

CHAPTER 5 – COMMENCEMENT OF PROCEEDINGS AND TEMPORARY RELIEF AVAILABLE

STATUTORY REFERENCES: RSA 169-C (Child Protection Act)
RSA 173-B:1 (Definitions)
RSA 173-B:3 (Commencement of Proceedings; Hearing)
RSA 173-B:4 (Temporary Relief)
RSA 173-B:5-a (Permissible Contact)
RSA 173-B:11 (Notice to the Victim)
RSA 288 (Holidays)
RSA 458:17 (Support and Custody of Children)

CROSS REFERENCES: Chapter 2 - Definitions of Domestic Violence and Protected Persons
Chapter 14 - Firearms and Other Deadly Weapons

INTRODUCTION

Pursuant to RSA 173-B:11, staff are charged with the responsibility of advising the plaintiff of specific issues that the plaintiff may ask the judge to consider when writing the order. The sections below expand upon the basic information which must be conveyed to the plaintiff and set policy for assisting the parties in the process.

A. GENERAL STAFF RESPONSIBILITIES

PROTOCOL 5-1

All staff shall be fully trained to handle domestic violence cases. The clerk may, however, designate one or more members who will be primarily responsible for handling domestic violence petitions and related issues.

PROTOCOL 5-2

Trained personnel should be available to respond to any domestic violence inquiry during court business hours.

PROTOCOL 5-3

Except for requests for telephonic orders issued during non-business hours, all petitions seeking protective orders shall be filed at a courthouse.

NOTE: Petitioners may take blank petitions from the courthouse. However, staff should advise them that the court can only accept petitions filed in person at the courthouse. Under no circumstances are petitions for protective orders, under RSA 173-B or RSA 633:3-a, to be filed by mail or by a third party.

PROTOCOL 5-4

The designated staff person should meet with the plaintiff and inquiry should be made as to the following:

- a. Check for proper subject-matter jurisdiction.

COMMENT

The staff's role at this stage is to gather information for presentation to the judge. It is not their responsibility to determine whether a plaintiff qualifies for a protective order.

- b. Ask where the defendant is at the present time.

COMMENT

In the event that the defendant is on the way to the court or arrives during the filing of the petition, court security personnel should be notified so that appropriate protective measures may be taken.

- c. Ask whether the defendant is a family or household member.

COMMENT

Minor children and step-children of the defendant wishing to bring an action against a parent may do so under the juvenile statute, RSA 169-C, but not RSA 173-B.

- d. Ask whether the defendant is a spouse or ex-spouse.
- e. Ask whether the parties currently share the same residence, or have in the past.

COMMENT

Roommates who have not been involved in a romantic relationship may not be covered by this statute.

- f. Ask whether the defendant is a current or former sexual or intimate partner.

COMMENT

Intimate partner means persons involved in a romantic relationship, whether or not such relationship was ever sexually consummated and includes same sex relationships.

- g. Ask whether the plaintiff has been subjected to any acts of abuse as defined by RSA 173-B.

PROTOCOL 5-5

Every attempt should be made to provide privacy and security to the plaintiff during the inquiry/completion of the petition. Remember that contact with the public must be courteous, compassionate and non-judgmental.

PROTOCOL 5-6

Staff shall provide the plaintiff with the following materials:

- a. Petition;
- b. Information regarding the availability of local crisis centers;
- c. Information on the Address Confidentiality Program;
- d. Defendant Information Sheet for Law Enforcement;
- e. Domestic Violence Confidential Information sheet.

COMMENT

Staff should also provide any other informational brochures including lists of community support services that may be available.

PROTOCOL 5-7

Staff shall instruct the plaintiff to be specific when completing the petition about the facts causing fear for safety, including dates and times at which events occurred, if known. If the plaintiff has difficulty reading, hearing, writing, or understanding the English language, staff shall fill out the form or provide an interpreter. A note should be included on the petition, indicating that the information was written by the staff member as dictated by the plaintiff. The plaintiff shall still sign the petition.

PROTOCOL 5-8

If an interpreter is required, staff should follow regular court procedure, including contact with the Language Bank. Staff should arrange to have an interpreter available for the final hearing at the same time.

PROTOCOL 5-9

Staff shall advise the plaintiff of the statutory relief available under RSA 173-B:11, II.

PROTOCOL 5-10

A clerk, deputy clerk, notary public or justice of the peace shall take the plaintiff's oath as follows: "I swear that the following information is true and complete to the best of my knowledge. I understand that making a false statement on this petition will subject me to criminal penalties."

PROTOCOL 5-11

If the plaintiff does not have a government issued photo ID at the time of completing the petition, staff should ask for some other form of identification, such as school or employment ID. If not personally known to any staff member, the oath or affirmation of another credible witness who knows the plaintiff may suffice. Failing this, the plaintiff should appear before a judge who may make inquiry.

COMMENT

Facts such as the individual's address, family background, place of employment and other biographical information such as schools attended are suggested areas of inquiry to assist in making the determination of credibility. Other less formal forms of identification such as mail delivered to the named individual, library cards or credit cards may also be reviewed and considered in properly identifying the individual. RSA 456-B does not establish a burden to be met by the individual seeking an acknowledgment. Judicial officers and staff are encouraged to liberally construe the statute to allow full access to the courts.

PROTOCOL 5-12

Staff should browse the ODYSSEY/SUSTAIN party index to determine whether there are on file any "active" restraining orders or pending criminal or civil cases involving the same parties. If so, the case should be pulled and presented to the judge to ensure that no inconsistent orders are issued by the court. If orders exist in other pending cases that the domestic violence orders may supersede, contact should be made with the other court or judge for purposes of modification if necessary.

NOTE: Under no circumstances should the presence of previous filings or orders be considered in determining whether the presently pending petition should be granted.

B. CONDUCT OF HEARING

As indicated above, it is very important that domestic violence cases be accorded prompt, efficient and dignified treatment. The protocol for the issuance of *ex parte* orders is designed to encourage that treatment.

PROTOCOL 5-13

The petition should be presented to the judge for review. If the allegations are unclear or purely summary in nature, the plaintiff should be requested and allowed to provide more detail.

PROTOCOL 5-14

The judge may review the petition and issue temporary orders without conducting a hearing if it appears on the face of the petition that temporary orders are warranted. The judge may nonetheless conduct a hearing in the courtroom or meet with the plaintiff in chambers prior to issuing orders. Staff or a security officer shall be present at all times. Any advocate assisting the plaintiff shall be allowed to accompany the plaintiff into the courtroom or chambers.

COMMENT

It is best practice to meet with the plaintiff in the courtroom on the record. If the judge relies upon oral testimony presented during the *ex parte* hearing, which is not reflected in the plaintiff's written petition, the judge should make note of those facts on the face of the petition or on an order appended to the petition prior to service upon the defendant. Many times, however, orders are issued by fax so that an in-person meeting with the plaintiff is not always possible.

PROTOCOL 5-15

After initial review of the petition, if the judge believes the petition should be denied for any reason, the judge **shall** have contact with the plaintiff in person or by telephone before making a decision.

COMMENT

At times the plaintiff does not understand what needs to be included in the petition. Only after having a conversation with the plaintiff should an order be issued denying temporary or final protection.

PROTOCOL 5-16

If no judge is in the building, the case shall be handled as set forth in Protocol 4-3.

PROTOCOL 5-17

Under no circumstances should the victim's address and telephone number be part of the public record, except by order of the court for good cause shown. Access to this information shall be provided to the appropriate law enforcement agency. The victim shall be notified that this information will be released to the applicable law enforcement agency.

C. PROOF REQUIRED

PROTOCOL 5-18

If, based upon a review of the allegations in the petition and, if needed, discussion with the plaintiff, the court is satisfied that it has jurisdiction and that credible facts amounting to abuse, as defined by the statute, have been alleged, and that there is an immediate and present danger of abuse, the court shall issue such temporary orders as it deems necessary to protect the plaintiff.

COMMENT

It is widely accepted that an act or acts of abuse of recent occurrence in combination with other behavior or circumstances, including such events as the defendant's release from incarceration, may be sufficient to demonstrate a showing of "immediate and present danger of abuse" to meet the statutory requisite for the issuance of an *ex parte* order.

PROTOCOL 5-19

If the court finds that abuse has been alleged but that the facts do not support a finding of an immediate and present danger of abuse, the Court may simply schedule the matter for final hearing, with notice to the defendant, without issuing temporary orders.

NOTE: Such a course of action can lead to a potentially volatile situation. The victim may be placed in danger if the petition was filed without the knowledge of the defendant, and the defendant is served with notice of a hearing. The court should discuss the situation with the plaintiff to ascertain that a viable safety plan is in place. A referral to a shelter may be necessary.

PROTOCOL 5-20

In the rare instance where a judge has not issued temporary orders, but has scheduled the matter for final hearing, such that the defendant will be served but no temporary orders are in effect for the plaintiff's protection, the staff shall explain to the plaintiff that the petition may be withdrawn without prejudice. In such case, the pleadings shall not be served and any orders issued shall be vacated and the case immediately closed.

PROTOCOL 5-21

If, upon review of the plaintiff's petition, the court denies relief and dismisses the case, no pleadings shall be sent or served upon the defendant. The case shall be closed forthwith.

D. ORDERS AVAILABLE

PROTOCOL 5-22

RSA 173-B:4 sets out the temporary protective orders and other relief that the court may consider once the appropriate findings have been made. Note that the list of orders is non-inclusive. The judge can include appropriate orders as required by the circumstances of the case and add orders not printed on the form. The following are the orders delineated in the statute.

- a. The court may restrain the defendant from abusing the plaintiff.
- b. The court may restrain the defendant from entering the premises and curtilage where the plaintiff resides, except when the defendant is accompanied by a peace officer and upon reasonable notice to the plaintiff, is allowed entry by the plaintiff for the sole purpose of retrieving toiletries, medication, clothing, business equipment, and any other items as determined by the court.
- c. The court may restrain the defendant from withholding items of the plaintiff's personal property that are specified in the order. A peace officer shall accompany the plaintiff in retrieving such property to protect the plaintiff.

COMMENT

The court should inform the plaintiff that if the defendant seeks to take possession of personal property which plaintiff feels is the plaintiff's, the property should be left in possession of the plaintiff and a written request made to the court to decide the issue.

- a. The court may award custody of minor children to either party, or, upon notice, to the Division for Children, Youth and Families when in the best interest of the child(ren). Custody shall not be given to the Division for Children, Youth and Families (DCYF) unless the Division is given an opportunity to consult with the court and written findings are made that:
 - i. The child's health or life is in imminent danger if immediate action is not taken, and the protective order would not correct the situation; and
 - ii. There is no parent, relative or friend capable of providing care for the child.
- b. When findings sufficient to form the basis for the issuance of an *ex parte* order are made, custody of the children should generally be given to the plaintiff except in extraordinary circumstances. If custody is given to the defendant, the court shall state its reasons for doing so in writing.
- c. The presumption in favor of joint rights and responsibilities found in RSA 461-A does not apply in domestic violence cases.

COMMENT

In many domestic violence cases, there are pending divorce or parenting cases. If the latter are in a different court, the court should advise the plaintiff that it may be appropriate to seek modification of the parenting orders. The court should advise the plaintiff that a petition should be made to the appropriate court for modification of existing orders. This procedure should be started while the temporary orders are in place to provide some protection for the plaintiff and the children. In non-family division counties, Fichtner v. Pittsley, 146 NH 512 (2001), further suggests that in such cases the district court should consider transfer to the superior court.

- a. If appropriate, the court may provide for visitation with the children. If the plaintiff feels threatened by this contact, the court should discuss with the plaintiff the possibility of establishing a location, safe for the plaintiff, for the transfer of the children, for purposes of visitation with the defendant. Consideration should be given by the court as to whether it may be appropriate to prohibit visitation, pending the final hearing.
- b. The court may deny the defendant visitation, order that visitation be supervised, or order a specific visitation schedule. Visitation shall only be ordered on an *ex parte* basis where such order can be entered consistent with the following requirements. In determining whether visitation can be safely ordered, the court shall consider the following factors:
 - (i) the degree to which visitation exposes the plaintiff or the children to physical or psychological harm;
 - (ii) whether the risk of physical or psychological harm can be removed by ordering supervised visitation; and
 - (iii) whether visitation can be ordered without requiring the plaintiff and defendant to have contact regarding the exchange with the children.
- c. The court may restrain the defendant from contacting the plaintiff or entering the plaintiff's place of employment, school, or any specified place frequented regularly by the plaintiff or by any family or household member.
- d. If the court issues a "no contact" order, the plaintiff should be informed that any contact by the defendant with the plaintiff shall constitute a violation of this restraining order and may subject the defendant to criminal prosecution.

NOTE: See Part E. below regarding permissible contact.

- a. The court may restrain the defendant from abusing the plaintiff, plaintiff's relatives, regardless of their place of residence, or plaintiff's household members in any way.
- b. The court may restrain the defendant from taking, converting or damaging property in which the plaintiff may have a legal or equitable interest.
- c. The court should inquire of the plaintiff whether the defendant possesses, controls or owns any firearms, ammunition or other deadly weapons. If the plaintiff answers the court's inquiry in the affirmative, the court should, in its discretion, order relinquishment of the weapons to a peace officer. (See Chapter 14 – Firearms and Other Deadly Weapons)

COMMENT

The plaintiff should make a list of firearms, ammunition and deadly weapons, if possible. The Defendant Information Sheet for Law Enforcement should be filled out and passed on to the appropriate law enforcement department.

- d. The court may direct the defendant to relinquish to a peace officer any and all firearms, ammunition and deadly weapons in the control, ownership and possession of the defendant, or any other person on behalf of the defendant, for the duration of the protective order. (RSA 173-B:4, I and 173-B:4, I(a)(9).)
- e. The court may also order the defendant to surrender any hunting licenses or concealed weapons permits. If this is ordered, staff will need to notify Fish and Game by faxing a copy of the protective order.
- f. The court may prohibit the defendant from purchasing, receiving or possessing any deadly weapons, firearms and ammunition for the duration of the order. (RSA 173-B:4, II)

- g. The judge should specifically ask the plaintiff whether there are any additional orders required. The judge should check the appropriate order lines.
- h. Other relief may include, but is not limited to:
 - (i) Awarding to the plaintiff the temporary exclusive use of an automobile. (RSA 173-B:4, I(b)(1)).
 - (ii) The judge should make an order with respect to the temporary exclusive use and possession of the parties' home and household furniture, if the defendant has the legal duty to support the plaintiff or the plaintiff's minor children, or the plaintiff has contributed to the household expenses. The court shall consider the type and amount of the contribution to be a factor. (RSA 173-B:4, I(b)(1)).
 - (iii) The judge may restrain the defendant from taking any action which would lead to the disconnection of any and all utilities and services to the parties' household, or the discontinuance of existing business or service contracts, including, but not limited to, mortgage or rental agreements.

E. PERMISSIBLE CONTACT

INTRODUCTION

RSA 173-B:5-a was adopted by the New Hampshire legislature in 2006 to authorize certain forms of legitimate and necessary contact between the parties or their representatives, under limited and controlled circumstances, designed to maintain safety for the plaintiff. This statute is an exception to the general rule barring contact between a defendant, or one acting on the defendant's behalf, with the plaintiff.

PROTOCOL 5-23

An attorney or any person acting on the attorney's behalf who is representing the defendant in either a domestic violence case or in any criminal proceeding concerning the abuse alleged under RSA 173-B shall not be prohibited from contacting the plaintiff for a legitimate purpose within the scope of the civil or criminal proceeding; provided, that the attorney or person acting on behalf of the attorney: identifies himself or herself as a representative of the defendant; acknowledges the existence of the protective order and informs the plaintiff that he or she has no obligation to speak; terminates contact with the plaintiff if the plaintiff expresses an unwillingness to talk; and ensures that any personal contact with the plaintiff occur outside of the defendant's presence, unless the court has modified the protective order to permit such contact.

PROTOCOL 5-24

A no contact provision in a temporary order issued pursuant to RSA 173-B:4 shall not be construed to (a) prevent contact between counsel for represented parties; (b) prevent a party from appearing at a scheduled court or administrative hearing; or (c) prevent a defendant or defendant's counsel from sending the plaintiff copies of any legal pleadings filed in court relating to the domestic violence petition or related civil or criminal matters.

F. INSTRUCTIONS TO PLAINTIFF FOR FINAL HEARING

PROTOCOL 5-25

In every case, staff must:

- a. Give the plaintiff a certified copy of the petition with attachments, and a certified copy of the temporary order;
- b. Inform the plaintiff of the defendant's right to request an expedited hearing (within 3-5 business days of the court's receipt of the request);

- c. Explain that the defendant has the right to be present at the final hearing and may be represented by an attorney;
- d. Obtain satisfactory information from the plaintiff for contact in the event a request is made for an expedited hearing; and,
- e. Review the temporary order with the plaintiff and make certain the plaintiff understands the need to return to court for a final hearing (the hearing date on the order should be specifically shown to the plaintiff);

COMMENT

The plaintiff should be instructed to return to court on the final hearing date, and to keep the court apprised of a current address and phone number, even if the defendant has not been served so that new temporary orders may be issued with a new court date. If a request for an expedited hearing is received, the court shall notify the plaintiff of the hearing by telephone and by written mailed notice.

- f. Make available the phone number of the local crisis center and the opportunity to have a court advocate present during the final hearing;

COMMENT

Courts routinely should advise plaintiffs of the high risk of violence when the defendant is served with the temporary restraining order and that the plaintiffs must act with an increased sense of awareness regarding their own safety. Furthermore, courts should advise and refer plaintiffs to local crisis centers (if an advocate is not already present) for safety planning. Victims may assume that obtaining a restraining order will automatically provide greater safety, when, in reality, a victim may be faced with greater danger at the time of obtaining an order.

- g. Explain to the plaintiff that he/she should be prepared to present evidence, including witnesses, supporting the allegations of domestic violence at that time. The plaintiff may also hire an attorney, if desired;
- h. Explain to the plaintiff that s/he should bring in evidence of any damages as provided in Protocol 7-29 on compensatory damages.

COMMENT

This will enable a plaintiff to be more prepared at the hearing and possibly avoid further hearings or motions on the issue of damages.

- i. Provide the plaintiff with a copy of the Address Confidentiality Program brochure published by the NH Department of Justice.

G. SCHEDULING A FINAL HEARING

INTRODUCTION

RSA 173-B:3, VII provides that the final hearing is to be held **within 30 days** of the filing of the petition or **within 10 days** of service of process on the defendant, whichever occurs later. Effective January 1, 2008, RSA 173-B:3, VII allows this time limit to be extended for 10 days upon motion, for good cause shown. Recusals, acts of God, or closing of the court that interfere with scheduling shall not be cause for dismissal of the petition. Any rescheduling must be in an expeditious manner. (Chapter 284, HB 707)

PROTOCOL 5-26

Staff shall assign a case number and a PNO number to the case, select a hearing date for the final hearing (which must be held **within 30 calendar days**) and enter the data into ODYSSEY (or SUSTAIN). If the case is to be transferred to another court, staff shall obtain a hearing date from the transferee-court. Staff should ensure that the victim's telephone number is in the file in court records in the event the court needs to make contact with the plaintiff.

PROTOCOL 5-27

Unless an expedited hearing request is made, final hearings should be scheduled near the end of the 30-calendar-day period.

COMMENT

Scheduling of domestic violence cases takes priority over other cases without statutory or other time limitations.

PROTOCOL 5-28

A defendant may request an expedited hearing. If so, pursuant to RSA 173-B:4, I, such a hearing shall be held **no less than three (3) nor more than five (5) business days** after a written request is received by the court from the defendant in response to temporary orders issued *ex parte*. This hearing may, in the discretion of the court, constitute the final hearing in the case.

COMMENT

These timeframes are to be strictly interpreted, regardless of the court's schedule. Timeframes for scheduling expedited hearings should be computed according to Family Division rule 1.13. Pursuant to those rules, the day the petition is filed shall not be included. Likewise, the day the written request from the defendant is received by the court shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period shall extend until the end of the next day that is not a Saturday, Sunday, or legal holiday, as specified in RSA 288, as amended.

PROTOCOL 5-29

If a continuance of the final hearing is granted, the case should be expeditiously rescheduled, but in all cases, **within 10 days** upon motion for good cause shown. The temporary order should be extended until disposition of the final order.

PROTOCOL 5-30

The clerk should advise the plaintiff that if s/he wishes to request an attorney, the plaintiff should contact the local crisis center that will then contact a DOVE attorney.

COMMENT

The NH Bar Association sponsors the DOVE program, providing free legal services for victims of domestic violence at final hearings if victims are unable to afford counsel. "DOVE" is an acronym for Domestic Violence Emergency Program (**DO**mestic **V**iolence **E**mergency program).

