

A Benchguide for

The Family Abuse Prevention Act

ORS 107.700–107.732

Revised and updated:

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I. THE PETITION

A. Venue

ORS 107.728

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

B. Showing Required

ORS 107.710; ORS 107.718

A petitioner is entitled to relief under FAPA when:

ORS 107.705(1) (definition)

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

ORS 107.710(1)

a. within the preceding 180 days,

ORS 107.705(3) (definition)

b. between "family or household members," as defined in ORS 107.705(3); and

ORS 107.710(1); ORS 107.718(1)

2. Petitioner is in "imminent danger of further abuse" by respondent, and

ORS 107.718(1)

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

C. Definitions

ORS 107.705(1)

1. "Abuse"

See Cottongim v. Woods, 145 Or App 40, 45, 928 P2d 361 (1996) (verbal and physical abuse, harassment, and threats provide a "more-than-sufficient basis" for allegation of violation of ORS 107.705(1)(b))

"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.

ORS 107.705(3)

2. "Family or Household Members"

"Family or household members" include:

a. Spouses;

b. Former spouses;

c. Adult persons related by blood, marriage, or adoption;

The statute does not define "cohabitation" but co-residence with sexual intimacy is perhaps the best guide given indirect support in legislative history that "roommates" were not intended to be covered.

See discussion re: Paternity, III.D.2, below

ORS 107.718(1), (3). See *Cottongim v. Woods, supra*, 145 Or App at 44-45 (1996)

ORS 107.726

Note that no two year recency limitation exists for minors qualifying under the "sexual intimates" relationship, as it does for adult petitioners.

ORS 107.710(1), (6)

- d. Persons who are cohabiting or who have cohabited with each other;
- e. Persons who have been involved in a sexually intimate relationship with each other within two years immediately preceding the filing of the petition; and
- f. Unmarried parents of a child.

3. "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.

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 the 180 days preceding the filing of the FAPA petition (i.e., past abuse), and
- 2. That the petitioner is in imminent danger of further abuse from the respondent (i.e., prospective danger).

ORS 107.710(6) excludes the following for purposes of computing the 180-day period:

- a. Any time during which respondent is incarcerated;
- 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., 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. The nature of the abuse, described with particularity; **and**
2. Specific dates of abuse.

G. Amendments

Nothing in FAPA prohibits petitioner from amending the petition after filing and before hearing. See section III.H., below regarding a request to amend the order.

II. UNCONTESTED, IMMEDIATE HEARING

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); ORPC 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 courts and judges, however, grant or deny orders by reviewing the petition and proposed order without in-person or telephone contact with the petitioner. While this may serve judicial efficiency, it arguably violates the law. Having the petitioner appear in person or telephonically allows the court to clarify the facts and

A. Ex Parte Hearing Required

1. In person or by phone.
2. **On the day the petition is filed** or the next judicial day.

determine the appropriateness of issuing the order.

ORS 107.710(2)

See I.B., above.

B. Standard of Proof is Preponderance

C. Required Showing is:

1. Eligible relationship
2. Prior abuse within 180 days
3. Imminent danger of further abuse
4. Credible threat to Petitioner's or child's physical safety

III. RELIEF

ORS 107.718(1)

A. Mandatory (Not Discretionary) Relief

The court must order the following relief if:

- A petitioner with an eligible relationship requests it; **and**
- The court finds, at the hearing, that
 - respondent abused petitioner within the preceding 180 days; and
 - petitioner is in imminent danger of further abuse by respondent and that respondent represents a credible threat to the physical safety of petitioner or petitioner's child.

1. Restraint from Abuse

Restrain respondent from doing the following to petitioner and any children in petitioner's custody:

ORS 107.718(1)(e) and (f)

ORS 107.705(5)

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

ORS 107.705(7)

- 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 the petitioner's position."

ORS 107.705(4)

- c. **Interfering with**, defined as "interpos[ing] in a manner that would reasonably be expected to hinder or impede a person in the petitioner's situation."

ORS 107.705(6)

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

ORS 107.718(1)(a)
ORS 107.718(2)
ORS 107.716(2)

NOTE: 2005 legislative changes provide a narrow exception to the previous mandate that upon the necessary showing custody be awarded as requested by the petitioner. Now 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 the 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 and each party's contact with the child.

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 107.700-107.732. 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.

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d. **Menacing**, defined as "act[ing] in a manner that would reasonably be expected to threaten a person in the petitioner's situation."

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

2. 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 and award custody to respondent, if requested by the petitioner EXCEPT:

If the court determines that "exceptional circumstances" exist that affect the custody of the child:

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

See also Sections III.D.1. and III.D. 2. below.

3. 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 also restrain respondent from entering or attempting to enter a reasonable area surrounding petitioner's current or subsequent residence.

ORS 107.718(1)(g)

ORS 107.718(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, attempt to draft as narrowly as possible, after inquiring into the availability and timing of services. Consider reducing 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 safety concerns permit the respondent's presence at same.

ORS 107.718(1)(i)

The statute mentions only bans on contact in person or by telephone or mail. While this language would arguably include electronic mail, this point might best be made specific in the order.

In addition, contact by "mail" may not include other written communication., i.e., notes left on petitioner's car.

Consider where appropriate excepting out contact for the limited purpose of respondent's arranging parenting time, if those arrangements can not be made through a third person.

ORS 107.718(1)(d)

4. Restraint from Entry onto Specified Premises

Restrain from entry into 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.

Specified premises typically include:

- a. petitioner's business or place of employment,
- b. petitioner's school,
- c. A close relative's home that the petitioner frequently visits.

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

- a. the child's school
- b. the child's day care provider

5. "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., below. Banning all written communication, for example, might be appropriate under this latter section.

6. 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 children) from the residence.

ORS 107.718(1)(h)

- a. Such items include clothing, diapers, medications, social security cards, birth certificates, and other identification.
- b. The court's only other authority to divide property between the parties under FAPA is the section authorizing "other relief the Court considers necessary to provide for the safety and welfare of the petitioner or children in petitioner's custody." See III.B.2, below.

ORS 107.719 (1) and (2)

- 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.

7. Security Amount

ORS 107.718(7)

The order must specify the amount of security to be posted after arrest for violation of the restraining order. The statutory 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 without a security amount.

ORS 107.720(1)(a)

ORS 107.835

8. Waiver of Personal Service in Subsequent Contempt Proceeding

The court must allow any party to the order to include a waiver of personal service in any subsequent contempt proceeding by filing a form that specifies a contact address and selects a method of substituted service.

- a. The form appears in ORS 107.835.
- b. The party may later file an amended waiver designating a different method or contact address.

ORS 107.718(7); ORS 107.718(10)(a)

9. Notice

A description of procedures to request a hearing to contest the order and other notice of rights must be served on respondent with the order. See section IV., below.

ORS 107.718(8)(a)

10. Copies for Petitioner

The clerk must provide petitioner, at no cost, the number of 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.

ORS 107.718(1)(h)

B. Discretionary Relief

The Court may order any other relief it considers necessary to provide for the safety and welfare of petitioner and any child or children in petitioner's custody.

1. Expanded "no contact" Provisions

As discussed in III.A.5 above, a ban on *all* contact or all written contact, might be appropriate in addition to the prohibition on in person or telephonic and mailed communication that is mandated on petitioner request.

Similarly, no "third party" contact by respondent with petitioner might be appropriate. This would prohibit respondent from communicating with petitioner through the petitioner's friends, family, or co-workers.

2. Property Division

While the statute specifically limits to "essential personal effects" the property that a party may remove while a police officer stands by, more comprehensive property division could be ordered by the court under the "other relief necessary" provision. Due process concerns, however, limit the extent such relief is ordered on *ex parte* application and the issue, if appropriate at all, would be more properly addressed at a contested hearing. See IV, below.

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 often better left to a dissolution case or other court filing.

ORS 107.718(1)(h)

3. 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 such a money award that

While child support is not excluded by this language, an order of on-going support is problematic given the necessity for and time involved in applying the support guidelines, the lack of money award summaries or other ORCP-compliant language in the statutory forms, and the temporary nature of FAPA relief, especially as it might intersect with the operation of on-going support orders. Better practice may be for limited, one-time payments and referral of petitioners to state-provided child support services or

government cash programs such as TA/DVS (Temporary Assistance for Domestic Violence survivors).

coincides with or post-dates the opportunity for hearing by the respondent.

A money award ordered in a FAPA must comply with 2004 legislative requirements for captioning and informational summaries to be entered as a judgment.

See **Judges' Handbook on State and Federal Firearms Laws (April 2004)** available on The Judges' Forum under "FIREARMS" and the CPSD Reference Database under "BENCHGUIDES".

4. Firearm or Other Weapon Dispossession

- a. The FAPA statute contains no specific reference to weapons. It is arguable, however, that the legislature intended the "other relief" provision of ORS 107.718(1)(h) to be broad enough to allow the court to restrict a respondent's access to, or possession of, firearms. Testimony before the legislative subcommittee that considered and approved revisions to the statute in 1995 suggested that the "other relief" section of the statutory form could be used to that effect.

Violation of such a dispossession order would be punishable as contempt of court.

18 U.S.C §922(d)(8) and (g)(8)

- b. Federal Law (the Violence Against Women Act) prohibits certain individuals from possessing or purchasing firearms or ammunition during the pendency of a protective order. Violation of this statute exposes the respondent to federal criminal liability, i.e., federal courts have exclusive jurisdiction.

18 USC §922(d)(8) and (g)(8). 18 U.S.C. §921(a)(33). Oregon's FAPA orders protect more classes of petitioners than those who are protected under the federal dispossession law. Sexual intimates who have not cohabited, for example, qualify for FAPA relief, but their respondents are not subject to the federal gun ban.

- (1) The *classes of respondents* who are subject to this federal law are the petitioner's current or former spouse, current or former cohabitant, and the other parent of petitioner's child.

18 USC 922(g)(8)(A). Oregon's *ex parte* FAPA orders probably do not qualify under the federal statute. Only those orders issued at a hearing about which respondent received notice and had participatory rights (e.g., a 5 or 21 day contest in Oregon) come under the federal gun law.

- (2) The *types of orders* that subject the respondent to federal liability are those that meet all of the following conditions:

18 USC 922(g)(8)(B)

18 USC 922(g)(8)(C)(i). The FAPA statute requires, and the statutory forms contain, the "credible threat"

(A) issued after a hearing about which the respondent had notice and at which the respondent had an opportunity to be heard and

(B) restrain respondent from harassing, stalking, or threatening petitioner, or engaging in other conduct that places petitioner or petitioner's children in fear of bodily injury, and

finding. 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).

Sample form for *Order Certifying Compliance* is available in the **Judges' Handbook on State and Federal Firearms Laws (April 2004)** available on The Judges' Forum under "FIREARMS" and the CPSD Reference Database under "BENCHGUIDES".

ORS 166.291(1)(l)
ORS 166.293(3)(a)

See ORS 107.716(6)

18 U.S.C. §2265

ORS 107.718(1)(a)
ORS 107.718(2)

But also apply the subject-matter jurisdiction requirements of the UCCJEA. 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's presence here and the need to prevent abuse to petitioner. ORS 109.762. Communication with a judge in another state may be required.

(C) Include a finding that respondent represents a credible threat to the physical safety of petitioner or petitioner's children.

(3) If the order meets all of the above requirements, the OJD Domestic Violence Data Entry Protocols require that an *Order Certifying Compliance with Federal Domestic Violence Firearms Laws* be completed and attached to the Order After Hearing.

c. Revocation and Denial of Concealed Weapon Permits

Concealed weapon permits are issued by county sheriffs, some of whom have a process to revoke the permits when a restraining order is issued. Issuance of a restraining order against a permit holder is ground for denial of an application for a permit, as well as revocation of an already-issued permit.

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

In 1995, state legislation prohibited "mutual" restraining orders, **except** when each party files a petition and each 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 sections IV.A.10. and IV.B., below)

1. Temporary Custody

The court **must** make a temporary custody award, except as discussed in paragraph 2 below.

- a. 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.

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 107.700-107.732. See ORS 107.755(1)(d)(B) and 107.755(2).

ORS 107.718(2)
ORS 107.716(2)
See discussion of 2005 legislative changes at III.A.2. above.

When an exceptional circumstances hearing is scheduled, the respondent is not entitled to request a contested hearing pursuant to ORS 107.718(10), i.e., an *additional* hearing. If respondent contests other provisions of the restraining order, the respondent must raise these at the “exceptional circumstances” hearing. See ORS 107.716(2)(b) and IV.A. below.

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 the 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 the 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, the petitioner states that the respondent is breast-feeding the baby.

- c. The child/ren subject to the custody award must be the child or children of the parties.
- d. The court may order that, despite other restrictions, respondent may be at restricted locations at specified times to exercise parenting time rights.
- e. The temporary custody provisions in pre- and post-judgment dissolution of marriage proceedings **do not** apply to FAPA proceedings. Nor do mediation procedures.

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.

- a. If exceptional circumstances are determined to 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’s residence and the parties’ contact with the child that are appropriate to provide for the child’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.

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)

3. Effect of Subsequent Domestic Relations Judgments and Orders on FAPA Orders

a. FAPA first, then temporary domestic relations order: Any temporary parenting time or custody award made under ORS 107.095(1)(b) in a subsequent dissolution, annulment, separation action, or unmarried parent's petition for custody supersedes a FAPA custody or parenting time order **only if**:

- 1) the domestic relations case is consolidated with the FAPA case; and
- 2) the nonmoving party was given notice and an opportunity for hearing on the custody and parenting time issue in the domestic relations case.

ORS 107.722(1)

b. FAPA first, then final domestic relations judgment. Domestic relations judgments or modifications of judgments issued under ORS 107.105, 107.135 109.103 or 109.155 supersede contrary provisions of a preexisting FAPA order.

ORS 107.722(2)

The court's authority to modify the custody and parenting time terms of preexisting domestic relations judgments was clarified in the 2005 legislative session.

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

4. Modification in FAPA Cases of Preexisting Orders or Judgments (Domestic relations order or judgment first, then FAPA)

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

ORS 107.722(2)(b)

b. If the court modifies the custody provisions of an preexisting order or judgment, the FAPA order must specify a period of time the court considers adequate under the circumstances

during which the 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 immediately effective.

- c. If the court modifies only parenting time provisions of a pre-existing order, the statute does not require that petitioner seek modification of the pre-existing 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.

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., birth certificate form under ORS 109.070(10(e)), or merely referring the parties to the state child support program.

ORS 107.718(1)(a)

5. Paternity

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

6. Parenting Time (See also section IV.A.10. and IV.B., below.)

- 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 or children.

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

- 1) The fact that domestic violence has occurred in the family may go to the issue of the best interests of the child or children.
- 2) The court is not limited to a "traditional" visitation schedule.

ORS 107.718(6)

- 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 or children. The protections under ORS 107.718(6) include, but are not limited to, requiring one or more of the following:
 - 1) the exchange of the child or children take place at a particular location;
 - 2) the parenting time be supervised;
 - 3) the perpetrator of the abuse attend and complete a program of intervention for perpetrators of domestic violence or other counseling program the court deems appropriate;
 - 4) the perpetrator of the abuse not possess or consume alcohol or controlled substances during the parenting time and up to 24 hours before;
 - 5) the perpetrator of the abuse pay the costs of supervision of the parenting time and any other conditions placed on him or her by the court; and
 - 6) no overnight parenting time occur.

ORS 107.718(7)

- c. ORS 107.718(7) provides a form parenting time order.

ORS 107.732(1)

7. Recovery of Child(ren)

Specific addresses identified by the petitioner where the child 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) (discussion of 4th Amendment issues in context of execution of writ of assistance in family law matter).

ORS 109.701 - 109.990

ORS 109.751

ORS 107.718(3)

See V., below.

ORS 107.720(2)(a)

The variation in judicial practice is the result of attempts to balance safety concerns with respect for victim-litigant autonomy. Dismissal 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

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

8. Interstate Custody Issues

- a. The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) applies to visitation and custody orders in FAPA restraining order proceedings.
- b. When the child or children may not be subject to Oregon court jurisdiction under the UCCJEA, the temporary emergency provisions may apply. This requirement may implicate a mandatory communication with a judge in another state.

E. Duration of Relief

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

1. One year; or
2. The date the order is withdrawn or amended or superseded under ORS 107.722.

F. Dismissal

1. By Written Order

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

FAPA provides no specific standard or guidance for dismissal of restraining orders, and court practices vary considerably. ORCP 54(A)(1) permits dismissal without court order upon filing of a notice by the plaintiff.

opportunity to speak with a victim advocate.

- Encouragement of safety planning and referrals to community resources.
- Alternatives to dismissal that might more effectively address a petitioner's safety needs, such as simply liberalizing existing restrictions.
- Encouragement to return if the petitioner's safety needs change.

ORS 107.720(2)(b)

2. Notarized Signature Required

If petitioner requests that the restraining order be dismissed, the request **must** include petitioner's notarized signature.

ORS 107.725

G. Renewals

1. Renew an Order

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.

2. Further Abuse Not Required

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

3. Not Limited in Number

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

4. Hearing

a. ORS 107.716(5) and 107.718(8)-(10) apply when a renewal order is granted, see section IV.A., below (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 the petitioner.

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

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

ORS 107.725

H. Amendments/Modifications

1. Amending the Petition

Nothing in ORS ch 107 prohibits petitioner from amending the petition or requesting the court to amend the order. Due process requires notice to respondent and an opportunity for hearing on a request to amend the order.

2. Modifying the Order

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

a. Within 30 days after the restraining order is served, respondent may request a hearing at which the court may cancel the order or change any terms.

ORS 107.730

Mailed notice is not sufficient unless it is certified or registered, return receipt requested, or express mail. ORCP 7D(3)(a)(i); ORCP7D2(d)(i). Court practice in some counties is to simply mail notice to the both parties when a modification motion has been made.

b. Once 30 days have passed since the order was issued, either party may request a modification only to the terms in the order that provide for custody and parenting time. The clerk must provide, without charge, the number of certified true copies of the request for modification of the order and notice of hearing necessary to effect service. Service must be effected in the manner that summons is served.

IV. THE CONTESTED HEARING PROCESS

Four types of contested hearings are available after the court issues a FAPA restraining order:

ORS 107.718(10)(a), ORS 107.716(1)

- A hearing within 30 days following initial service of the restraining order on objections to the order or its specific provisions;

ORS 107.718(2), ORS 107.716(2)

- An “exceptional circumstances” hearing to determine temporary custody and resolve other contested issues.

ORS 107.730

- A hearing at any time that the restraining order remains in effect, regarding modification of child custody or parenting time issues, or both, similar to any other show cause hearing on those issues.

- A hearing to challenge the basis for renewal of an order. This last type is addressed in III.G., above.

A. Hearing on Objections to the Restraining Order and “Exceptional Circumstances” Hearing

1. Hearing Requests

ORS 107.718(10)(a)

ORS 107.716(2)(b). See also IV.A.2.b., below.

a. Timing

Respondent must request the hearing within 30 days after the restraining order is served unless an “exceptional circumstances” hearing has been scheduled.

b. Forms

The court clerk must make hearing request forms available

- 1) in substantially the form set out in ORS 107.718(7); and
- 2) designed to frame the issues for the court hearing and to permit respondents to designate whether they are contesting the entire restraining order, child custody, parenting time, or some other specifically-identified issue.

2. Scheduling the Hearing

a. Hearing at the Request of the Respondent

- 1) The court must hold the hearing within 21 days following respondent's request, unless:

ORS 107.716(1)

The statutory request form enables the respondent to request a hearing within 5 or 21 days when no exceptional circumstances hearing has been scheduled by the court. When an exceptional circumstances hearing has been scheduled, the form permits the respondent to request an earlier hearing that must occur within 5 days of the request. Some courts are avoiding the work of re-scheduling by setting all exceptional circumstance hearings within 5 days of request.

the request contests custody in which case the hearing must be held within 5 days of the request.

ORS 107.716(3)

This procedural rule doesn't control statutory timeframes, only regulatory ones. ORS 174.120 is the applicable statute and does not appear to exclude Saturdays and Sundays unless either is the last day of the period.

See *Strother and Strother*, 130 Or App 624, 630, 883 P2d 249 (1994), *rev den* 320 Or 508 (1995) (denying relief to a respondent who alleged that the trial

- 2) A hearing held outside the statutory time frame is not error when the respondent causes or contributes to the delay.

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 107.718(2)
ORS 107.716(2)(a)

ORS 107.716(2)(b)

ORS 107.716(2)(c)
ORS 107.718(10)(a)

b. Exceptional Circumstances Hearing

- 1) If the court determines that exceptional circumstances exist, the court must order the parties to a hearing to determine temporary custody. The hearing must be scheduled to occur within **14** days of the issuance of the FAPA order. The court must set the hearing time and date when issuing the restraining order and must contemporaneously issue a notice of hearing.
- 2) The respondent may request an earlier hearing which must be held within 5 days of the request.
- 3) When the court schedules an exceptional circumstances hearing, the respondent may **not** request an additional or separate hearing to contest the restraining order.

3. Continuances

ORS 107.716(4)(a)

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

ORS 107.716(4)(b)

- b. If one party is represented by an attorney at either an exceptional circumstances or a hearing on respondent's objections, the court may continue the hearing for up to 5 days at the other party's request to enable that party to seek representation.

ORS 107.718(10)(c)

- c. If the respondent seeks to raise an issue at the hearing on respondent's objections that was not raised in the request form, or the 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)

4. Hearing Notice Requirements

a. Court Clerks' Duties

- 1) The clerk must notify petitioner of the date and time of the hearing; and
- 2) 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 hearing.

- 1) Some petitioners 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 notice delivered to the contact address.
- 2) The statute does not require petitioner to give a physical location for personal service of the notice. Petitioner's use of a post office box address may limit the ability to serve the notice personally, which is a local practice in some areas.

5. Petitioner Fails to Appear

If petitioner does not appear at the hearing, granting relief to respondent other than dismissal is problematic because petitioner is unavailable to explain the underlying bases for the order.

a. The court should review the file carefully to ensure that:

- 1) petitioner received notice of the hearing;
- 2) petitioner had sufficient time to

receive any notice sent by mail; and

3) any mailed notice was sent correctly to the address petitioner supplied.

b. If the court perceives a problem with notice, the court should consider whether to continue the hearing to allow further notice.

c. If petitioner fails to appear at the hearing and the court vacates the temporary restraining order, petitioner may file a second petition alleging the same occurrences. Neither claim preclusion nor issue preclusion bars petitioner from litigating the second petition, as long as the dismissal was not based on the merits.

d. Compliance with the Violence Against Women Act Firearms Provision

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

Where there is no request for hearing, or the respondent does not otherwise appear in the proceeding, it is not likely that the requirements for federal prosecution under the "Brady" law will have been met.

See *Obrist v. Harmon*, 150 Or App 173, 176-77, 945 P2d 1089 (1997)

ORS 107.718(11). See III.B.4., above.

See *Judges' Handbook on State and Federal Firearms Laws (April 2004)* available on The Judges' Forum under "FIREARMS" and the CPSD Reference Database under "BENCHGUIDES".

ORS 107.716(6)

6. Settlement

The court may approve a consent agreement, with a few exceptions, that will bring about a cessation of abuse of the parties:

a. Restraint

1) The settlement may **not** provide for an order of restraint against a party unless the other party petitioned for, and was granted, an order under ORS 107.710.

2) Thus, the settlement may **not** provide for **mutual** restraint unless each party petitioned for, and was

ORS 107.716(6)

granted, an order under ORS 107.710.

ORS 107.716(7)

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

ORS 36.185; ORS 107.755(2). See III.A.2. above. Mediation may not be encouraged or provided in FAPA proceedings.

7. Mediation Prohibited

The court may not refer to mediation contested child custody or parenting time claims that are made in a FAPA proceeding.

ORS 107.718(10)(c)

8. Scope of the Hearing

- a. 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.
- b. The court must grant a reasonable continuance in either of these circumstances.

ORS 107.718(10)

9. Hearing Procedures and Discovery

a. Hearing Procedures

- 1) The FAPA statutes do not specify what takes place at the "court hearing."

Nelson v. Nelson, 142 Or App 367, 369, 921 P2d 412 (1996) (quoting *Miller and Miller*, 128 Or App 433, 434, 875 P2d 1195 (1994) (construing ORS 107.718(8) (1993))

Appellate decisions hold that a FAPA hearing "means a proceeding similar to a trial in which parties have a right to be heard and issues of fact or law are to be determined. It contemplates both the sworn testimony of the parties themselves and the examination under oath of other witnesses on relevant matters."

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

b. Discovery

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

stemming from the same acts of domestic violence.

cases is rarely 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.

To the extent discovery can be appropriately accommodated in terms of FAPA-mandated timeframes, courts may consider crafting protective orders to address:

Limiting respondent to telephonic participation in a deposition of petitioner may be advisable.

- safety issues;
- harassment of victims by alleged perpetrators; and
- possible restraining order violations (e.g., presence of the respondent at a deposition).

10. Evidentiary Issues

See ORS 40.015(2)

- a. The Oregon Evidence Code applies to hearings held under ORS 107.716.

ORS 107.710(2)

- b. Burden of Proof

Petitioner has the burden of proving a claim by a preponderance of the evidence.

ORS 107.705(1) (definition)

- c. 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);

ORS 107.710(1)

(2) "Imminent danger of further abuse" by respondent; and

ORS 107.705(3) (definition)

(3) Respondent's representing a credible threat to the physical safety of petitioner or petitioner's child.

ORS 107.710(1); ORS 107.718(1)
Imminent danger includes, but is not limited to, situations in which respondent has recently threatened petitioner with additional harm. ORS 107.718(5)

- d. 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 contextually relevant to

LeFebvre and LeFebvre, 165 Or App 297 (2000). See also *Strother*, *supra*, 130 Or App at 630

explain the existence or degree of current fear.

11. Available Relief

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

ORS 107.716(3)

a. Dismiss the Restraining Order

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

ORS107.716(1)
ORS 107.716(3)

b. Award or Modify Temporary Custody

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

See ORS 107.718(1)(a)
ORS 107.716(1)-(3)

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 when the restraining order was issued.

ORS 107.718(1)(b)

d. Require a Party to Move Out

Require either party to move from any family residence whose title, or right to occupy those premises, the parties hold jointly.

ORS 107.716(3)

e. Assess Fees and Costs

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

ORCP 68 rules regarding the pleading, proof, and recovery of attorney fees do NOT apply in FAPA cases since FAPA relief is "granted by order rather than

entered as part of a judgment.” (ORCP 68C(1)(b))

Most statutory and court forms for FAPA relief do not contain provisions requesting attorney fees, so frequently no notice is provided to the respondent 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: (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 tied 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.

ORS 107.835

f. Allow Waiver of Later Personal Service

The court must allow a party to waive personal service in any subsequent contempt proceeding, as described in section III.A.8., above.

ORS 107.718(1)(h)

g. Order Emergency Monetary Assistance

Although the petitioner’s need may not be as emergent, both the evidentiary and due process bases for ordering financial awards would be stronger at the contested hearing stage. See III.B.3.

h. Other Available Remedies

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

ORS 107.730

B. Hearings on Requests to Modify Custody or Parenting Time

1. Timing

A party may request that the court modify custody or parenting time provisions any time

the order is in effect and after 30 days have passed since the order issued.

2. Limited Relief

The court's authority is limited to modifying provisions relating to child custody or parenting time.

ORS 107.730(2), (3)

3. Procedure

- a. 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.
- b. If requested by the party, the clerk must deliver the modification request and notice of hearing to the sheriff for service.
- c. The sheriff must serve the request for modification and notice of hearing unless the party elects to have service accomplished by a private party.
- d. Service must be made on the other party in the manner provided by law for service of a summons.

See ORCP 7. Mailed notice is not sufficient unless it is certified or registered, return receipt requested, or express mail. ORCP 7D(3)(a)(i); ORCP 7D2(d)(i). Questionable court practice in some counties is to simply mail notice to the both parties when a modification motion has been made.

V. EFFECT OF FAPA ORDERS ON DISSOLUTION OF MARRIAGE PROCEEDINGS

ORS 107.722

A. FAPA order followed by Final Domestic Relations Judgment

An original or modified judgment of dissolution of marriage under ORS 107.105, custody or visitation order under ORS 109.103, or filiation decree under ORS 109.155 supersedes a contrary provision in a preexisting FAPA custody or visitation order.

ORS 24.115(1)

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

B. FAPA order followed by Temporary Domestic

Relations Order

A temporary custody order under ORS 107.095(1)(b) supersedes a contrary provision of a preexisting FAPA order **only** if the party requesting temporary relief in the dissolution action:

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

VI. FOREIGN RESTRAINING ORDERS

ORS 24.190

ORS 24.190(2)

18 U.S.C. §2265(d)(2)

A protection order entitled to Full Faith and Credit under VAWA may be civil or criminal and are not limited to those protecting intimate partners. 18 U.S.C. §§2265 and 2266. Codified in Oregon at ORS 24.190(1)

ORS 24.190(3)(a)

18 U.S.C. §2265(d)(1)

ORS 24.190(6)

18 U.S.C. §2265(d)(1)

A. Entitled to Full Faith and Credit

A restraining order from another state or tribe 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.

B. Registration is Optional

1. With Law Enforcement

The protected person may choose to register the foreign order with law enforcement. Entry into this computer ensures that all police agencies statewide have knowledge of the order and provide mandatory arrest protection. The protected person must provide a copy of the order, certify that it is the most recent order, and that the restrained person has actual notice. Federal law prohibits the state from notifying the respondent of the registration, unless the 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 the respondent of the registration, unless the petitioner requests this step.

When filed, the foreign order is enforceable as an Oregon order unless the respondent shows that:

- a. The issuing court lacked subject matter or personal jurisdiction over the respondent,
- b. Respondent was not given reasonable notice and opportunity to be heard under the law of the issuing state, or
- c. The order also restrains the petitioner and the respondent did not file a petition for the order and the court did not make specific findings that the respondent was entitled to the order.

C. Violation of Foreign Orders

ORS 107.728;
State v. Bachman, 171 Or App 655
(2000)

Legislation effective June 11, 2003, overruled the *Bachman* decision to provide that venue for punitive contempt cases for violations of FAPA orders may lie in either the county of issuance or the county of violation. This legislation also requires the person initiating the contempt action in the county of violation to file with the court a certified copy of the order. Contempt cases regarding violations of *foreign* orders, then, will proceed similarly with venue lying in the county of violation.

VII. CONTEMPT—REMEDIAL AND PUNITIVE SANCTIONS

ORS 107.720(4)

A. Statutory Authority

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

1. Remedial Sanctions Under ORS 33.015(4)

ORS 33.055(2)

As in civil proceedings, a party, city attorney, district attorney, or the Attorney General may seek remedial sanctions.

2. Punitive Sanctions Under ORS 33.015(3)

ORS 33.065(2)

As in criminal proceedings, only a public prosecutor (city attorney, district attorney, or

the Attorney General) may seek punitive sanctions.

UTCR 19.040(1)

ORS 33.055(12). ORS 33.065(5) and (6). *State ex rel Hathaway v. Hart*, 300 Or 231 (1985) (*criminal contempts are not "criminal actions within the meaning of state criminal statutes nor "criminal prosecutions" within the meaning of the state constitution*).

ORS 33.055(3); ORS 107.728

ORS 33.065(2); ORS 107.728

ORS 133.310(3)

ORS 133.310(4)

3. Applicable Procedural Rules

ORCP does not apply to remedial contempt proceedings unless specifically provided in statute or UTCR Chapter 19. Generally, criminal procedure applies to punitive contempt proceedings (without the right to jury trial).

4. Venue

- a. A party eligible to initiate a contempt proceeding for remedial sanctions must file a motion to do so in the related FAPA proceeding. This filing would be in the county of issuance or the county of violation.
- b. A party eligible to initiate a contempt proceeding for punitive sanctions may file the accusatory instrument in either the county of issuance or the county of violation.

B. Punitive Sanctions—Procedure

1. Mandatory Arrest for Violating Order

Arrest is mandatory when:

- a. Respondent, called "defendant" in the contempt proceeding, has been served with the FAPA order;
- b. a true copy of the FAPA order has been properly filed with the Law Enforcement Data System; **and**
- c. a police officer has probable cause to believe the restraining order has been violated.
- d. Foreign Restraining Order

Arrest is mandatory when:

- 1) a protected person presents a copy of the foreign restraining order as defined by ORS 24.190,

- 2) the protected person represents that the order is the most recent order in effect and the other person has been personally served with a copy of the order or has actual notice of the order, and
- 3) the peace officer has probable cause to believe that there has been a violation.

ORS 133.310(6)

2. Mandatory Arrest for Violating Certain Release Agreements

Arrest on probable cause is also mandatory for violations of a release agreement entered into after an arrest for certain crimes between family and household members.

3. Release from Custody

ORS 107.720(4)

a. Pending a hearing, FAPA violations are subject to normal release decisions under ORS 135.230 to 135.290.

ORS 135.250(2)(a), (b)

b. A release agreement **must** include a provision for "no contact" with the victim. The court may waive 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 107.720(4); ORS 135.245(3)

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."

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

The court should work with law enforcement, release officers, and prosecutors to ensure that victims receive notice that defendant will be released. ORS 135.245(5)(a)(B)(i)

ORS 33.065(2)

4. Accusatory Instrument Required

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

ORS 33.065(4)

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

ORS 33.065(5)

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

- 1) Defendant must be personally served a copy of the instrument and be arraigned.
- 2) Defendant may move against the instrument by demurrer.

UTCRC 19.020(1)

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

- 1) the maximum sanctions sought;
- 2) whether those sanctions include incarceration; and
- 3) for each sanction sought, whether the moving party considers it punitive or remedial.

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

ORS 33.065(6)

5. Defendant's Rights

Except for the right to a jury trial, defendant generally has all rights normally accorded criminal defendants, including:

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

See State ex rel Hathaway v. Hart, 300 Or 231, 708 P2d 1137 (1985); *State v. Bachman*, 171 OR App 655 (2000).
See note at II.A.2

An unsettled question is whether the defendant has confrontation rights independent of those grounded on due process. As a punitive contempt case is not a "criminal prosecution," 6th Amendment and state constitutional confrontation rights may not be applicable.

ORS 33.065(9); ORS 33.055(11)

See *Gerlack v. Roberts*, 152 Or App 40, 44-45, 952 P2d 84 (1998)

See *State ex rel Emery v. Andisha*, 105 Or App 473, 476 n 2, 805 P2d 718 (1991)

Couey and Couey, 312 Or 302, 305-06 821 P2d 1086 (1991) (construing former ORS 33.010, repealed by Or Laws 1991, ch 724, § 32). See ORS 33.015 (defining contempt as certain acts done "willfully")

See *Emery, supra*, 105 Or App at 476 (construing statute before 1995 amendments adding definitions and before 1997 amendments altering definitions to incorporate an objective standard: terms of restraining order were not vague)

d. the right to discovery.

6. Trial

a. Burden of Proof and Elements of Charge

To sustain a finding of contempt, the state must prove that an order existed, that the defendant had knowledge of the order (frequently proven by service), and that the defendant willfully violated the order.

- 1) The state must prove contempt beyond a reasonable doubt if any punitive sanctions or the remedial sanction of confinement is sought.
- 2) The state must prove contempt by clear and convincing evidence if remedial sanctions other than confinement are sought.

b. Willfulness

Voluntary noncompliance with the order. "Bad intent" is not an element of contempt separate from the requirement of "willfulness."

c. Defenses

1) Vagueness of Order

Actions that may be prohibited under ORS 107.718(1)(e) and (f) are defined in ORS 107.705(4) - (7). See section III.A.2., above.

2) Invalidity of Underlying Order

The fact that petitioner's situation did not qualify for the underlying restraining order is not a defense to contempt, but an impermissible

collateral attack when argued in the contempt case. See, e.g., *State ex rel Mix v. Newland*, 277 Or 191 (1977). Only if the defendant has not had a meaningful opportunity to challenge the validity of the FAPA order might their defense be available. Such situation appears unlikely, given that the five and 21 day hearings would almost always occur before adjudication of a contempt case.

ORS 33.065(7); *State ex rel Mikkelsen v. Hill*, 315 Or 452, 459, 847 P2d 402 (1993)

ORS 161.055(2)

3) Inability to Comply

Inability to comply with the restraining order is an affirmative defense, and defendant must file and serve prior notice to the prosecutor not less than 5 days before trial or risk that right. The defendant has the burden of proof on this defense and must show preponderant evidence to prevail.

4) Petitioner's Conduct Irrelevant

Although defendants often raise it as a mitigating factor or defense, petitioner's conduct is not relevant.

5) Asserting Parenting Time Rights

Visitation with minor children often puts defendant in the vicinity of petitioner, which may cause an arrest for violation of the restraining order after a disagreement arises. In such cases, resolution of whether defendant violated the restraining order will usually depend on whether defendant's behavior exceeded the scope of defendant's parenting time rights or was otherwise intimidating, interfering, or menacing within the meaning of the FAPA injunction.

6) Mental Illness

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

7. Pleas and Sentencing

a. Guilty and No Contest Pleas

The court may take a guilty plea or plea of no contest, as in any other criminal case.

b. Forty-Eight (48) Hour Delay before Sentencing

The 48-hour period between plea/conviction and sentencing applies unless defendant waives it.

c. Sentencing Objectives

- 1) protect victims and family members who are directly or indirectly affected by domestic violence;
- 2) hold offenders accountable for their behavior; and
- 3) reduce future violations through
 - i) strict supervision, and
 - ii) effective offender treatment programs.

d. Maximum Punitive Sanctions

The maximum punitive sanctions are:

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

ORS 33.105

C. Remedial Sanctions

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.

ORS 33.055(2), (3), (4)

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:

ORS 33.055(5)

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

2) the court orders substitute service; or

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

UTCR 19.020(1)

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

ORS 33.055(7), (8); *State ex rel Hathaway v. Hart*, 300 Or 231, 708 P2d 1137 (1985)

2. Defendant's Rights

a. Defendant has only those rights afforded a defendant in a civil action, **unless** the sanction of confinement is sought, except there is no right to a jury trial.

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

ORS 33.055(8)(a)

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

ORS 33.055(8)(b)

2) afforded the right to court-appointed counsel at government expense, if defendant is indigent.

ORS 33.055(6)

3. Opportunity for Hearing

The court must afford defendant an opportunity for a hearing before imposing

sanctions, unless defendant waives the opportunity by stipulated order.

ORS 33.055(11)

a. Burden of Proof

- 1) clear and convincing evidence, unless confinement is sought; and
- 2) if confinement is sought, proof must be beyond a reasonable doubt.

ORS 33.055(10); *Mikkelsen, supra*, 315
Or at 459

b. Inability to Comply Defense

Inability to comply with the court order is an affirmative defense.

ORS 33.105(1)

c. Available Sanctions

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

- 1) restitution;
- 2) confinement 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 prior 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.

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