

A Benchguide for

The Elderly Persons and Persons With Disabilities Abuse Prevention Act

ORS 124.005 – 124.040

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Revised and updated 2000 by the Honorable Michael S. Loy, Multnomah County Courts.

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INTRODUCTION

In response to concerns regarding the abuse of the elderly and persons with disabilities the 1995 Oregon Legislature enacted specific legislation to restrain such abuse. The legislation has been amended and expanded since its enactment. While similar to provisions regarding the Family Abuse Prevention Act (FAPA), the Elderly Persons and Persons With Disabilities Abuse Prevention Act (EPPWDAPA) has some key distinctions meant to deal with specific concerns and circumstances regarding the abuse of the elderly and persons with disabilities. These differences include the type of alleged abuse that is actionable, potential remedies to address such abuse, and the role of agents who can appear in these actions on behalf of an elderly person or a person with a disability.

Under EPPWDAPA actions that can fall under the definition of abuse are expanded and the court has greater remedial powers to address such abuse. Under FAPA, abuse is generally defined in terms of attempting, threatening, or using force to physically injure or coerce a victim. The definition of abuse under EPPWDAPA is expanded to include not only physical violence but can also include the wrongful taking of property, neglect or failure to provide care or services, abandonment, derogatory conduct that causes emotional harm, and even the mailing of sweepstakes promotions. To remedy such claims of abuse the court can not only restrain the respondent from further contact with the victim, but can also order the respondent to return money and property to the petitioner, divest control of property, and follow instructions given by a guardian or conservator for the elderly person or the person with a disability.

EPPWDAPA allows this protection to be requested and put in place without the victim appearing personally before the court. Many times the victim may be too physically or mentally incapacitated to be able to appear and advocate for themselves. Other times the alleged victim may not want the protection of the court for a variety of reasons, including their support for the alleged abuser. In these instances the law specifically allows a guardian or guardian ad litem to apply for the relief without the presence of the alleged victim. The alleged victim is only required to be informed of the proceeding by written notice. In the absence an objection from the alleged victim, it is possible that he or she may never directly address the court except through a guardian or guardian ad litem.

The Elderly Persons and Persons With Disabilities Abuse Prevention Act is a powerful legal tool to attempt to address abuse of the elderly and people with disabilities. With the increasing numbers of elderly persons and persons with disabilities in our society, applying this specialized legal protection may unfortunately become more commonplace. A full understanding of the law and the circumstances regarding these potential victims is essential in addressing these issues. This bench guide is an attempt to aid the courts in this understanding.

I. THE PETITION

A. Venue

ORS 124.012

An Elderly Persons and Persons with Disabilities Abuse Prevention Act (EPPWDAPA) petition may be filed only in a county where the petitioner or the respondent resides.

ORS 124.005(9) and (3),
ORS 124.020(5)

1. Caveat: "Petitioner" and "guardian petitioner" are separately defined. When filling out forms, a "guardian petitioner shall provide information about the (elderly) person (or person with a disability)," "rather than information about the petitioner." The statute is not clear, therefore, whether the relevant residence is that of the guardian petitioner, or the residence of the elderly person or person with a disability.

B. Definitions

ORS 124.010

An elderly person or a person or with a disability (or a "guardian petitioner" on behalf of such a person) may seek relief under EPPWDAPA when:

1. Background.
 - a. The elderly person or person with a disability has been the victim of "abuse," as defined in ORS 124.005(1) within the preceding 180 days; and
 - b. The elderly person or person with a disability is "in immediate and present danger of further abuse by the abuser."
2. Specific Definitions.
 - a. Elderly Person.

ORS 124.005(2)

Under EPPWDAPA, an "elderly person" is "a person 65 years of age or older who is not subject to ORS 441.640 to ORS 441.665."

ORS 441.640 to ORS 441.685

These statutes deal with the requirement to report abuse of a resident of a long term care facility. The only persons who seem technically to "be subject to" ORS 441.640 to ORS 441.685 are persons who are required to

make reports. This plain reading of the statute results in what is apparently the correct result. i.e. despite the restrictions that initially appear to restrict the court from granting relief under EPPWDAPA simply because a victim is a resident of a nursing home or other long term care facility, a close reading of the statutes in question appears to render this restriction a nullity. Any other interpretation would have the inconsistent result of allowing a person with a disability who lives in a long term care facility to avail herself or himself of the protections of ORS 124.005 et seq, while restricting elderly residents of the same facility from receiving the same protections.

b. Person With A Disability.

A “person with a disability” is a person who

- I) Meets the criteria in ORS 410.040(7)(b) by being a person with a mental or physical disability who is:
 - i) mentally retarded, developmentally disabled, or mentally or emotionally disturbed and resides in or needs placement in a residential program administered by the Department of Human Services; or
 - ii) an alcohol or drug abuser and resides in or needs placement in a residential program administered by the Department of Human Services; or
 - iii) Otherwise has a physical or mental disability; or
- II) Suffers brain injury caused by extrinsic forces which results in the person suffering a loss of cognitive, psychological, social, behavioral or physiological function for a sufficient time to affect that person’s ability to perform activities of daily living.

ORS 124.005(8)(a);
ORS 410.040(7)(b)

ORS 124.005(8)(b);
ORS 410.715

c. Guardian Petitioner.

A guardian petitioner is a guardian or a guardian ad litem for an elderly person or a

ORS 124.005(3)

person with a disability who files a petition under ORS 124.005 to ORS 124.040 on behalf of the person.

ORS 124.010(7)

Note: The elderly person or person with a disability retains rights to be represented, have access to records, file objections, request a hearing, and present evidence and cross examine witnesses if a guardian petitioner files an EPPWDAPA petition.

ORS 124.005(1)

d. Abuse.

Unlike the Family Abuse Prevention Act (FAPA), the EPPWDAPA does not limit “abuse” to that between family or household members. “Abuse” under the EPPWDAPA means any of the following:

ORS 124.005(1)(a)

I) Any physical injury caused by other than accidental means or that appears inconsistent with the explanation given of the injury;

ORS 124.005(1)(b)

II) Neglect that leads to physical harm through withholding services necessary to maintain health and well-being;

ORS 124.005(1)(c)

III) Abandonment, including deserting or willfully forsaking an elderly person or a person with a disability, or withdrawing or neglecting duties and obligations that a care giver or other person owes an elderly person or a person with a disability;

ORS 124.005(1)(d)

IV) Willfully inflicting physical pain or injury;

ORS 124.005(1)(e)

V) Using derogatory or inappropriate names, phrases or profanity, ridicule, harassment, coercion, threats, cursing, intimidation, or inappropriate sexual comments or conduct of such a nature as to threaten significant physical or emotional harm to the elderly person or person with a disability;

(Note the potential for use of the EPPWDAPA process by participants in a domestic situation, particularly relating to dissolution of marriage or separation, involving persons over

65 years of age, or persons with a disability, who may seek to gain advantages where the situation does not rise to a level where relief could be granted under FAPA. See also ORS 124.010(4) requiring disclosure of any such pending proceedings.)

ORS 124.005(1)(f)

VI) Causing any sweepstakes promotion to be mailed to an elderly person or a person with a disability who spent more than \$500 in the preceding year on sweepstakes, provided that the elderly person or person with a disability represented to the court that the person felt the need for the court's assistance to prevent the person from incurring further expense;

ORS 124.005(1)(g)

VII) Wrongfully taking or appropriating money or property, or knowingly subjecting an elderly person or a person with a disability, to alarm by conveying a threat to wrongfully take or appropriate property of the person, which threat would reasonably be expected to cause the person to believe that the threat would be carried out; or

Church v. Woods, 190 Or. App. 112, 77 P3d 1150, 2003

This case discusses "wrongful" and "taking" in the context of a similar statute, ORS 124.100, which relates to civil actions for abuse of vulnerable persons. Of particular note is the court's discussion of "improper motive" and "improper means" as they relate the concept "wrongful;" as well as the court's discussion of what constitutes a taking, especially as regards joint ownership, right of survivorship, etc. regarding both real and personal property, and regarding both tangible and intangible property.

ORS 124.005(1)(h)

VIII) Sexual contact with a nonconsenting elderly person or person with a disability considered incapable of consenting to a sexual act as described in ORS 163.315 (statutory rape), and as defined in ORS

163.305 (definitions).

e. Immediate and Present Danger.

ORS 124.020(4)

“Immediate and present danger of further abuse by the abuser” includes but is not limited to situations in which the respondent has recently threatened the elderly person or person with a disability with additional abuse.

ORS 124.005

f. Other Defined Terms.

Other terms specially defined for the purposes of EPPWDAPA include:

- I. “Interfere” (to hinder or impede);
- II. “Intimidate” (to compel or deter conduct by a threat);
- III. “Menace” (to act in a threatening manner);
- IV. “Molest” (to annoy, disturb or persecute with hostile intent or injurious effect);
- V. “Sweepstakes” (a procedure for awarding a prize based on chance; or in which a person is required to purchase, pay something of value, or make a donation as a condition of winning a prize or receiving or obtaining information about a prize; or which is advertized in a way to create a reasonable impression that such a payment, purchase or donation is a condition of winning or receiving information about a prize; and
- VII. “Sweepstakes promotion” (an offer to participate in a sweepstakes).

C. Limitations - Persons Against Whom a Petition May NOT Be Filed

ORS 124.010(8)

An elderly person or a person with a disability may not file a petition under ORS 124.005 to 124.040 against a guardian or a conservator of the person.

Note: Although an elderly person or a person with a

disability cannot file an EPPWDAPA against their guardian or conservator, the statute is silent as to whether a guardian petitioner may file an EPPWDAPA petition against a guardian or a conservator of an elderly person or a person with a disability.

D. Time Frames

ORS 124.010(1)

An EPPWDAPA petition must allege both of two different time frames:

ORS 124.010(1)

1. That the prior abuse occurred within the 180 days preceding the filing of the EPPWDAPA petition.

ORS 124.010(6)

a. Note: Time when the respondent is incarcerated, or has a principal residence more than 100 miles from the principal residence of the elderly person or person with a disability, is not counted as part of this 180-day period.

ORS 124.010(1)

2. That petitioner is in immediate and present danger of further abuse from respondent.

ORS 124.020(4)

a. Immediate and present danger includes situations in which the respondent has recently threatened further abuse.

E. Requirement to Disclose Other Actions

ORS 124.010(4)

An EPPWDAPA petition must disclose the existence of any of the following pending between the parties:

1. Any other EPPWDAPA proceedings; or
2. Any "Abuse Prevention Act" proceedings; or
3. Any marital annulment, dissolution or separation proceedings; or
4. Any protective proceedings under ORS Chapter 125 (including guardianships and conservatorships).

F. Moving Does Not Affect Rights

ORS 124.010(3)

The right to petition for relief under EPPWDAPA is not affected if the elderly person or a person with a disability

has left the residence or household to avoid abuse.

G. Amendments to Petition

1. Amendments of Petitioner Permitted.

Nothing in ORS ch. 124 prohibits petitioner from amending the EPPWDAPA petition after filing and before hearing.

ORS 124.020(9)(c)

2. Amendments of Objector Permitted.

The contested hearing that is set following service on the respondent and/or the elderly person or person with a disability is not limited to issues raised in the request for hearing form.

ORS 124.020(9)(c)

- a. However, if the respondent or the elderly person or person with a disability seeks to raise such an issue the Petitioner of Guardian Petitioner is entitled to a reasonable continuance.

H. Burden and Standard of Proof

ORS 124.010(2)

1. Burden of Proof.

The petitioner or guardian petitioner has the burden of proof for all claims made under ORS 124.005 to 124.040.

ORS 124.010(2)

2. Standard of Proof.

The standard of proof is a preponderance of the evidence for all claims made under ORS 124.005 to 124.040.

I. Notice to Elderly Person or Person with a Disability

ORS 124.024(1) and (2)

1. Copies of Documents and Statement of Rights.

If an EPPWDAPA petition is filed by a guardian petitioner, that person must give notice to the elderly person or the person with a disability or the petition, order, and related forms described in ORS 124.020(6), and must also serve on that person a notice that contains a statement of that person's rights to contact and retain counsel, have access to personal records, file objections, request a hearing, and present evidence and cross examine witnesses.

- ORS 124.024(3) 2. Form of Notice.
Notice must be similar to that provided to a respondent.
- ORS 124.024(3) 3. Objection Form To Be Included.
The notice must contain an objection form that the elderly person or person with a disability can mail to the court.
- ORS 124.024(4) 4. Personal Services Required Within 72 Hours.
This notice must be personally served on the elderly person or person with a disability not later than 72 hours after the court issues a restraining order under ORS 124.020.
The statute is not clear what the result is if such service is not completed within 72 hours.
- ORS 124.024(4) 5. Proof of Service Before Contested Hearing.
This notice must be personally served on the elderly person or person and proof of service thereof filed in the proceeding before a contested hearing can be held pursuant to ORS 124.015.
The statute is not clear as to the result when a petition filed by a guardian petitioner, if service on the elderly person or person with a disability is not obtained, but the respondent requests a hearing, and the 21 day period within which the hearing must be held runs.

J. Clerk's Duties

The court clerk has several duties under EPPWDAPA.

- ORS 124.010(5) 1. Information.
The court clerk must give the elderly person information provided by the Department of Human Resources about local adult protective services, domestic violence shelters, and local legal services available.
- ORS 124.020(9)(a) 2. Forms, Instructions.
The clerk must make available an instruction

brochure and forms for the petition, order, and related forms. The forms must be in substantially the form prescribed by statute.

(Note that OSCA Legal Counsel has developed standard forms and instructions, which OSCA updates as needed to reflect new legislation and case law, and comments from judges and court staff who review the updates.)

3. Copies.

ORS 124.020(7)(a)

If the court allows the petition, the clerk of the court must provide, without charge, the number of certified true copies of the petition and order necessary to effect service on the respondent. The court clerk must also deliver a true copy of the petition and order to the county sheriff for service, unless the court finds service is unnecessary because respondent appeared in person in court.

4. Notify Petitioner if Documents Returned by Sheriff.

ORS 124.020(8)(a)

If the sheriff returns the order and petition to the court, because they are incomplete, the Clerk shall notify the Petitioner or Guardian Petitioner.

5. If Service Not Achieved by Sheriff.

ORS 124.020(8)(b)

If the sheriff cannot achieve service, the sheriff shall notify the petitioner or guardian petitioner, and if that person does not respond within 10 days, the sheriff shall file a return to the clerk showing service was not completed.

6. Provide Hearing Request Form, and Give Notice of Hearing.

ORS 124.020(9)(a)

The respondent, or the elderly person or the person with a disability, may request a court hearing upon any relief granted within 30 days after being served with an EPPWDAPA restraining order or notice thereof. The clerk shall provide a hearing request form in substantially the form provided in statute. The clerk shall also notify the petitioner or guardian petitioner of the time and date of the hearing, and shall provide a copy of the request for hearing.

7. Deliver Proof of Service To Sheriff.

ORS 124.030(1)

The clerk, or any other person serving a restraining order including a security amount and an expiration date, shall deliver to the sheriff a true copy of the proof of service and a true copy of the Petition and a true copy of the Order.

8. Deliver Notice of Early Termination.

ORS 124.030(3)

When an EPPWDAPA restraining order is terminated before the expiration date, the clerk shall deliver a true copy of the termination order upon the sheriff.

K. No Filing, Service, or Hearing Fees

ORS 124.020(7)(d)

The court cannot charge filing, service, or hearing fees. The sheriff cannot charge service fees.

II. UNCONTESTED, IMMEDIATE HEARING

A. Ex Parte Hearing Required

ORS 124.020(1)

An EPPWDAPA petitioner is entitled to an ex parte hearing, in person or by telephone, on the same day that the petition is filed or the next judicial day.

B. Testimony May Establish Required Showing

ORS 124.020(3)

1. Who May Testify To Meet Requirement.

EPPWDAPA explicitly provides that the required showing may be made by testimony of the elderly person or person with a disability, a guardian or a guardian ad litem of the person, witnesses to the abuse, or adult protective services workers who have conducted an investigation.

ORS 124.020(1)

2. Under EPPWDAPA there must be a showing that:

- a. The elderly person or a person with a disability;
- b. Has been the victim of abuse;
- c. Committed by the respondent;
- d. Within 180 days preceding the filing of the petition; and that
- e. There is an immediate and present danger of

further abuse to the person.

- f. Note that many of these terms are defined and discussed above, and that their statutory definitions may be different from the more common meanings of some of these terms.

ORS 124.020(5)

3. Error in Order Form.

Forms printed in accordance with statute, including the pre-printed form for the Order, contain errors, in that they fail to clarify that “petitioner” should often be interpreted as “elderly person or person with a disability.” Although there is a statutory correction (ORS 124.020(5)) in this regard for forms to be filled out by the petitioner or guardian petitioner, there is no such statutory correction for the form of the Order. The court should, nonetheless, make this substitution where common sense dictates, as, for example, in the section requiring a finding that there has been abuse of “the petitioner.”

ORS 124.010(4).

4 Intersection of FAPA and EPPWDAPA Processes.

Note also the discussion above regarding the potential use of the EPPWDAPA process by persons who may be seeking advantages in dissolution proceedings, as also discussed above, and the requirement that any such proceedings which are pending be reported to the court per ORS 124.010(4).

C. Burden and Standard of Proof

ORS 124.010(2)

As outlined above, the petitioner or guardian petitioner has the burden of proof in this and all hearings under EPPWDAPA, with the standard of a preponderance of the evidence.

III. RELIEF

A. Mandatory (Not Discretionary) Relief

ORS 124.020(1)

At the initial hearing the court must order the following relief if petitioner or guardian petitioner requests it, **and** the court finds that:

ORS 124.010(1);

- respondent abused the elderly person or

also see benchguide above at section (I)(B)(2)(d)

ORS 124.010;
also see benchguide above at section (I)(B)(2)(d)

person with a disability within the preceding 180 days; and

- the elderly person or person with a disability is in immediate and present danger of further abuse by respondent.

Note: When a guardian petitioner files a petition, and appears at the ex parte hearing, the elderly person or person with a disability may or may not be present at this ex parte hearing. However, issues may not be raised at this ex parte hearing regarding an objection to the requested relief or regarding other wishes of the elderly person or person with a disability. Such issues are to be addressed through the objection hearing process under ORS 124.020 as set forth below in section IV. Relief requested by a guardian petitioner, if legally appropriate, is to be granted by the court at this ex parte hearing, as the court is without discretion in many of these matters if the specific relief is requested by the guardian petitioner, although the guardian petitioner may have discretion as to whether to request such relief.

1. Restraint from further abuse

ORS 124.020(1)(c)

Order that the respondent be restrained from doing the following to the elderly person or person with a disability:

ORS 124.020(1)(c); 124.005(1)

a. **Abusing**, defined in ORS 124.005(1);

ORS 124.020(1)(c); 124.005(5)

b. **Intimidating**, defined as compelling or deterring conduct by a threat;

ORS 124.020(1)(c); 124.005(7)

c. **Molesting**, defined as annoying, disturbing, or persecuting with hostile intent or injurious effect;

ORS 124.020(1)(c); 124.005(4)

d. **Interfering with**, defined as interposing in a way that hinders or impedes;

ORS 124.020(1)(c); 124.005(6)

e. **Menacing**, defined as acting in a threatening manner;

ORS 124.020(1)(c)

f. **Attempting** to abuse, intimidate, molest, interfere with or menace the elderly person or person with a disability;

ORS 124.020(1)(e)(A);
ORS 124.005(1)(f)

g. **Mailing** any sweepstakes promotion to the elderly person or person with a disability, effective not less than 150 days after entry of the order.

ORS 124.020(1)(d)

2. Restraint from Entry Onto Specified Premises

If requested by petitioner or guardian petitioner, order that respondent be restrained from entering, or attempting to enter, any premises if the court deems it necessary to prevent respondent from abusing, intimidating, molesting, interfering with or menacing the elderly person or person with a disability.

ORS 124.020(1)(a)

3. Ouster

If requested by petitioner or guardian petitioner, order respondent to move out of the residence of the elderly person or person with a disability if:

- a. the residence is solely in name of the elderly person or person with a disability; or
- b. the elderly person or person with a disability and the respondent jointly own or rent the residence; or
- c. the respondent is married to the elderly person or person with a disability.

ORS 124.020(1)(b);

4. Police "Standby" for Essential Personal Property

If requested by petitioner or guardian petitioner, order that a peace officer accompany the party moving from the residence of the elderly person or person with a disability to remove *essential* personal effects.

ORS 124.025(1)&(2)

- a. The "standby" time is not required to exceed 20 minutes
- b. The peace officer may temporarily interrupt the removal of property at any time.
- c. Police "standby" is available on only one occasion.
- d. Essential person effects include, but are not limited to: clothing, toiletries, medications, Social Security cards, birth certificates,

ORS 124.020

identification and tools of the trade.

ORS 107.718(d)

Note: The statute does not define *essential personal effects* but see ORS 107.718(d) which deals with FAPA restraining orders and lists the above items as essential personal property.

5. Security Amount

ORS 124.030(4)

Specify the amount of the bond for violation of the restraining order. Although the statutory form specifies a default bond amount at \$5,000, the court may impose a higher or lower security amount.

6. Notice to Respondent

ORS 124.020(6), See Form -
Notice to Respondent

Notice of respondent's right to request a hearing must accompany order in order to comply with the statute.

7. Notice to Elderly Person or Person With a Disability

ORS 124.024(1)

Guardian petitioners must give notice of petition, order, and related forms described in ORS 124.020(6) to the elderly person or person with a disability named in the petition.

ORS 124.024(4)

Such notice must be provided within seventy-two hours after the court issues a restraining order under ORS 124.020.

8. Sweepstakes Promotions

In addition to restraining the respondent from mailing any sweepstakes promotion to the elderly person or person with a disability, the court can order the respondent to:

ORS 124.020(1)(e)

- a. Remove the elderly person or person with a disability from the sweepstakes mailing list (within 150 days of the date the order is entered); or place the elderly person or person with a disability on a list of persons to whom the promotions may not be mailed; *and*
- b. Immediately refund any payment received in any form from the elderly person or person with a disability after the court order is

entered.

B. Discretionary Relief

1. Authority to Order the Return of Wrongfully Appropriated Money or Property

ORS 124.020(2)(a)

If the court finds that the elderly person or person with a disability has been the victim of abuse as defined in ORS 124.005(1)(g) the court may order only that relief which the court considers *necessary* to prevent or remedy the **wrongful** taking or appropriation of the money or property of the elderly person or person with a disability, including but not limited to the relief which is set forth below at III.B.1.a through d.

ORS 124.005 (1)(g)

Note: ORS 124.005(1)(g): includes the following as one definition of abuse.
“Wrongfully taking or appropriating money or property, or knowingly subjecting an elderly person or person with disabilities to alarm by conveying a threat to wrongfully take or appropriate money or property, which threat reasonably would be expected to cause the elderly person or person with a disabilities to believe that the threat will be carried out.”

Church v. Woods, 190 Or. App. 112, 118-9, 77 P.3d 1150 (2003)

Note: see *Church v. Woods*, 190 Or. App. 112, 118-9, 77 P.3d 1150 (2003) (internal citations omitted.) defining wrongfully: “[Wrongfully’s] ordinary meaning is full of wrong: INJURIOUS, UNJUST, UNFAIR.” More specifically, it has a well-understood meaning in the law of torts with regard to interference with legal interests. Conduct generally is “wrongful” if it is carried out in pursuit of an improper motive or by improper means. “Improper means” must be independently wrongful by reason of statutory or common law, beyond the mere fact of the injury complained of. Improper means, for example, include violence, threats, intimidation, deceit, misrepresentation, bribery, unfounded litigation, defamation and disparaging falsehood. The use of undue influence also constitutes an “improper means,” in that it involves the procurement of an unfair advantage. That dual meaning of the word “wrongful,” focusing alternatively on the defendant’s motives or the means by

which property was taken, is sensible in the context of ORS 124.110(1)(a). Accordingly, we adopt it.”

- ORS 124.020(2)(a)(A) a. Directing the respondent to **refrain from exercising control** over the money or property of the elderly person or person with a disability;
- ORS 124.020(2)(a)(B) b. Requiring the respondent to **return custody** or control of the money or property of the elderly person or person with a disability to him or her;
- ORS 124.020(2)(a)(C) c. Requiring the **respondent to follow the instructions** of the guardian or conservator of the elderly person or person with a disability; or
- ORS 124.020(2)(a)(D) d. **Prohibiting** the respondent from **transferring the money or property** of the elderly person or person with a disability to any person other than the elderly person or person with a disability.

Note: The statutory order form does not list the above options as possible relief and therefore a pro se petitioner may not know to write them in the “other relief” requested section of the form. The court should inquire if petitioner wants to include any of these options when executing an order where petitioner has alleged the money or property has been wrongfully appropriated.

- ORS 133.310(3) Note: As noted below there are other consequences to ordering the return of property. At the ex parte hearing the respondent has had no opportunity to contest ownership of the allegedly wrongfully obtained property. ORS 133.310(3) requires a peace officer to arrest and take into custody a person without a warrant when the officer has probable cause to believe that person has been served with a restraining order and has violated that order. A respondent in possession of allegedly wrongfully obtained property would therefore be subject to mandatory arrest.

C. Additional Discretionary Relief

- ORS 124.020(1)(f) The court may order any additional relief it considers necessary to provide for the safety and welfare of the elderly person or person with a disability.

D. Limits on Relief

The court may not use a restraining order issued under ORS 124.005 to 124.040 to:

ORS 124.020(2)(b)(A)

1. Allow any person other than the elderly person or person with a disability to assume responsibility for managing any money or property of the elderly person or person with a disability;

ORS 124.020(2)(b)(B)

2. Provide relief that is more appropriately obtained in a protective proceeding filed under ORS chapter 125 (Protective Proceedings).
 - a. This includes, but is not limited to, giving control or management of the financial accounts or property of the elderly person or person with a disability for any purpose other than necessary to prevent or remedy the wrongful taking or appropriation of money described in 124.005(1)(g).

E. Entry Into Law Enforcement Data System

ORS 124.030 (1)

1. When a EPPWDAPA restraining order is issued and the person to be restrained has actual notice thereof, the clerk of the court shall deliver:
 - a. a true copy of the affidavit of proof of service,
 - b. a copy of the petition, and
 - c. a true copy of the order to a county sheriff.
2. Upon receipt of the order the county sheriff shall entered the order into the Law Enforcement Data System (LEDS), which gives notice to all law enforcement agencies of the order. The order will be fully enforceable in any county in the state.

F. Duration of Relief

ORS 124.020(1)

1. Order remains in effect for a period of one year; or
2. Until the order is withdrawn or amended, whichever is sooner.

G. Dismissal

1. By Written Order

ORS 124.030(2)

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

EPPWDAPA 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.

2. Notarized Signature Required

ORS 124.030(2)

A restraining order entered under ORS 124.020 can be terminated upon a motion for dismissal by the petitioner or guardian petitioner, only if the motion is notarized.

H. Renewals

1. For Good Cause Shown

ORS 124.035

The court may renew an EPPWDAPA order for “good cause shown” regardless of whether there has been further abuse.

2. Due process may require notice to respondent and an opportunity for a hearing on the renewal.

I. Early Termination

ORS 124.030(3)

When the order is terminated before it expires, the clerk of the court must deliver a true copy of the termination order to the sheriff with whom the original order was filed. The sheriff must then remove the original order from the Law Enforcement Data System.

IV. THE CONTESTED HEARING PROCESS

Either the respondent or the elderly person or person with a disability (in a case brought by a guardian petitioner) may request a hearing to object to the order or to its particular provisions.

A. Contested Hearing Requests

1. Timing

ORS 124.020(9)(a)

The respondent or the elderly person or person with a disability must request the hearing within 30 days after the restraining order is served on the

person who requests the hearing

2. Forms

ORS 124.020(9)(a)

The clerk must make the hearing request form available substantially in the form provided in ORS 124.020(6).

B. Scheduling the Contested Hearing

ORS 124.015(1)

1. The court must hold the hearing within 21 days of the hearing request.

Strother and Strother, 130 Or App 624, 630, 883 P2d 249 (1994), *rev den* 320 Or 508 (1995)

However if respondent or the elderly person or person with a disability causes or contributes to the delay, the 21-day rule may not apply. Per *Strother and Strother*, 130 Or App 624, 630, 883 P2d 249 (1994), *rev den* 320 Or 508 (1995), if the delay is attributable to the person requesting the hearing, the hearing may be postponed beyond 21 days in an appropriate circumstance.

ORS 124.015(3)

2. If respondent or the elderly person or person with a disability is represented by counsel and another party so requests, the court may extend the time for hearing up to five (5) days, to allow other parties to seek representation.

C. Contested Hearing Notice Requirements

ORS 124.020(9)(b)

The clerk of the court shall notify all parties of a scheduled contested hearing, and the petitioner or guardian petitioner shall give the clerk sufficient information to allow such notification.

D. Settlement

ORS 124.015(4)

1. The court can approve any consent agreement to bring about a cessation of the abuse.

ORS 124.015(4)

2. However, the settlement cannot provide for restraint of a party unless the other party petitioned for and was granted an order under ORS 124.010.

ORS 124.015(4)

3. Thus, the settlement cannot provide for mutual restraint unless both parties petitioned for and received orders under ORS 124.010.

ORS 124.020(2)(b)(A)

4. In addition, the court cannot use a restraining order

under ORS 124.005 to 124.040 to allow a person other than the elderly person or the person with a disability to assume responsibility for managing the money or property of the person.

ORS 124.020(2)(b)(B)

5. Nor can the court use a restraining order under ORS 124.005 to 124.040 to grant relief that is more appropriately filed under ORS chapter 125 (protective proceedings, including guardianships and conservatorships).

E. Subject Matter of Contested Hearing

ORS 124.020(9)(c)

1. The EPPWDAPA hearing is not limited to issues that respondent raised in the request for hearing.

ORS 124.020(9)(c)

2. The EPWPDAPA hearing may include testimony from witnesses to the abuse and from adult protective services workers.

Although not specified in ORS 124.020(9), other witnesses may, of course, also testify, as may be appropriate.

ORS 124.020(9)(c)

3. If the respondent, elderly person, or person with a disability seeks to raise an issue at the hearing not previously raised in the request form, the petitioner or guardian petitioner is entitled to a reasonable continuance to prepare a response.

F. Contested Hearing Procedures

ORS 124.020(9)(d)

1. EPPWDAPA does not specify what takes place at the hearing.

2. The court, during the hearing, must exercise its discretion to protect the elderly person or person with a disability from traumatic confrontation with respondent.

ORS 124.020(9)(c)

3. The EPPWDAPA contested hearing may be held in person or by phone.

ORS 45.400

4. Nothing in EPPWDAPA specifically overrides ORS 45.400 relating to telephone testimony, which requires 30 days prior written notice of telephone testimony, but which allows shorter notice if good cause is shown.

- ORS 45.400(3)
5. ORS 45.400 contains significant restrictions setting forth situations when telephone testimony is not allowed.

G. Evidentiary Issues

- ORS 40.015(2)
1. The Oregon Evidence Code applies to EPPWDAPA hearings.
- ORS 124.010(2)
2. The burden of proof is on the petitioner or guardian petitioner to prove a claim by a preponderance of evidence.

H. Available Relief

- ORS 124.015(1)
1. The court may cancel or change any order issued under ORS 124.020.
- ORS 124.015(2)
2. ORS 124.015 provides relief that is “in addition to the relief granted under ORS 124.020.” See Section III., above, for relief available under ORS 124.020. In addition to that relief, under ORS 124.015, the court may also order any of the following:
 - a. Require either party to move from any residence whose title or right to occupy is held jointly by the parties.

As with many other situations, although the statute speaks of “either party” in this circumstance, this appears to be a function of the fact that the statute was not comprehensively revised when it was changed to allow for petitions by guardian petitioners. When this portion of the statute was written, the only “parties” were the respondent and the elderly person or person with a disability.

- ORS 124.015(2)(b)
- b. The court may assess against any party reasonable attorney fees and costs incurred in the hearing.
- ORS 124.015(4)
- c. The court may approve a consent agreement to bring about a cessation of abuse. There are significant restrictions on the content of settlement agreements and restraining orders that are available, however, despite the initial

impression given by the first sentence of ORS 124.015(4). See section IV.D., above.

ORS 124.030(4)

- d. The court can increase the security amount that was set at the ex-parte hearing for violation of the order.

V. FOREIGN RESTRAINING ORDERS

ORS 24.190

See *FAPA Benchguide* for a discussion of the general statutory provisions regarding foreign restraining orders and their effect.

VI. CONTEMPT—REMEDIAL AND PUNITIVE SANCTIONS

A. Enforcement

ORS 124.015(8)

Notwithstanding ORS chapter 90 (Landlord and Tenant Law) and ORS sections 105.105 to 105.168 (FED statute), a petitioner may enforce an order issued under EPPWDAPA.

B. Contempt Proceedings

As under FAPA, EPPWDAPA restraining orders are enforced through ORS chapter 33 contempt proceedings.

ORS 166.293(3)(a)

1. See *FAPA Benchguide* on contempt procedures and remedial and punitive sanctions.
2. Note that ORS 166.293(3)(a) (providing the court authority to revoke a concealed weapons permit) does not apply when an EPPWDAPA order is violated.

ORS 124.030(4)

3. Pending a contempt hearing for violation of an EPPWDAPA restraining order, a person arrested and taken into custody pursuant to ORS 133.310 may be released as provided in ORS 135.230 to 135.290.