court of Appeals reversed the issuance of a stalking protective order (SPO) under ORS 30.866, finding that contacts may have been subjectively alarming but were not of a nature that would have caused a reasonable person to be alarmed. However, the court specifically states that "our conclusion should not be understood as a holding that ostensibly innocuous contacts of the kind we have in this case can never give rise to objectively reasonable alarm and apprehension regarding personal safety."

There was no evidence of domestic violence presented; however, petitioner did suffer from post-traumatic stress disorder due to military experiences. This was the second petition for a SPO filed by petitioner. Petitioner alleged that over a one-and-one-half year period respondent drove by her store with his new girlfriend and waved; drove by petitioner's home twice; sent her a postcard and letters; called her one time; and left real-estate flyers for her. The court found that the contacts were neither implicitly nor explicitly threatening. Petitioner further alleged that respondent had made numerous hang-up phone calls to her, flattened her tires, set her dog loose, started a fire at her house, and left a bottle bomb in the neighbor's mailbox. The trial court sustained respondent's objection to these allegations on relevancy grounds due to a lack of evidence tying respondent to the events.

State v. Maxwell, 165 Or. App. 467 (2000)

The Court of Appeals upheld felony convictions for violation of stalking protective order and held that the term "presence" is not unconstitutionally vague.

The court found that "a person is within another's 'visual or physical presence' when the person is capable of being seen – whether or not the person is in fact seen – or when the person is within physical calling distance." The court found that even though expressive contact had occurred on two occasions, the prohibited contact was coming into the presence of the victim, not the note or statements made. Therefore, there was no problem with *Rangel*.

Miller v. Leighty, 158 Or. App. 218 (1999)

The Court of Appeals reversed trial court's issuance of a stalking protective order, and remanded for further proceedings. The court held that the trial court erred in entering the permanent SPO without affording respondent an opportunity to cross-examine adverse witnesses, including petitioner, and to present his own evidence. Respondent has the right to present his own witnesses and cross-examine adverse witnesses in hearing on stalking protective order. However, there is no authority for the proposition that Court must advise a respondent of these rights.

Wayt v. Goff, 153 Or. App. 347 (1998)

The court reversed the permanent stalking protective order issued by the trial court, holding that there was insufficient evidence to find that the contacts were "unwanted and repeated" as required by the statute.

Petitioner, a police officer, cited three contacts with respondent. In 1985, petitioner and respondent had a confrontation in a mall parking lot, in which respondent told petitioner that if he "put his hand on me again, it would be a mistake," and said that "If you take that [petitioner's gun] out, I'll stick it up your ass." The second incident took place on January 15, 1992, when respondent confronted petitioner at a courthouse and said, "Well, Gary, that's perjury number three. I guess it's time for a 12-34 and possibly the pill or a big pill." The final incident took place on August 26, 1995; petitioner confronted respondent, who told petitioner that he knew where he lived and knew the names of petitioner's wife and daughters.

ORS 163.738 requires that, before a stalking protective order may be issued, the court must find that alleged stalker "intentionally, knowingly or recklessly engaged in repeated and unwanted contact with the other person or a member of that person's immediate family or household thereby alarming or coercing the other person." To avoid a conflict with the guarantee of free expression in Or. Const. art. I, § 8, ORS 163.738 had to be construed to require that the alleged stalker not only intended his expressive conduct to threaten another person, but also had the means to carry out the threat.

The court concluded that, of the three incidents in the record, only one incident fit the statutory requirements. Accordingly, the order was reversed.

Hanzo v. deParrie, 152 Or. App. 525 (1998)

The Court of Appeals reversed the issuance of a stalking protective order against an anti-abortion protestor. Where the predicate contacts for a civil stalking protective order issued pursuant to ORS 30.866 involve expression, the expression or other associated conduct must "unambiguously, unequivocally, and specifically communicate the respondent's determination to cause harm." In *Hanzo*, the Court of Appeals concluded that the evidence was not sufficient to support issuance of a stalking protective order because the predicate contacts were not "unambiguously" or "unequivocally" threatening.

The respondent in *Hanzo* was the leader of a local anti-abortion group who publicly

supported anti-abortion activists who killed abortion providers. The petitioner was the executive director of a Portland health center that provides gynecological health care and counseling, including abortions. Respondent and his supporters initiated a campaign to stigmatize, harangue, agitate, mortify, and expose ("S.H.A.M.E.") petitioner; that campaign centered on petitioner's home. On two occasions, respondent led a group of anti-abortion protesters who picketed on the sidewalk and street in front of petitioner's home and paraded around petitioner's neighborhood with signs stating "your neighbor is an abortionist" and other slogans. Respondent and supporters also distributed handbills listing petitioner's work and (unpublished) home telephone numbers and addresses, and encouraged people to call or write petitioner to express their anti-abortion views. There was evidence that unidentified person(s) mailed an anti-abortion flyer and postcard to petitioner, and left an anti-abortion magazine at her front door. The picketers were peaceful and did not trespass on petitioner's property. On one occasion, respondent telephoned petitioner at home but was requested to never call back again. Respondent complied with that request.

The court of appeals held that, under both the civil (ORS 30.866) and criminal (ORS 163.732) stalking statutes, respondent must "knowingly" engage in "unwanted contact," and the complainant's alarm must be objectively reasonable. The contacts that petitioner pleaded and proved were not actionable contact because the contacts were not "unambiguously" or "unequivocally" threatening. The court rejected petitioner's "contextual overlay" argument, that the court should consider respondent's acts in the context of escalating violence towards abortion providers and respondent's prior statements in support of such violence. The court reasoned that (1) even if such advocacy is reasonably read as advocating violence, "that advocacy is abstract advocacy;" and (2) if petitioner's argument were correct "then *any* contact between petitioner and respondent would, necessarily [,] be an actionable "unwanted contact." (The concurring opinion did not join in the argument that respondent's earlier declarations of support for violent acts against abortion providers may have bearing on whether or not the contacts were "objectively reasonable" or a "threat.")

Shook v. Ackert, 152 Or. App. 224 (1998)

The Court of Appeals reversed the trial court's denial of a stalking protective order, holding that the ORS 163.730 *et. seq* is not, on its face, unconstitutionally overbroad. *If* a SPO proscribes arguably protected expression, that order is subject to an "as applied" constitutional challenge. The trial court erred when it dismissed the police citation and vacated the SPO on the grounds that the definition of "contact" in ORS 163.730(3) is an unconstitutionally overbroad restraint upon speech.

Criminal stalking statutes that describe the potential content of a SPO [ORS 163.730(3) and ORS 163.738(2)(b)] are not unconstitutionally overbroad simply because the statutes *may* authorize a SPO that restrains SPO that encompasses all forms of conduct specified in ORS 163.738(3). Because the trial court has the discretion to require the respondent to refrain from less than all of the forms of contact specified, and the court must specify the conduct covered by the SPO, the stalking law is not overbroad and does not violate the free speech provisions of the Oregon and United States Constitutions. The case was remanded to the trial court for reinstatement of the SPO.

Delgado v. Souders, 146 Or. App. 580, 934 P2d 1132, *rev allowed*, 326 Or. 43 (1997)

The Court of Appeals upheld the trial court's issuance of a stalking protective order. holding that ORS 30.866 was not unconstitutionally vague or overbroad, and that he terms

"contact," alarm," "danger" and "personal safety" were not unconstitutionally vague. The court further held that it was not an unconstitutional restriction on the right to freedom of movement to prohibit a person from frequenting a public place, where the circumstances are appropriate. (The court noted that this was an issue of scope of the protective order rather than constitutionality of the statute and that the former argument was not preserved.)

Defendant's conduct of repeatedly sitting next to and following petitioner in the university library, and appearing next to her on campus pathways, streets, and sidewalks, and in front of her personal residence, was not trivial conduct and was reasonably alarming to petitioner. (The court referred to ORS 163.732 as the "criminal analog" of ORS 30.866.) The trial court's issuance of the SPO was affirmed.

State v. Rangel, 146 Or. App. 571, *rev allowed*, 325 Or 367 (1997)

The Court of Appeals reversed the trial court's denial of a stalking protective order, holding that ORS 163.732, which defines the crime of stalking, is not overbroad and does not violate Article I, section 8, of the Oregon Constitution. For purposes of constitutional analysis, the court examined the focus of ORS 163.732 on "the forbidden effects of knowingly alarming and coercing."

Relying on its earlier analysis of Oregon's harassment statute in *State v. Moyle*, 299 Or. 691 (1985), the court held that, where the alleged stalking activity is carried out, in whole or in part, by communicative means, proof of the crime of stalking requires a "threat" or its equivalent to have been made. The defendant must intend to cause alarm or to coerce. The victim's alarm must be subjectively experienced and objectively reasonable.

The trial court erred when it granted defendant's demurrer. The case was remanded for trial on the criminal charge of violating the stalking protective order.

(NOTE: The following Court of Appeals cases were decided *before* the 1997 revisions to the stalking statute)

State v. Orton, 137 Or. App. 339 (1995)

Collateral bar doctrine did not bar criminal defendant, charged with the crime of violating a court-issued stalking protective order (SPO), from demurring on grounds that the term "without legitimate purpose" was impermissibly vague and overbroad. The court vacated defendant's conviction, agreeing that the term "without legitimate purpose" was unconstitutionally vague. [Note: This element has since been deleted.]

Johnson v. McGrew, 137 Or. App. 55, *rev den*, 322 Or. 361 (1995)

Respondent is not entitled to a court-appointed attorney to appeal a court-issued stalking protective order (SPO). The proceedings that lead to the issuance of a court's SPO do not meet the statutory definition of a "criminal action" ("an action at law by means of which a person is accused and tried for the commission of a crime." ORS 138.500 (since amended by Or Laws 1995, ch. 117, sec. 2, and ch. 194, sec. 1).

The court relied on the Oregon Supreme Court's ruling in *Brown v. Multnomah County*, 280 Or. 95 (1977), which identified five indicia that are to be evaluated to determine whether a proceeding is a "criminal prosecution" under Article I, section 11 of the Oregon Constitution: (1) The type of offense: Although violating a court's SPO is a crime, the conduct on which the underlying SPO is based need not be criminal. Moreover, the stalking statute imposes a burden

of proof associated with civil, not criminal, actions; (2) The prescribed penalty: This is generally regarded as the single most important criterion. The SPO proceeding results only in injunctive relief; the court cannot impose any other penalty at the SPO hearing. The fact that there is a criminal penalty for violating a SPO is irrelevant (and there was no such charge in this case); (3) Collateral consequences: The possibility that the issuance of a SPO could result in criminal prosecution is not a relevant "collateral consequence" and does not convert the civil process into a criminal proceeding; (4) Punitive significance: The test is whether the court's order "carries a stigmatizing or condemnatory significance." The overriding purpose of the SPO is injunctive; any stigmatizing or condemnation is incidental; and (5) Pretrial procedures: Arrest for failing to appear in court on an officer's SPO is a regulatory function. The fact that a failure to appear results in a subpoena or order for arrest does not mean that the proceeding in which the subpoena was issued was criminal. Other than as a consequence for failing to appear, the stalking statute does not provide for physical restraints, booking, detention in jail, or other procedures normally associated with criminal proceedings.

Starr v. Eccles, 136 Or. App. 30 (1995)

The phrase "legitimate purpose" is unconstitutionally vague. Because, under ORS 163.735 and ORS 163.738, the police officer and the court, respectively, must find that respondent intentionally, knowingly, or recklessly contacted petitioner or a member of petitioner's family or household "without legitimate purpose" as a prerequisite for the entry of the officer's and the court's stalking protective order, and the term "without legitimate purpose" is impermissibly vague, both the officer and the court were without authority to enter the SPO.

Foster v. Souders, 135 Or. App. 542 (1995)

Defendant's criminal stalking conviction was reversed, pursuant to the court's ruling in *State v. Norris-Romine*, 134 Or App 204, rev den, 321 Or. 512 (1995) (see below). The statutory term "without legitimate purpose" in ORS 163.735 and 163.738 is unconstitutionally vague; that vagueness is grounds for dismissing criminal charges against defendants accused of violating stalking protective orders issued pursuant to ORS 163.735 and ORS 163.738.

Under the Oregon Constitution, a criminal statute must be sufficiently explicit "to inform persons of common intelligence of the conduct that they must avoid." The term "legitimate purpose" does not, on its face, tell a person of ordinary intelligence what is encompassed within that term. It is insufficient that the meaning of the term may become clear upon reference to legislative history.

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	SEXUAL ABUSE PROTECTIVE ORDER (SAPO) Effective 1/1/2014
ELIGIBILITY	• Available to minor* as well as adult petitioners (12 yo and older can file on own petition; parent or lawful guardian can petition for person under 18, but must file petition for person under 12) • Not available against minor respondent • Petitioner and respondent must NOT be "family or household members" (defined by ORS 107.705) • Respondent must NOT be subject to another protective order (ie, EPPDAPA, FAPA**, Release Agreement (in criminal case), No Contact Order, Stalking Order, Protective Order from Juvenile Dependency Court, including foreign restraining orders)
ABUSE	• One incident of abuse required • Subjected petitioner to sexual abuse. Sexual abuse = sexual contact with: o a person who does not consent to the sexual contact; or o a person who is considered incapable of consenting to a sexual act under ORS 163.315 • Petitioner must reasonably fear for their safety with respect to respondent • Abuse must have taken place within last 180 days (unless respondent is in jail or more than 100 miles away or was subject to a restraining, protective or no contact order)
RELIEF	• One year (renewable upon finding that it is objectively reasonable for a person in the petitioner's situation to fear for the person's physical safety if the restraining order is not renewed) • <u>Order shall restrain respondent from</u>: o contacting petitioner and from intimidating, molesting, interfering with or menacing the petitioner, or o attempting to intimidate, molest, interfere with or menace the petitioner. • <u>Upon petitioner request, Court may order</u>: o Respondent be restrained from contacting the petitioner's children or family or household members; o Respondent be restrained from entering, or attempting to enter, a reasonable area surrounding petitioner's residence; o Respondent be restrained from intimidating, molesting, interfering with or menacing any children or family or household members of petitioner (or attempting to do this); o Respondent be restrained from entering, or attempting to enter, any premises and a reasonable area surrounding the premises when necessary to prevent the respondent from intimidating, molesting, interfering with or menacing the petitioner or the petitioner's children or family or household members; and o Other relief necessary to provide for the safety and welfare of the petitioner or the petitioner's children or family or household members.
MODIFICATION	• Terms of order may be modified o Petitioner may remove or make terms less restrictive by ex parte motion o For other modifications by either party, notice and hearing required
PROCEDURE	• SATF to develop forms and make available an instructional brochure regarding SAPO rights • One procedure – all petitions filed through Court • No filing, service, or hearing fees • Hearing only if requested by respondent • Prohibits use of certain evidence in hearing (Rape Shield law applies) • Preponderance-of-the-evidence standard (51%) • Ex parte hearing may be held by telephone • A party may request that the party or a witness appear by telephone if hearing scheduled
ENFORCEMENT	• Petitioner cannot violate • Mandatory arrest laws apply • Sheriffs to enter into LEDS and NCIC databases • Violation of order can be prosecuted by issuing county or the county in which violation occurred • Violation is a civil matter but remedial sanctions may be sought pursuant to ORS 33.055 (Contempt proceeding)
FULL FAITH AND CREDIT	Yes, enforceable in all states
FEDERAL GUN LIABILITY	No, except certain minor petitioners

*<u>Minor petitioners</u> seeking an order should be advised that Judges and Law Enforcement Officers are mandatory child abuse reporters who will likely make a report to law enforcement or Department of Human Services upon receipt of a SAPO petition from, or on behalf of, a minor petitioner.
**<u>Minor petitioners</u> could be eligible for FAPA and SAPO <u>at same time</u>.

BRIEF SUMMARY OF EMERGENCY PROTECTIVE ORDER STATUTE

HB 2776

I. A Peace Officer **MAY** inform a person in danger of abuse of the officer's ability to apply for an ex parte emergency protective order.

II. Peace Officer must have:

A. Consent or permission of the person **AND**

B. Probable cause to believe, 1) after responding to a domestic disturbance, circumstances for mandatory arrest exist (ORS 133.055(2)(a)), **OR** 2) the person is in immediate danger of further abuse by a "family or household member" (ORS & 107.705(3) **AND** an emergency protective order is necessary to prevent further abuse.

III. Application will consist of the proposed order and the Officer's declaration setting forth facts and circumstances.

VI. Electronic Transmission is allowed.

[THIS WILL BE THE METHOD EMPLOYED AFTER WORK HOURS IN MULTNOMAH COUNTY]

V. Court **MAY** enter order **IF** the court finds:

A. In response to a domestic disturbance the officer believes circumstances for mandatory arrest exist **OR**

B. The person is in immediate danger of abuse from family/household member **AND** an emergency protective order is necessary to prevent further abuse.

VII. Unlike Family Abuse Protection Act restraining orders, the Emergency Protective Order restrains the respondent from contacting, intimidating, molesting, interfering with or menacing the person, or attempting to do any of those things **ONLY**.

VII. Order must include probable cause findings, the date the order expires and a security amount for violation.

VIII. The rest of the statute and after-hours protocol documents provide further detail regarding the process for law enforcement and for the after-hours warrant duty judge.

RELATED STATUTES:

MANDATORY ARREST – ORS 133.055 (2)(a):

(2)(a) Notwithstanding the provisions of subsection (1) of this section, when a peace officer responds to an incident of domestic disturbance and has probable cause to believe that an assault has occurred between family or household members, as defined in ORS 107.705, or to believe that one such person has placed the other in fear of imminent serious physical injury, the officer shall arrest and take into custody the alleged assailant or potential assailant.

FAMILY OR HOUSEHOLD MEMBER – ORS 107.705(3)

(3) "Family or household members" means any of the following:

(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. *[Note: This has been interpreted to apply to people cohabiting or who have cohabited in a sexually intimate relationship, not to platonic roommates).*

(e) Persons who have been involved in a sexually intimate relationship with each other within two years immediately preceding the filing by one of them of a petition under ORS 107.710.

(f) Unmarried parents of a child.

Oregon Judicial Department (OJD) Website Links

Forms for Family Abuse Prevention Act (FAPA) - Restraining Orders; Elderly Persons & Persons with Disabilities Abuse Prevention Act (EPPDAPA) – Restraining Orders; Sexual Abuse Protective Orders (SAPO); and Stalking Orders: http://www.courts.oregon.gov/ojd/forms/pages/index.aspx

OJD's website with DV information and resources:
http://www.courts.oregon.gov/OJD/OSCA/JFCPD/Pages/FLP/Domestic-Violence-Resources.aspx

OJD's website with information about Firearms Restrictions in Domestic Violence cases:
http://www.courts.oregon.gov/OJD/OSCA/JFCPD/Pages/FLP/Firearms-Restrictions.aspx