

Family Abuse Prevention Act (FAPA) Benchbook

ORS 107.700–107.735

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

Copyright Notice: Copyright © 1996, 1998, 2000, 2004, 2006, and 2012 for the use and benefit of the Oregon Judicial Department, all rights reserved. You may reproduce or copy this material for personal use or non-profit educational purposes, but not for resale or other for-profit distribution unless you have permission from Juvenile Court Programs, Oregon Judicial Department.

Family Abuse Prevention Act (FAPA)

Benchbook

I. THE PETITION.....	- 1 -
A. Venue	- 1 -
B. Showing Required.....	- 1 -
C. Definitions	- 1 -
1. “Abuse”	- 1 -
2. “Family or Household Members”	- 2 -
3. “Child”	- 2 -
4. “Interfere,” “Intimidate,” “Menace,” and “Molest”	- 2 -
5. “Imminent Danger of Further Abuse”	- 2 -
6. “Credible Threat”	- 3 -
D. When Minors May Petition	- 3 -
E. Time Frames.....	- 3 -
F. Specific Allegations Required.....	- 4 -
II. UNCONTESTED, IMMEDIATE (EX PARTE) HEARING	- 4 -
A. <i>Ex Parte</i> Hearing Required	- 4 -
B. Standard of Proof is Preponderance of the Evidence	- 4 -
C. Required Showing.....	- 4 -
III. RELIEF.....	- 5 -
A. Mandatory (Not Discretionary) Relief	- 5 -
1. Required Showing	- 5 -
2. Restraint from Abuse.....	- 5 -
3. Temporary Custody and Parenting Time	- 6 -
4. Ouster	- 6 -
5. Restraint From Entry Onto Specified Premises	- 7 -
6. “No Contact” by Telephone or Mail	- 7 -
7. Police “Standby” for Essential Personal Property	- 8 -
B. Discretionary Relief	- 8 -
1. Safety and Welfare of Petitioner and Any Child/ren in Petitioner’s Custody.....	- 8 -
a. Expanded “No Contact” Provisions.....	- 8 -
b. Property Division.....	- 8 -
c. Emergency Monetary Assistance.....	- 9 -
d. Firearm or Other Weapon Dispossession.....	- 9 -
2. Protection of Pets.....	- 11 -
C. Mutual Restraining Orders Only if Parties Separately Petition.....	- 11 -
D. Custody Issues	- 11 -
1. Temporary Custody.....	- 11 -
2. Exceptional Circumstances Affecting the Custody of a Child.....	- 12 -
3. Effect of Subsequent Domestic Relations Judgments and Orders on Preexisting FAPA Orders	- 12 -
4. Modification of Preexisting Domestic Relations Orders or Judgments	- 12 -

5. Paternity.....	- 13 -
6. Parenting Time.....	- 13 -
7. Recovery of Child/ren.....	- 14 -
8. Interstate Custody Issues.....	- 14 -
E. Other Provisions	- 15 -
1. Security Amount.....	- 15 -
2. Duration of Relief	- 15 -
3. Notice.....	- 15 -
4. Copies for Petitioner.....	- 15 -
5. Service on Petitioner	- 15 -
6. Fees.....	- 16 -
F. Termination.....	- 16 -
1. By Written Order	- 16 -
2. Notarized Signature Required	- 16 -
G. Renewals.....	- 16 -
1. Renew an Order by Petitioner	- 16 -
2. Renew an Order by Formerly Protected Child, Now 18	- 17 -
3. Hearing	- 17 -
H. Amendments.....	- 17 -
IV. THE CONTESTED HEARING PROCESS	- 18 -
A. Hearings on <i>Ex Parte</i> Orders	- 19 -
1. Exceptional Circumstances Hearings	- 19 -
2. Respondent's Hearing Request.....	- 19 -
a. Timing.....	- 19 -
b. Forms	- 20 -
3. Scheduling the Hearing Requested by Respondent	- 20 -
4. Continuances	- 20 -
5. The Hearing Notice	- 21 -
a. Court Clerk's Duties	- 21 -
b. Petitioner's Responsibilities	- 21 -
6. Settlement.....	- 21 -
7. Mediation Prohibited.....	- 21 -
8. Discovery	- 21 -
a. Applicability to FAPA.....	- 21 -
b. Protection Orders.....	- 22 -
9. Scope of the Hearing.....	- 22 -
10. The Contested Hearing	- 22 -
a. Hearing Procedures	- 22 -
b. Telephone Testimony	- 22 -
11. Evidentiary Issues	- 23 -
12. Available Relief	- 24 -
a. Terminate the Restraining Order.....	- 24 -
b. Award or Modify Temporary Custody.....	- 24 -

c. Award or Modify Parenting Time.....	- 24 -
d. Require Respondent to Move Out	- 24 -
e. Assess Attorney Fees and Costs	- 24 -
f. Allow Waiver of Later Personal Service.....	- 25 -
g. Order Emergency Monetary Assistance	- 25 -
h. Other Available Remedies	- 25 -
B. Modifying the Order	- 25 -
1. <i>Ex Parte</i> Modification for Less Restrictive Terms	- 25 -
2. Show Cause Modification	- 26 -
3. Hearings.....	- 27 -
4. Attorney fees.....	- 27 -
V. EFFECT OF FAPA ORDERS ON DISSOLUTION OF MARRIAGE PROCEEDINGS	- 27 -
A. FAPA Order Followed by Final Domestic Relations Judgment	- 27 -
B. FAPA Order Followed by Temporary Domestic Relations Order	- 27 -
VI. FOREIGN RESTRAINING ORDERS	- 28 -
A. Entitled to Full Faith and Credit; Registration not required	- 28 -
B. Optional Registration.....	- 29 -
1. With Law Enforcement	- 29 -
2. With the Courts	- 29 -
C. Violation of Foreign Orders	- 29 -
VII. MANDATORY ARREST FOR VIOLATION OF ORDER	- 29 -
A. Oregon Restraining Orders	- 29 -
B. Foreign Restraining Orders	- 30 -
C. Mandatory Arrest for Violating Certain Release Agreements.....	- 30 -
VIII. CONTEMPT – REMEDIAL AND PUNITIVE.....	- 30 -
A. Statutory Authority	- 30 -
1. Remedial Sanctions Under ORS 33.015(4)	- 31 -
2. Punitive Sanctions Under ORS 33.015(3)	- 31 -
B. Applicability of Procedural Rules	- 31 -
1. Remedial Contempt.....	- 31 -
2. Punitive Contempt.....	- 31 -
C. Venue	- 31 -
D. Trial.....	- 31 -
1. Burden of Proof and Elements of Charge	- 31 -
2. Willfulness.....	- 32 -
3. Defenses.....	- 32 -
a. Vagueness of Order	- 32 -
b. Invalidity of Underlying Order.....	- 32 -
c. Inability to Comply	- 32 -
d. Petitioner's Conduct Irrelevant.....	- 33 -
e. Asserting Parenting Time Rights	- 33 -
f. Mental Illness	- 33 -
E. Remedial Contempt	- 33 -

1. Procedure	- 33 -
2. Defendant's Rights	- 34 -
3. Opportunity for Hearing	- 34 -
F. Punitive Contempt.....	- 35 -
1. No Contact with Victim While Lodged.....	- 35 -
2. Conditions for Release from Custody	- 35 -
3. Accusatory Instrument Required	- 36 -
4. Defendant's Rights.....	- 36 -
a. The Presumption of Innocence	- 37 -
b. The Right to Counsel	- 37 -
c. The Right to a Speedy Trial	- 37 -
d. The Right to Discovery.	- 37 -
5. Pleas and Sanctions.....	- 37 -

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

ORS 107.728.

ORS 107.710; ORS 107.718.

ORS 107.705(1) (definition of abuse).

ORS 107.710(1), (6).

ORS 107.705(3) (definition of family or household members).

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

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

ORS 107.705(1).

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

Abuse may be claimed solely or partially on the basis of verbal threats placing one in fear of imminent bodily injury. Although the Oregon appellate courts

I. THE PETITION

A. Venue

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

B. Showing Required

A Petitioner is entitled to relief under FAPA when

1. “abuse,” as defined in ORS 107.705(1), has occurred
 - a. within the preceding 180 days (see I.E.3. (pg. 4) regarding exceptions to this requirement)
 - b. between “family or household members,” as defined in ORS 107.705(3);
2. Petitioner is in "imminent danger of further abuse" by Respondent; and
3. Respondent represents a credible threat to the physical safety of Petitioner or Petitioner’s child/ren.

C. Definitions

1. “Abuse” is the occurrence of one or more of the following acts between family or household members:
 - a. attempting to cause or intentionally, knowingly, or recklessly causing bodily injury;
 - b. intentionally, knowingly, or recklessly placing another in fear of imminent bodily injury;
 - c. causing another to engage in involuntary sexual relations by force or threat of force.

have not held that the more rigorous scrutiny applied to speech-based conduct in stalking cases applies also to FAPA proceedings, footnotes in two Court of Appeals decisions signal appellate interest in the issue. See *Holbert v. Noon*, 245 Or App 328, 338 n 6 (2011), and *Roshto v. McVein*, 207 Or App 700, 705 n 2 (2006) (comments in both cases noting that Respondent did not assert such a constitutional claim).

ORS 107.705(3).

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

See discussion regarding Paternity at III.D.5. (pg. 13).

ORS 107.705(2).

ORS 107.705(4) - (7).

ORS 107.718(5).

The totality of the evidence heard is relevant to determining the element of "imminent danger of further abuse." Abuse outside the 180-day window may be considered. *Lefebvre v. Lefebvre*, 150 Or App 297 (2000) (previous obsession with killing

2. "Family or Household Members" include
 - a. spouses;
 - b. former spouses;
 - c. adult persons related by blood, marriage, or adoption;
 - d. persons who are cohabiting or who have cohabited with each other;
 - e. persons who have been involved in a sexually intimate relationship within two years immediately preceding the filing of the petition; and
 - f. unmarried parents of a child.
3. "Child" means an unmarried person under 18 years of age.
4. The terms "interfere," "intimidate," "menace," and "molest" are defined in FAPA. See definitions at III.A.2. (pg. 5).
5. "Imminent Danger of Further Abuse"

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

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

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

ORS 107.726.

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

ORS 107.710(1), (6).

6. "Credible Threat"

This element of a FAPA claim is very similar to the "imminent danger" prong. Evidence for one often satisfies the other. See, e.g., *Hubbell v. Sanders*, 245 Or App 321, 327 (2011). The "credible threat" language was added to FAPA to harmonize Oregon law with federal law imposing criminal liability on a Respondent who possesses or uses firearms or ammunition while subject to qualifying protective order. 18 USC 922(g)(8). See III.B.1.d.1 (pg. 9).

D. When Minors May Petition

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

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

b. Petitioner is

1) the spouse of Respondent,

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

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

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

E. Time Frames

The petition must allege abuse in two time frames:

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

ORS 107.710(1).

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

F. Specific Allegations Required

The petition must specifically allege

- 1.
- 2.

II. UNCONTESTED, IMMEDIATE (EX PARTE) HEARING

A. Ex Parte Hearing Required:

1. in person or by telephone,
2. **on the day the petition is filed** or the next judicial day.

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

ORS 107.718(1).

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

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

ORS 107.710(2).

B. Standard of Proof is Preponderance of the Evidence

C. Required Showing

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

III. RELIEF

A. Mandatory (Not Discretionary) Relief

ORS 107.718(1).

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

ORS 107.710; ORS 107.718(1).

1. Required Showing

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

- a. a Petitioner with an eligible relationship **requests it and**
- b. the court finds at the hearing that
 - 1) Respondent abused Petitioner within the preceding 180 days (see I.E.3. (pg. 4) regarding exceptions to this requirement),
 - 2) Petitioner is in imminent danger of further abuse by Respondent, and
 - 3) Respondent represents a credible threat to the physical safety of Petitioner or Petitioner's child/ren.

2. Restraint from Abuse

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

- a. **Intimidating**, defined as "act[ing] in a manner that would reasonably be expected to threaten a person in Petitioner's situation, thereby compelling or deterring conduct on the part of the person."
- b. **Molesting**, defined as "act[ing], with hostile intent or injurious effect, in a manner that would reasonably be expected to annoy, disturb or persecute a person in Petitioner's position."
- c. **Interfering with**, defined as "interpos[ing] in a manner that would

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

ORS 107.705(5).

ORS 107.705(7).

ORS 107.705(4).

ORS 107.705(6).

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

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

Note: Although ORS 107.755(1)(c) requires that mediation be provided in any case in which child custody, parenting time, and visitation are in dispute, a specific statutory exception applies to FAPA cases. "Neither the existence of nor the provisions of a restraining order issued under ORS 107.718 may be mediated." ORS 107.755(1)(d)(B). Neither mediation nor mediation orientation can be encouraged or provided in proceedings under ORS 107.700 to 107.732. ORS 107.755(2). See also ORS 36.185.

ORS 107.718(1)(b).

ORS 107.716(7).

ORS 107.718(1)(c).

A typical order might use a 150-foot limitation.

reasonably be expected to hinder or impede a person in Petitioner's situation."

- d. **Menacing**, defined as "act[ing] in a manner that would reasonably be expected to threaten a person in Petitioner's situation."
- e. **Attempting** to intimidate, molest, interfere with, or menace.

3. *Temporary Custody and Parenting Time*

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

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

- a. shall order the parties to appear at an "exceptional circumstances" hearing to determine custody and other contested issues and
- b. may make interim orders regarding the child/ren's residence and the parties' contact with the child/ren that are appropriate to provide for the child/ren's welfare and the safety of the parties pending the "exceptional circumstances" hearing.

See also III.D.1. and 2. (pg. 11).

4. *Ouster*

Require Respondent to move from Petitioner's residence if

- a. the residence is solely in Petitioner's name,
- b. the parties jointly own or rent the residence, **or**
- c. the parties are married to each other.

The order may not affect title to any real property.

If the court requires Respondent to move from Petitioner's residence, the order can

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

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

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

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

ORS107.718(1)(i).

The statute mentions bans on contact that is in person, by telephone, or by mail. The SCA [Restraining Order to Prevent Abuse](#), however, includes options that forbid Respondent from having contact with Petitioner by e-mail or other electronic transmission, by cell phone, or by text message. In addition, options include prohibitions against Respondent having in-person and other specified contact with Petitioner through third parties. Such expansion of prohibited contact is authorized by the “other relief” clause at ORS 107.718(1)(h). See III.B.1. (pg. 8).

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

also restrain Respondent from entering or attempting to enter a reasonable area surrounding Petitioner’s current or subsequent residence.

5. *Restraint From Entry Onto Specified Premises*

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

- a. Specified premises may include
 - 1) Petitioner’s business or place of employment,
 - 2) Petitioner’s school,
 - 3) a close relative’s home that Petitioner frequently visits.
- b. The SCA forms anticipate that when children are involved, the following premises might be addressed:
 - 1) the child/ren’s school,
 - 2) the child/ren’s day care provider.

6. *“No Contact” by Telephone or Mail*

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

- a. no contact in person,
- b. no contact by telephone, and
- c. no contact by mail.

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

ORS 107.718(1)(d).

ORS 107.718(1)(h).

ORS 107.719(1), (2).

ORS 107.718(1)(h).

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

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

7. *Police “Standby” for Essential Personal Property*

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

- a. Such items include clothing, diapers, medications, social security cards, birth certificates, tools of the trade, and other identification.
- b. The court’s only other authority to divide property between the parties under FAPA is the section authorizing “other relief that the court considers necessary” to provide for the safety and welfare of Petitioner or any child/ren in Petitioner’s custody. See III.B.1.b., below.
- c. The “standby” time is not required to exceed 20 minutes and usually does not in most jurisdictions. A police “standby” is required to be available on only one occasion.

B. Discretionary Relief

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

- a. **Expanded “No Contact” Provisions**
As discussed in III.A.6. (pg. 7), a ban on *all* contact or all written contact might be appropriate in addition to the prohibition on in-person, telephonic, and mailed communication that is mandatory upon Petitioner’s request. Similarly, no “third party” contact by Respondent with Petitioner might be appropriate. This would prohibit Respondent from communicating with Petitioner through Petitioner’s friends, family, or co-workers.
- b. **Property Division**
While the statute specifically limits the property that a party may remove while a police officer stands by to “essential personal effects,” more comprehensive property division arguably could be

In addition, due process concerns limit the extent such relief should be ordered on *ex parte* application, and the issue, if appropriate at all, would be more properly addressed at a contested hearing. See IV. (pg. 18).

ORS 107.718(1)(h).

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

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

For a detailed discussion of firearms prohibitions in domestic violence cases, see "[Firearms Prohibitions in Domestic Violence Cases: A Guide for Oregon Courts](#)."

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

Current FAPA forms promulgated by the SCA allow Petitioners to request specific orders relating to dispossession of firearms and ammunition. See [Restraining Order to Prevent Abuse](#) at paragraph 10.

18 USC § 922(d)(8), (g)(8).

ordered by the court under the "other relief necessary" provision – assuming a nexus between such relief and the safety and welfare of Petitioner or any child/ren in Petitioner's custody.

c. Emergency Monetary Assistance

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

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

d. Firearm or Other Weapon Dispossession

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

Violation of such a dispossession order would be punishable as contempt of court. See VIII. (pg. 30).

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

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

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

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

18 USC § 922(g)(8)(A).

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

18 USC § 922(g)(8)(B), (C)(i).

The FAPA statute requires, and the SCA forms contain, the "credible threat" finding. The federal statute allows an alternative basis to this finding (an explicit prohibition regarding physical force), but Oregon did not codify this language, found at 18 USC § 922(g)(8)(C)(ii). It is, however, included in the federal firearms findings (Brady) in the SCA [Order After Hearing](#).

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

See "[Firearms Prohibitions in Domestic Violence Cases: A Guide for Oregon Courts](#)."

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

exposes Respondent to federal criminal liability.

- i. The *relationships* that subject a Respondent to the federal law are: the person protected by the order is a spouse or former spouse of Respondent, the parent of Respondent's child/ren, a person who does or did cohabit with Respondent, or Respondent's child/ren or child/ren of an intimate partner of Respondent.
- ii. The *types of orders* that subject Respondent to federal liability are those that meet all of the following conditions:
 - (A) issued after a hearing about which Respondent had actual notice and an opportunity to participate in the hearing;
 - (B) restrain Respondent from harassing, stalking, or threatening Petitioner or Petitioner or Respondent's child/ren **or** engaging in other conduct that places Petitioner in fear of bodily injury to Petitioner or Petitioner or Respondent's child/ren; and
 - (C) include a finding that Respondent represents a credible threat to the physical safety of Petitioner or Petitioner's or Respondent's child/ren.
- iii. If the order meets all of the above requirements, judges should complete the Federal Firearms Findings (Brady) in the Order After Hearing. Court staff then should enter this information in OJIN.

- 3) Revocation and Denial of Concealed Weapon Permits
Concealed weapon permits are issued and revoked by county

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

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

Orders concerning pets should be set out in the "Other Relief" section on page 4 of the [Restraining Order to Prevent Abuse](#).

See ORS 107.716(6).

18 USC § 2265.

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

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

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

2. *Protection of Pets*

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

C. **Mutual Restraining Orders Only if Parties Separately Petition**

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

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

1. *Temporary Custody*

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

- 1) Petitioner has met the statutory criteria **and**
- 2) Petitioner requests it.

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

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

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

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

See discussion of exceptional circumstances language at III.A.2. (pg. 5).

When an exceptional circumstances hearing is scheduled, Respondent is not entitled to request a contested hearing pursuant to ORS 107.718(10); *i.e.*, an additional hearing. If Respondent contests the issuance or other provisions of the restraining order, Respondent must raise these at the "exceptional circumstances" hearing. See ORS 107.716(2)(b) and IV.A.1. (pg. 19).

EXAMPLES of "Exceptional Circumstances" may include the following:

1. The petition reflects that the 4-year-old child of the parties has never resided with Petitioner. In response to the court's inquiries, Petitioner acknowledges seeing the child only rarely and for short periods of time.
2. The petition shows that the parties' two school-age children have lived with Respondent in an Oregon community that is 125 miles from the home of Petitioner since the beginning of the school year. School will be out in 6 weeks.
3. The petition alleges that the parties' child is six weeks old. Upon being questioned by the court, Petitioner states that Respondent is breast-feeding the baby.
4. Petitioner appears to be impaired by drugs at the *ex parte* hearing and acknowledges a problem with substance abuse. The children have lived with Respondent for the last 6 months.

ORS 107.722(1).

ORS 107.722(2).

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

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

2. *Exceptional Circumstances Affecting the Custody of a Child*

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

- a. If exceptional circumstances exist, the court must order the parties to appear and provide additional evidence regarding temporary custody and to resolve other contested issues.
- b. Pending the hearing, the court may make any orders regarding the child/ren's residence and the parties' contact with the child/ren that are appropriate to provide for the child/ren's welfare and the safety of the parties.
- c. The court must schedule the hearing within 14 days of issuance of the restraining order and issue a notice of the hearing at the same time the restraining order is issued.

3. *Effect of Subsequent Domestic Relations Judgments and Orders on Preexisting FAPA Orders (See V. (pg. 27))*

4. *Modification of Preexisting Domestic Relations Orders or Judgments*

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

ORS 107.722(2)(b).

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

ORS 109.751(4).

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

ORS 109.094.

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

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

ORS 107.718(1)(a).

A [Safety-Focused Parenting Plan Guide](#) is available on the Oregon Judicial Department website.

- b. If the court modifies the custody provisions of a preexisting order or judgment, the FAPA order must specify a period of time the court considers adequate under the circumstances during which Petitioner may obtain a modification of the preexisting order or judgment. Upon expiration of that period of time, if no modification has been obtained, the custody provisions of the FAPA order expire, and the provisions of the preexisting order or judgment become effective immediately.
- c. If the court modifies only parenting time provisions of a preexisting order, the statute does not require that Petitioner seek modification of the preexisting parenting time order or judgment.
- d. If the court modifies a preexisting order or judgment of another jurisdiction, ORS 109.701 to 109.834 (the UCCJEA) apply.

5. *Paternity*

- a. If paternity has not been established, the court has no authority to order custody or parenting time to the putative father.
- b. The court may note on the restraining order that the reason no custody or parenting time order is being entered is because paternity has not been established.

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

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

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

ORS 107.718(6).

The [Restraining Order to Prevent Abuse](#) at paragraph 17 contains several options for addressing the issue of parenting time.

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

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

ORS 109.701 - 109.990.

- 1) The fact that domestic violence has occurred in the family may go to the issue of the best interests of the child/ren.
 - 2) The court is not limited to a "traditional" parenting time schedule.
- b. If the court awards parenting time to a parent who committed abuse, the court **must** include adequate provisions in its order to protect and provide for the safety of Petitioner and the child/ren.

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

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

7. *Recovery of Child/ren*

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

8. *Interstate Custody Issues*

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

proceedings.

ORS 109.751.

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

ORS 107.720(1)(a).

E. Other Provisions

1. Security Amount

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

ORS 107.718(3).

2. Duration of Relief

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

See V. (pg. 27).

- a. one year or
- b. the date the order is withdrawn, amended, or superseded under ORS 107.722.

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

3. Notice

SCA form is [Notice to Respondent/Request for Hearing](#).

A hearing request form must be served on Respondent with the order. The SCA form includes a notice of rights and procedures for this purpose. See IV. (pg. 18).

ORS 107.718(8)(a).

4. Copies for Petitioner

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

ORS107.718(12).

5. Service on Petitioner

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

ORS 107.718(8)(c).

ORS 107.720(2)(a).

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

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

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

ORS 107.720(2)(b).

ORS 107.725.

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

6. Fees

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

F. Termination

1. By Written Order

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

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

2. Notarized Signature Required

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

G. Renewals

1. Renew an Order by Petitioner

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

a. Further Abuse Not Required

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

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

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

See SCA [FAPA Forms Packet 4 - Renewal of Restraining Order Involving Former Protected Child](#).

ORS 107.725(4).

See IV.B. (pg. 25) for discussion of modification of FAPA orders.

b. Not Limited in Number

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

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

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

- a. The court can issue the order regardless of whether the original Petitioner agrees to or seeks renewal of the order.
- b. If the original Petitioner does not agree to or ask for renewal of the order concurrently with the request of the now-18-year-old, the court may exclude Petitioner as a protected person in the renewed order.
- c. The now-18-year-old person is not required to file a petition under ORS 107.710.

3. *Hearing*

- a. ORS 107.716(5) and 107.718(8) to (10) apply when a renewal order is granted, see IV.A. (pg. 19) (Respondent may request a hearing within 30 days of being served with a renewal order), **except** that the court may hear no issue other than the basis for renewal unless requested in the hearing form and agreed to by Petitioner.
- b. The court shall hold a hearing within 21 days of Respondent's request.

H. Amendments

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

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

IV. THE CONTESTED HEARING PROCESS

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

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

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

ORS 107.730(1)(a).

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

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

Since Petitioner's motion should benefit Respondent, objection is unlikely. The SCA [Notice to](#)

- The court may set an “exceptional circumstances” hearing to determine temporary custody and resolve other contested issues when there are exceptional circumstances affecting child custody.
- Respondent may request a hearing within 30 days of being served the order to object to the order or to its provisions.
- Petitioner or Respondent may request a hearing on an existing order after the 30 day response time has lapsed to modify child custody and/or parenting time, restrictions from certain locations (including ouster from the residence), or restrictions on contact with Petitioner.
- Thirty days after the restraining order is served on Respondent, Respondent no longer can request a hearing to object to the order itself. After that time period has passed, however, Respondent or Petitioner can ask the court to modify the order's terms regarding child custody and/or parenting time, restrictions from certain locations (including ouster from the residence), or restrictions on contact with Petitioner for good cause shown. The other party may contest this request at a show cause hearing.
- Respondent may request a hearing objecting to Petitioner's *ex parte* motion to remove terms in the order or make the order less restrictive.

[Respondent/Request for Hearing - Less Restrictive Order](#) is served on Respondent along with Petitioner's [Motion, Affidavit and Order for Less Restrictive Terms](#).

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

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

ORS 107.716(1).

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

ORS 107.716(2)(c).

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

ORS 107.718(11).

- Respondent may request a hearing to challenge the basis for renewing an order. See III.G. (pg. 16).

A. Hearings on *Ex Parte* Orders

1. *Exceptional Circumstances Hearings*

- a. If there are exceptional circumstances that affect child custody, the court must hold a hearing to determine temporary custody. The hearing must occur within **14** days after issuance of the FAPA order. The court must set the exceptional circumstances hearing when it issues the restraining order and must contemporaneously issue a notice of hearing to the parties.
- b. Even when an exceptional circumstances hearing is set, Respondent may request a hearing contesting custody, and that hearing must be held within five days of the request.
- c. When the court schedules an exceptional circumstances hearing, Respondent may **not** request an additional or separate hearing to contest the restraining order. Respondent's objections to the restraining order must be heard as part of the exceptional circumstances hearing.

2. *Respondent's Hearing Request*

a. Timing

Respondent must ask for a hearing within 30 days after being served unless an "exceptional circumstances" hearing is scheduled. Even if an exceptional circumstances hearing is scheduled, Respondent may ask for an earlier hearing. If Respondent fails to request a hearing within 30 days after being served, the restraining order is confirmed by operation of law.

ORS 107.718(7).

These forms are available on the Oregon Judicial Department [Family Abuse Prevention Act](#) webpage.

ORS 107.716(1).

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

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

ORS 107.716(4)(a).

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

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

ORS 107.716(4)(b).

ORS 107.718(10)(c).

b. Forms

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

3. *Scheduling the Hearing Requested by Respondent*

Timing

- a. If custody is contested, the court must set a hearing within five days after Respondent's hearing request.
- b. If custody is not contested, the court must set a hearing within 21 days after Respondent's request.
- c. A hearing held outside the statutory time frame is not error when Respondent causes or contributes to the delay.

4. *Continuances*

- a. If service of the notice of hearing is inadequate to provide a party with enough notice of either an exceptional circumstances hearing or a hearing on Respondent's objections, the court may continue the hearing for up to 5 days to permit the party to seek representation.
- b. If one party is represented by an attorney at an exceptional circumstances hearing or a hearing on Respondent's objections, the court may continue the hearing for up to five days to enable the unrepresented party to seek representation.
- c. If Respondent raises an issue at the hearing that was not raised in the hearing request form, or if Petitioner seeks relief at that hearing that was not granted in the original order, the other party shall be entitled to a reasonable continuance to prepare a response to the issue.

ORS 107.718(10)(b).

ORS 25.011.

For more information on Oregon's address confidentiality program, see the Oregon Department of Justice [Address Confidentiality Program](#) webpage.

ORS 107.716(6).

ORS 107.716(6).

ORS 107.716(7).

ORS 36.185; ORS 107.755(2).
See III.A.2. (pg. 5).

ORCP 1A.

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

5. *The Hearing Notice*

a. Court Clerk's Duties

- 1) The clerk must notify Petitioner of the date and time of the hearing, and
- 2) the clerk must provide Petitioner with a copy of Respondent's request for hearing.

b. Petitioner's Responsibilities

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

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

6. *Settlement*

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

- a. The settlement may not restrain a party unless that party petitioned for and was granted an order under ORS 107.710. Thus, mutual restraining orders can only be part of the settlement if each party petitioned for and was granted an order under ORS 107.710.
- b. The settlement may **not** in any manner affect title to real property.

7. *Mediation Prohibited*

The court may not order mediation in a FAPA proceeding.

8. *Discovery*

- a. Applicability to FAPA: The ORCP applies to special proceedings such as FAPA cases "except where a different procedure is specified by statute or rule." Given the conflicts between the timeframes set out in FAPA and many of the timeframes in the discovery rules,

stemming from the same acts of domestic violence.

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

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

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

ORS 107.718(10).

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

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

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

ORS 45.400; ORS 107.717.

discovery in FAPA cases rarely is feasible. If a FAPA hearing is delayed for some legitimate reason and discovery can be fairly conducted before the next scheduled hearing date, it may be reasonable to permit discovery after considering the basis for Respondent’s request and issues of safety.

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

9. *Scope of the Hearing*

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

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

10. *The Contested Hearing*

a. Hearing Procedures

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

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

b. Telephone Testimony

- 1) *Ex parte* hearing: A motion and

good cause are not required to hold the *ex parte* hearing by phone.

- 2) Contested Hearing: A party may file a motion asking to testify by phone or to have a witness testify by phone. The court should consider the expedited nature of the FAPA process in determining whether to allow a motion for telephone testimony with less than 30 days notice. In addition to the factors in ORS 45.400(7), the court should consider the safety and the welfare of the witness in determining whether good cause for telephone testimony exists.

11. Evidentiary Issues

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

See ORS 40.015(2).

ORS 107.710(2).

ORS 107.705(1) (definition).

ORS 107.710(1).

ORS 107.705(3) (definition); ORS 107.710(1); ORS 107.718(1).

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

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

- a. If Petitioner fails to appear at the hearing and the court terminates the *ex parte* restraining order, Petitioner may file a second petition alleging the same occurrences, if the termination was not based on the merits.
- b. Evidence: The Oregon Evidence Code applies to hearings held under ORS 107.716.
- c. Burden of Proof: Petitioner has the burden of proving a claim by a preponderance of the evidence.
- d. Showing Required:
 - 1) "Abuse," as defined in ORS 107.705(1),
 - i. within the preceding 180 days
 - ii. between "family or household members," as defined in ORS 107.705(3);
 - 2) "Imminent danger of further abuse";
 - 3) Respondent represents a credible threat to the physical safety of Petitioner or Petitioner's child/ren.

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

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

ORS 107.716(3).

ORS 107.716(1), (3).

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

ORS 107.718(1)(b).

The court may remove the ouster provision if Petitioner moves.

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

ORS 107.716(3).

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

e. Prior Abuse History

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

12. Available Relief

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

a. Terminate the Restraining Order

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

b. Award or Modify Temporary Custody

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

c. Award or Modify Parenting Time

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

d. Require Respondent to Move Out

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

e. Assess Attorney Fees and Costs

The court may assess against either party reasonable attorney fees and costs incurred in an exceptional circumstances hearing or a contested hearing within 30

must consider whenever a request for attorney fees is authorized by statute.

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

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

This position allows for two results if attorney fees are requested: (1) a set-over under ORS 107.718(10)(c) for an issue raised at hearing but not granted *ex parte* or mentioned in Respondent's hearing request form, or (2) a directive from the judge that ORCP 68 procedures will be followed regarding submission of fee statements and objections. Each choice allows a method for eliciting fee-relevant facts not tried at the hearing on the merits. The second choice is preferable from the standpoint of judicial efficiency, but the set-over is required if a party elects a postponement to address an issue not raised by the pleadings. See IV.A.12 (pg. 24).

ORS 107.835.

ORS 107.718(1)(h).

ORS 107.730.

ORS 107.730(1)(b).

days after service of the order or a hearing for modification of an existing order.

- f. Allow Waiver of Later Personal Service
If requested, the court must allow a party to waive personal service in any subsequent contempt proceeding to maintain the confidentiality of the party's address.
- g. Order Emergency Monetary Assistance
Although Petitioner's need may not be as urgent, both the evidentiary and due process bases for ordering financial awards would be stronger at the contested hearing stage. See III.B.1.c. (pg. 9)
- h. Other Available Remedies
Any relief available under ORS 107.700 to 107.732 is in addition to any other available civil or criminal remedy.

B. Modifying the Order

1. *Ex Parte Modification for Less Restrictive Terms*

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

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

ORS 107.730(2).

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

ORS 107.730(6)(b).

ORS 107.730(1)(a).

Within 30 days of service, Respondent may ask for a hearing on the order itself and/or custody and parenting time provisions in the order. See IV.A.2. (pg. 19).

ORS 107.718(10)(a).

ORS 107.730(3).

ORS 107.730(2).

a. Service of Order

- 1) The court clerk must provide, without charge, the number of certified copies of the modified order and notice of hearing necessary to effect service.
- 2) The sheriff must serve Respondent with the less restrictive order and notice to respondent/request for hearing by first class mail.
- 3) If the order recites that Respondent appeared in person before the court, the order need not be served.

b. Respondent may request a hearing on the less restrictive order. See IV. (pg. 18).

2. *Show Cause Modification*

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

a. Limited Relief

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

b. Service of Request

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

effect service.

- 2) If requested by the party, the clerk must deliver the modification request and notice of hearing to the sheriff for service.
- 3) The sheriff must personally serve the request for modification and notice of hearing unless the party elects to have service accomplished by a private party.

ORS 107.730(3).

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

ORS 107.730(7). See also IV.A.12.b. (pg. 24).

3. Hearings

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

4. Attorney fees

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

V. EFFECT OF FAPA ORDERS ON DISSOLUTION OF MARRIAGE PROCEEDINGS

See III.D.4. (pg. 12) regarding Modification in FAPA Cases of Preexisting Order or Judgments (Domestic relations order or judgment first, then FAPA).

ORS 107.722.

ORS 24.115(1), (3).

A. FAPA Order Followed by Final Domestic Relations Judgment

Provisions of an original or modified judgment of dissolution of marriage under ORS 107.105 or 107.135, custody or parenting time order under ORS 109.103, or filiation judgment under ORS 109.155 supersede contrary provisions in a pre-existing FAPA custody or parenting time order. Final domestic relations judgments from other states filed under ORS 24.105 *et seq.* also will supersede conflicting terms in an earlier Oregon FAPA order.

ORS 107.722(1).

B. FAPA Order Followed by Temporary Domestic Relations Order

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

1. consolidates the subsequently filed dissolution action with the preexisting FAPA proceeding **and**
2. provides the nonmoving party notice of the requested temporary order under ORS 107.095(1)(b) and an opportunity for a hearing in the domestic relations case.

VI. FOREIGN RESTRAINING ORDERS

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

1. Under the Full Faith and Credit provisions of VAWA and pursuant to Oregon statutes, a foreign restraining order is enforceable in Oregon if
 - a. the issuing court had subject matter and personal jurisdiction over Respondent;
 - b. Respondent was given notice and an opportunity to be heard under the law of the issuing state or, in the case of an *ex parte* order, Respondent will be given notice and an opportunity to be heard within a reasonable period of time; and
 - c. the order has not expired.
2. A restraining order from another state or tribal court is enforceable immediately upon the protected person's arrival in Oregon. Registration with the court or law enforcement is not required. Federal law prohibits states from requiring registration as a condition of full faith and credit.
3. If the order restrains Petitioner as well as Respondent, the order will not be enforceable against Petitioner unless Respondent filed a separate pleading seeking a restraining order and the court made specific findings that Respondent was

ORS 24.190(2)(b).
18 USC § 2265 (b).

ORS 24.190(2).
18 USC § 2265(d)(2).

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

entitled to the order.

A foreign restraining order is enforceable in Oregon without the necessity of filing with the court or any further action by the protected person. ORS 24.190(2)(a). See exceptions to enforceability in VI.A.2. (pg. 28).

ORS 24.190(3)(a).

18 USC § 2265(d)(1).
ORS 24.190(6).

ORS. 24.190(4). See VI.A.2. (pg. 28) regarding “qualifying” orders.

See ORS 107.728.

ORS 133.310(3).

B. Optional Registration

1. With Law Enforcement

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

2. With the Courts

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

C. Violation of Foreign Orders

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

VII. MANDATORY ARREST FOR VIOLATION OF ORDER

A. Oregon Restraining Orders

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

1. a court has issued a FAPA order;
2. Respondent (called “Defendant” in the contempt proceeding) has been served with the FAPA order;

3. a true copy of the FAPA order has been properly filed with law enforcement and entered into the LEDS; **and**
4. Respondent has violated the restraining order.

B. Foreign Restraining Orders

Arrest is mandatory when

1. a protected person presents to a law enforcement officer a copy of the foreign restraining order that is entitled to full faith and credit (as defined by ORS 24.190);
2. the protected person represents that the order is the most recent order in effect and that Respondent has been personally served with a copy of the order or has actual notice of the order; and
3. the law enforcement officer has probable cause to believe that the person to be arrested has violated the foreign restraining order.
4. Arrest also is mandatory if the protected person has filed a copy of the foreign restraining order with the court or has been identified by a law enforcement officer as a party protected by a foreign restraining order entered into LEDS or the National Crime Information Center database and the officer has probable cause to believe that Respondent has violated the terms of the order.

ORS 133.310(4).

ORS 133.310(5)

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

See VIII.F.2. (pg. 35) regarding Release from Custody.

For further discussion of contempt, see also Oregon Judges Criminal Benchbook, chapter 13.

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

C. Mandatory Arrest for Violating Certain Release Agreements

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

VIII. CONTEMPT – REMEDIAL AND PUNITIVE

A. Statutory Authority

FAPA restraining orders are enforced through contempt proceedings under ORS chapter 33 and UTCR chapter 19. Contempt proceedings

683 (2011).

ORS 33.055(2).

ORS 33.065(2).

UTCR 19.040(1).

ORS 33.055(12).

ORS 33.065(5), (6).

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

ORS 107.728.

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

Although private parties may bring remedial contempt proceedings (see VIII.A. (pg. 30)), these rarely are filed, as typically the district attorney will seek punitive contempt sanctions instead. Although most of the cases cited and some of the statutory references in this section specifically apply to punitive contempt, these may apply to remedial contempt by analogy.

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

State v. Trivitt, 247 Or App 199 (2011) (discussing meaning of “interfere with” in context of Defendant’s actions in holding a sign at the end of a third party’s driveway stating that Petitioner had genital herpes); *Gerlack v. Roberts*, 152 Or App 40 (1998) (Defendant

are *sui generis*, being neither civil nor criminal.

1. *Remedial Sanctions Under ORS 33.015(4)*

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

2. *Punitive Sanctions Under ORS 33.015(3)*

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

B. Applicability of Procedural Rules

1. *Remedial Contempt*

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

2. *Punitive Contempt*

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

C. Venue

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

D. Trial

1. *Burden of Proof and Elements of Charge*

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

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

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

coming within 150 feet of Petitioner in store not a violation, as FAPA order only prohibited Defendant from coming within 150 feet of Petitioner in certain other designated locations).

OEC 803(8)(b), (d) (ORS 40.460(8)(b), (d)) allows proof of service to be established by introduction of a sheriff's return of service. (Note: OEC 803(8)(d) (ORS 40.460(8)(d)) was amended in 2011 to specifically allow introduction of a sheriff's return of service without necessity of officer testifying.) Return of service is sufficient to find that Defendant was served and to infer beyond a reasonable doubt that Defendant's violation of the restraining order was knowing. *Frady v. Frady*, 185 Or App 245 (2002). However, see commentary to VIII.F.4.d. (pg. 37) regarding applicability in punitive contempt proceedings.

Couey and Couey, 312 Or 302 (1991).

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

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

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

See cases cited in VIII.D., above.

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

The definitions of "interfere," "intimidate," "menace," and "molest" are set forth in ORS 107.705(4) to (7). See also I.C. (pp. 1-3) and III.A.2. (pg. 5).

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

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

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

ORS 161.055(2).

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

2. Willfulness

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

3. Defenses

a. Vagueness of Order

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

b. Invalidity of Underlying Order

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

c. Inability to Comply

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

trial.

d. **Petitioner's Conduct Irrelevant**

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

e. **Asserting Parenting Time Rights**

Parenting time with minor children often puts Defendant in the vicinity of Petitioner, which may result in an arrest for violation of the restraining order if a disagreement arises.

In such cases, Defendant may be found in contempt if Defendant's behavior exceeded the parameters of Defendant's parenting time or was otherwise intimidating, interfering, or menacing within the meaning of the FAPA statutes.

f. **Mental Illness**

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

E. Remedial Contempt

1. *Procedure*

- a. A proceeding for remedial sanctions is commenced by a motion with supporting affidavit or other documentation sufficient to give Defendant notice of the specific acts alleged as contempt.
- b. The court may issue an order to appear that is specific enough to give Defendant notice of the acts of contempt.
- c. The order to appear must be personally served unless
 - 1) Defendant waives personal service under ORS 107.835 as part of the order allegedly violated;
 - 2) the court orders substitute service; or
 - 3) the court issues an arrest warrant upon motion, affidavit, and a finding that Defendant cannot be served.
- d. The motion and order to appear must state the sanctions sought.

ORS 33.055(2) - (5).

UTCR 19.020(1).

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

ORS 33.055(8)(a).

ORS 33.055(8)(b).

ORS 33.055(9).

ORS 33.055(6).

ORS 33.055(11).

See VIII.D.3. (pg. 32).

ORS 33.105(1).

2. *Defendant's Rights*

- a. Defendant has only those rights afforded a Defendant in a civil action **unless** the sanction of confinement is sought.
- b. Where the sanction of confinement is sought, the court must not impose confinement unless, **before** the hearing, Defendant is
 - 1) informed that the sanction of confinement may be imposed and
 - 2) afforded the right to court-appointed counsel, if eligible.
- c. If Defendant is not represented by counsel when coming before the court, then the court shall inform Defendant of the right to counsel. The court also shall advise Defendant of the right to have counsel appointed by the court if confinement is sought and Defendant qualifies financially for appointed counsel.

3. *Opportunity for Hearing*

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

- a. **Burden of Proof**
 - 1) Clear and convincing evidence unless confinement is sought, and,
 - 2) if confinement is sought, proof must be beyond a reasonable doubt.
- b. **Defenses**

The same defenses may apply to punitive contempt and remedial contempt.
- c. **Available Sanctions**

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

 - 1) restitution;

- 2) confinement, which may be imposed for so long as the contempt continues or six months, whichever is the shorter period;
- 3) a fine, which may be imposed as a compensatory fine of up to \$500 or 1 percent of Defendant's annual gross income, whichever is greater;
- 4) an order designed to ensure compliance with the FAPA order that was violated, including probation;
- 5) payment of attorney fees; and
- 6) any other sanction that the court determines would be an effective remedy for the contempt.

F. Punitive Contempt

1. *No Contact with Victim While Lodged*

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

2. *Release from Custody*

- a. Pending a contempt hearing, a person arrested for a FAPA violation is subject to release decisions under ORS 135.230 to 135.290.
- b. Including a provision for "no contact" with the victim should be considered. If "no contact with the victim" is ordered, the court should consider waiving that provision if
 - 1) the victim petitions the court for a waiver and
 - 2) the court finds, after a hearing on the petition, that waiving the condition is in the best interest of the parties and the community.

ORS 135.247.

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

ORS 107.720(4).

ORS 135.245(3).

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

at ORS 107.705(3).)

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

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

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

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

ORS 33.065(2).

ORS 33.065(4).

ORS 33.065(5).

UTCRC 19.020(1).

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

ORS 33.065(6).
State ex rel Hathaway v. Hart, 300 Or 231 (1985); see also *Bachman v. Bachman* (consolidated with *State v.*

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

3. *Accusatory Instrument Required*

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

- a. The prosecutor may initiate proceedings on his or her own initiative or on the request of a party or of the court.
- b. The accusatory instrument is subject to the same requirements and laws applicable to those in criminal proceedings in general. For example,
 - 1) Defendant must personally be served a copy of the instrument and be arraigned; and
 - 2) Defendant may move against the instrument by demurrer.
- c. In addition, the following information must be included in the initiating instrument:
 - 1) the maximum sanctions sought;
 - 2) whether those sanctions include incarceration; and
 - 3) for each sanction sought, whether the moving party considers it punitive or remedial.
- d. The instrument should set out a separate count for each violation to be proved.

4. *Defendant's Rights*

Except for the right to a jury trial, Defendant

Bachman), 171 Or App 665 (2000).

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

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

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

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

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

generally has all rights normally accorded criminal Defendants, including the following:

- a. the presumption of innocence;
- b. the right to counsel, including court-appointed counsel if indigent;
- c. the right to a speedy trial; and
- d. the right to discovery.

5. Pleas and Sanctions

a. Admit, Deny and No Contest Pleas

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

b. Time for Imposition of Sanctions/Entry of Judgment

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

c. Sanction Objectives:

- 1) protect victims and family members

who are directly or indirectly affected by domestic violence;

- 2) hold offenders accountable for their behavior; and
- 3) reduce future violations through
 - i. strict supervision and
 - ii. effective offender treatment programs.

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

d. Maximum Punitive Sanctions

The maximum punitive sanctions are

- 1) a fine not to exceed \$500 or 1 percent of Defendant's gross annual income, whichever is greater;
- 2) confinement of no more than six months;
- 3) forfeiture of any proceeds or profits obtained through the contempt;
- 4) probation, which may include a condition that Defendant attend and complete a batterer intervention program; and/or
- 5) community service.