McLain Legal Services PC

Family Law, Criminal Defense, Child Welfare

March 25, 2019

Oregon Senate Judiciary Committee
BY EMAIL TO: sjud.exhibits@oregonlegislature.gov BY EMAIL ONLY

RE: Testimony re: *Senate Bill 482*

Dear Members of this Committee,

I am a life-long Oregonian, and a Domestic Relations Attorney. I live in Senate District 18 and House District 36. My law office is in these districts as well. I have been practicing Domestic Relations—also known as "Family Law," and encompassing divorce, dissolution, child custody and child support, among other topics—for more than 12 years. I have appeared before the courts of 13 Oregon judicial districts. I also practice juvenile dependency law, and have a background in criminal defense.

SB 482 proposes to make changes to Oregon's Sexual Abuse Restraining Order laws (Oregon Revised Statutes ("ORS") 163.760 to 163.777. The Sexual Abuse Restraining Order, or "SAPO" as it is usually foreshortened by practitioners, was first enacted in 2013, and modified in 2015. Though the legislature has already amended the SAPO section of Chapter 163, to my knowledge and inquiry there have been no reported appellate decisions in Oregon concerning any aspect of the SAPO definitions, procedures, or the restraints the SAPO laws place upon those who are respondents of these Orders.

As a threshold matter, I urge the committee to decline to advance this bill, either in its initial form or in an amended form, because the law is too new and Oregon courts' experience with the law has not yet included judicial review by the Courts of Appeals. Because the SAPO law includes court-ordered restraints upon the liberty of Respondents who are subject to these orders, further tinkering—especially as contemplated by SB 482, to make these orders longer-lasting and therefore more intrusive upon Respondents—should be avoided. Oregon's Constitution grants its people greater liberty interests than the United States Constitution, and other states' laws (widely canvassed by the bill's proponents) are not particularly helpful in determining what an Oregonian should expect as far as protections of liberty.

Courts are already misconstruing these statutes. I consulted with a criminal law attorney this week, about a SAPO in which the Petitioner complained that her children were sexually assaulted by their Father. ORS 163.763(1)(a) excludes "family or household members" of the Respondent from using the SAPO statute, categorically—and yet the *pro tem* judge who heard the case did not agree that the SAPO Order should be dismissed because the Petitioner had failed to state a claim for relief under the applicable statute. The SAPO was ultimately dismissed because the Petitioner's statements about the abuse were inadmissible hearsay.

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The Criminal Defense bar, to whom I spoke regarding SAPO when it first became law, shares "war stories" about these Orders, and the extent to which they are being adjudicated as though the SAPO is the same as a Family Abuse Prevention Act Order of Restraint. Hearings to challenge the SAPO are often heard by *pro tem* rather than statutory judges, and Orders are entered without reviewing the applicable statutes.

It is important to prevent sexual assault and sexual abuse, and it is beneficial for the victims of sexual assault and sexual abuse to be free from contact by those who abused them. With that said, the SAPO is already a "next best" approach. If there is proof beyond a reasonable doubt that sexual assault or sexual abuse occurred, the power of the State, embodied in law enforcement and District Attorneys, enforces the statutes that make such actions criminal. A person found guilty of sexual abuse is very likely to be ordered to have no further contact with the victim. Criminal prosecution is the best approach. SAPO is most likely to be used when the evidence is not of the same quality or quantity—only a ponderance standard applies, the same standard courts apply when hearing a traffic ticket.

The legislature needs to consider the consequences, both intended and otherwise, behind these rule changes. A court cannot presume that a SAPO petitioner is relating objective truth in a SAPO petition, because people do lie, and they do so to gain an advantage. A SAPO petitioner may be earnestly trying to protect themselves from re-traumatization of further assault, but it is also possible that a SAPO petitioner is trying to have a court "bless" the story that sexual assault took place, even if it did not.

Our system of justice relies upon juries to make findings of fact when criminal activity has taken place, but a SAPO—which labels a Respondent as a sexual offender without a jury trial—requires just one person, the judge (or as I say, a lawyer who is sitting as a *pro tem* judge), to find it's more likely than not, that the Petitioner's story is true.

This is akin to a Family Abuse Prevention Act Order of Restraint, also issued *ex parte* if the court believes that the Petition makes out a statutorily sufficient claim that abuse occurred. Just like with FAPA Restraining Orders, the order issued *ex parte* is subject to a hearing if the Respondent seeks one. Prior to amendment, the SAPO and the FAPA are both valid for one year and can be renewed at the end of that year. FAPA orders have a lengthy appellate jurisprudence, so when SAPO was enacted, the lawyer's favorite tool, reasoning by analogy, had clear application.

The Amendments that are proposed to SAPO statutes by SB 482 would cast doubt upon the analogy to the FAPA statute. One may argue that sexual abuse is worse than domestic abuse as defined under the FAPA statute (ORS 107.705), but this argument misses the point. It is no more difficult to tell a false story of sexual abuse than it is to tell a false story of domestic abuse, but the constraint upon the Respondent's liberty would be greater, and the very title of the Restraining Order would cause anyone who knows about it to doubt the Respondent's fitness for work, for parenting, and for convivial association.

SAPO and FAPA orders are both public record after all, and anyone who walks into the courthouse can view the Petitions and the Orders. If you knew that a job applicant was found by a judge to have committed sexual assault or sexual abuse in the past, would you hire that applicant? Would it change your impression if you knew the applicable standard of proof? The

consequences of criminal conviction often include significant impairment of employment prospects, but only after proof beyond a reasonable doubt has been produced, when both the State and the defendant are represented by competent, professional attorneys with ethical obligations to the court. A SAPO order can be viewed from any courthouse terminal, and it has the same stigma despite the fact that a *pro tem* judge and two self-represented litigants may be the only people in the courtroom when the Order is confirmed after a hearing.

SB 482 would make that SAPO order permanent, unless the Respondent succeeds in removing the impediment to liberty. The burden is shifted to the Respondent to request termination. When does Oregon Law make the Defendant apply to be relieved from otherwise permanent consequences to crimes of conviction? When the Defendant is guilty of multiple DUII offenses, that Defendant must apply to have a driver license reinstated, and when certain Defendants have been convicted of certain sex crimes, they must request that their sex offender registration duties be terminated. An offender can also apply to the court to have a felony conviction treated as a misdemeanor, after that offender has already completed the sentence. It does not make sense to add a SAPO respondent to this list!

I know that amendments are being discussed, to change SB482 and instead make a SAPO last for 3 years or 5 years—longer than the single year presently authorized. It has been suggested to me that this "compromise" is a reasonable one. I disagree. There are—and should be—very few methods that a private individual can call upon the power of the Judiciary to impair the liberty of another private individual, and those methods should be limited in both scope and duration. The FAPA statutes have survived challenge because the impairment of liberty is limited in scope and duration, and that's why FAPA is the blueprint for SAPO, for the Extreme Danger Restraining Order, and for the Elderly and Disabled Persons Protection Act Order of Restraint. Does the State of Oregon want to incur the cost of litigation to defend SAPO against constitutional challenge? What is the public interest in doing so?

SAPO in its present form is closely modeled on FAPA, and the public interest is not furthered by destroying that link. The number of Oregonians who will qualify for SAPO orders is small, and the number who will seek them is much smaller. The difference in protection for those people, between an order renewable on an annual basis and an order renewable every three or five years, is extremely limited. If the SAPO is important and necessary to the Petitioner, it seems to be no great inconvenience, that the Petitioner must remember to go back to court to request renewal every year (like with a FAPA order). The standard for renewal is much lower than the standard for the initial issuance of the Order, and no recurrence of sexual assault or abuse is required.

It has also been suggested that the bill be amended so that it changes ORS 163.763(2)(b)(B), which imposes a 180 day "look back" period. The amendment, it is suggested, could eliminate the restriction altogether, or make it much longer, because victims of sexual abuse sometimes remember their trauma consciously after a long period of time has elapsed. It has been my experience that people do sometimes recall traumatic events only after the passage of time. However, I urge the Committee to reject this notion as well.

The immediacy requirement is modeled after FAPA, and in my opinion it is necessary to any Order of Restraint. Again, these Orders are sought by self-represented litigants in the vast majority of cases, so there is no attorney with a duty to the courts to vet the evidence and make a

judgment call about the justness of bringing a charge. The longer in the past an event occurred, the more likely that recollection has been clouded.

The State owes a duty to the people, to protect their liberty against unwarranted intrusion. In my opinion the legislature would be derelict in that duty, by changing the SAPO statutes as proposed in SB 482. The SAPO statutes are sufficient as they now stand, to protect a person who has been the victim of sexual abuse (non-consensual sexual contact, ORS 163.760(2)). The protection to those people would not be increased by SB 482—a piece of paper is still a piece of paper, and the consequences of violating a SAPO protective order remain unchanged by SB 482 or the amendments to SB 482 that have been discussed. Extending the "look back" period or extending the effective duration of the SAPO order also changes nothing about its efficacy in the first year of issuance.

The desire to protect victims of sexual abuse is laudable, but it must be weighed against the interests of a person wrongly accused of sexual abuse in a SAPO Petition. "Innocent until proven guilty" is the principle on which our criminal jurisprudence is based, and "proven guilty" means "proven beyond a reasonable doubt." SAPO by its present terms changes the meaning of "proven guilty," and the amendments proposed in SB 482 would only exacerbate the injustice done to a person wrongly accused. In criminal law a person who is "proven guilty" is afforded an attorney at no cost, if that person cannot afford to be represented by counsel, but SAPO and SB 482 provide no defense for a Respondent—not when the Order is issued, not when the Order is challenged, and not when the Order is renewed, even if the Petitioner is represented by counsel.

I'm sure it is not lost on the committee that I am not a fan of SAPO at all. FAPA restraining orders are an important part of my practice, and I have seen Petitioners who really needed those orders. However, I have also seen a number of Petitioners use the FAPA to gain an advantage in a divorce case or a child custody matter. The committee should assume that some SAPO Petitioners will be taking unfair advantage of the low burden of proof and the lack of public defense funds, to injure the reputation and the liberty of the Respondent, and should be wary of empowering this abuse of process.

The committee should not pass this bill, either in its present form or as amended. It changes the equivalency between FAPA and SAPO, and makes SAPO much more likely to be abused by the unscrupulous.

Sincerely,

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