

STATE OF NEW HAMPSHIRE

PROBATE COURT

PROCEDURE BULLETIN 28

Civil Actions under RSA 547:3

This procedure bulletin is prepared for informational purposes in processing case files. It is not intended to provide parties with legal advice.

Pursuant to RSA 547:3, the probate court has jurisdiction to decide civil cases (e.g. collections, torts, contract actions, suits on bond, small claims, landlord-tenant action) when an estate, trust, conservatorship or guardianship (adult or minor) is the plaintiff or the defendant. This jurisdiction is concurrent with district court or superior court. However, if either party requests a jury trial or if a statute or regulation provides for review by superior court, then probate court does not have jurisdiction.

In general, a new case will be opened when an action is filed in which one of the parties is not a party to the underlying case (estate, trust, guardianship or conservatorship).

These cases may come in the form of a small claim, a civil writ case (including a writ of replevin), or a landlord tenant case. Each case will have its own case number and the appropriate filing fee and forms associated with these case types.

Some of these cases, not small claim, civil writ or landlord tenant (e.g. petition for declaratory judgment), will be processed in accordance with the court procedures for equity cases. The filing fees for these cases will be the same as the filing fees for equity cases.

There may be petitions, motions, or bills filed that will not require notice to other parties and may not require a hearing (e.g. petition for settlement on behalf of minor). These may be processed as if filed as a petition or motion in the underlying case and no separate case will be opened and no additional fee will be charged.

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A. SMALL CLAIM ACTION (RSA 503)

Filing the Claim

Plaintiff shall file the Small Claim Complaint form along with the filing fee. The filing fee is waived for state agencies. A claim may list more than one defendant if it is for the same cause of action; an address must be provided for each defendant.

If the defendant is an individual, an Affidavit as to Military Service must be filed in case the defendant defaults. You may enter the claim without it; however, it must be filed before a default judgment can be entered.

If the defendant is a business, the name of a corporate officer or registered agent who can be responsible for accepting court paperwork for the business must be indicated in the defendant space. The plaintiff can obtain this information from the NH Secretary of State's Office (603-271-3246) or on their website at www.sos.nh.us. An Affidavit as to Military Service is NOT filed if a business is being sued.

Choose a return date (at least 30 days out) in accordance with your court scheduling preferences. Enter that date on the complaint form. Set up case file with a new case number (add the case number to the complaint form) and enter in case management system.

Send an attested copy of the Small Claim Complaint to the defendant by First Class Mail.

If there is more than one defendant, such as a husband and a wife who are being sued, each MUST receive their own copy of the complaint, even if it is going to the same address. Mail an attested copy to each defendant.

Mail a copy directly to the plaintiff, or to the plaintiff's attorney, if he/she has one.

Court staff should send a copy of the Small Claim Complaint to all parties and interested persons in the underlying case (estate, trust, guardianship or conservatorship). They are not automatically parties to this new case, but may wish to enter an Appearance. Include the Notice of Civil Action Filed when sending the copy to interested persons in the underlying case.

Failure of the Defendant to Respond – Mail Returned to Court

The court needs proof that the defendant has actually received the Small Claim Complaint before hearing the case. If the post office cannot deliver the complaint, the plaintiff has the option of (1) providing a new address for the defendant, (2) requesting personal service on the defendant or (3) deciding not to proceed at this time.

The post office will return the undelivered mail to the court. The court must notify the plaintiff or the plaintiff's attorney that the mail has been returned, by sending the Notice of Small Claim Returned form. Plaintiff has 60 days to respond to the court telling the court how he/she wishes to proceed, selecting from one of the following options:

Request for Second Mail Service

A plaintiff may find an alternative address for the defendant. This may be a new address or a work address. If the plaintiff would like to have the mail sent to the new address, he/she will check off the appropriate box on the Notice of Small Claim Returned and mail it to the court. The court will then prepare the complaint for a second mailing.

NOTE: The second mailing can be done either by amending the return date and date mailed on the defendant's copy of the complaint, or by photocopying the court copy and amending the dates. If sending out a photocopy of the court copy, be sure to include all pages. You cannot attempt a second mail service at the same address previously attempted.

Request for Personal Service

If the first attempt at mailing the claim to the defendant is unsuccessful, plaintiff may request to have the claim served by a sheriff. The plaintiff will then return the Notice of Small Claim Returned form with the appropriate box checked asking for personal service and providing an address for service.

Prepare documents for service by sheriff. When amending the return date, allow six to eight weeks to give law enforcement ample time to serve the claim. Attach a Return of Service form to the sheriff's copy. Send the documents to plaintiff or plaintiff's attorney along with Notice to Plaintiff Regarding Service on the Defendant. It is the plaintiff's responsibility to get the documents to the sheriff for service and to file the Return of Service form at the court.

Request Not to Proceed

The plaintiff can also check the box on the Notice of Small Claim Returned marked "I do not wish to proceed at this time" and return it to the court. This keeps the claim open for two years, allowing the plaintiff to continue searching for a new address for the defendant without risking that the claim will be dismissed for lack of action.

NOTE: Add a time standard two years out from the date of filing. At any time during the two-year period, the plaintiff can request action. At the end of the two years, if there has been no response from the plaintiff, the claim should be dismissed.

Failure of the Defendant to Respond – Mail NOT Returned to Court

If the post office does not return the mail but the defendant does not respond to court, there is no proof that the defendant received a copy of the complaint.

If the defendant does not respond in writing by the return date and the mail has not been returned to the court, assign a new return date and prepare documents for service by sheriff and mail this to the plaintiff. It is the plaintiff's responsibility to get the paperwork to the sheriff for service. Also send Notice to Plaintiff Regarding Service on the Defendant.

Dismissal of Claim

If there is no further request to proceed on a case, it may be dismissed. The court may also dismiss the case if the plaintiff fails to file a response to the Notice of Small Claim Returned in the time frame set by the court. Dismissal can also occur if the plaintiff fails to file the Return of Service form within the time frame set by the court.

Default Judgment

Default occurs when there is proof of service and a defendant fails to respond to the court within seven days of the return date. Prepare a Civil Order for the judge to sign and schedule as a routine matter.

Before issuing default judgment, be sure that the mail has been processed, and that the proof of service and Affidavit as to Military Service have been filed. Court staff sends all parties a copy of the Civil Order.

Note: See section on Judgment (below) for instructions on how to prepare Civil Order.

Confession of Judgment

A defendant may write to the court and admit that he or she owes the money as stated in the Small Claim Complaint form (i.e. confession of judgment). Prepare a Civil Order for judge to sign and schedule as a routine matter.

Defendant's Response and Scheduling a Hearing

If the defendant disputes that he or she owes the plaintiff the money as stated in the Small Claim Complaint, he or she must respond to the court in one of three ways:

- Defendant may complete the second page of the complaint form requesting a hearing or
- File an Appearance form (pro se or by an attorney) with the court within seven days of the return date or

- Submit a written request for a hearing. If the written request for hearing (e.g. by letter or other form) states details of the case or requests other relief, then court staff should review to see if it was sent to the plaintiff. Unless it clearly states that plaintiff was sent a copy, then court staff should send a copy of the response to the plaintiff or plaintiff's attorney.
- Probate court rule 21 does not apply to filing the response or appearance.

If the defendant responds to the small claim complaint in any of the ways listed above, the case shall be scheduled for a hearing shortly thereafter or as the court calendar permits. Both parties shall be notified by mail of the date and time of the hearing at least 14 days in advance of the hearing.

The hearing may be scheduled no sooner than 14 days from the receipt of the defendant's response.

Counterclaims

The defendant may file a counterclaim against the plaintiff if filed within 30 days of the return date indicated on the original claim. There is a filing fee (see Rule 169).

NOTE: A timely response or appearance form must be filed even though defendant has an additional 30 days to file a counterclaim.

The counterclaim must specify the nature of the claim and the amount of money sought by the defendant. The counterclaim can be written on a blank sheet of paper or by using a Petition/Motion form with "counterclaim" written across the top, along with the case name and case number. The defendant must send a copy to the plaintiff or plaintiff's attorney. **Do not give the counterclaim a new case number.**

Probate court rule 21 applies to counterclaims, motions and all pleadings except the original claim and the response of defendant (or appearance).

If the defendant wants to file a counterclaim but fails to do so within thirty days following the return date, he or she must file a new claim and pay the filing fee (he or she can then file a motion to consolidate). In this case, a new case number is assigned. Even if the counterclaim was filed as a separate action, it is advisable to wait to schedule the original claim until you have an appearance on the defendant's claim. Court staff can then schedule both matters for the same day.

Judgments

After the Hearing on the Merits, the judge will render a decision.

If a party fails to appear at the hearing, judgment will be rendered in favor of the party who did appear.

The total amount of the judgment will include the amount determined by the judge plus costs and interest. In a default judgment, the judgment is entered for the total amount requested on the small claim complaint plus costs and interest.

Use Civil Order form entering information in the appropriate spaces.

To determine the costs associated with the case, refer to the Taxation of Costs form, if the plaintiff has filed one. In most cases, however, court staff will determine costs from information in the file. Costs include the filing fee paid and any sheriff's fees for service.

Calculate the interest using the CE Judgment Calculator found on the Probate Court Applications Menu. This calculator will compute the amount of interest to be included in the judgment after entering the filing date for the claim, the date of judgment, and the amount of judgment. This is a very helpful tool because the interest rate is set by the legislature and changes annually.

Enter the Civil Order in the case management system. **Make a copy of the Civil Order and place it in the underlying case (estate, trust, guardianship, conservatorship).** Close the case. However, it is possible that the debt will not be paid until prior to filing the final account or the judge may order some other time as.

A decision on the merits should be issued within 60 days following the hearing and submission of briefs or memoranda, if any.

Agreements

In some cases, the parties may come to mutually agreeable terms that eliminate the need for a hearing. Either the plaintiff will notify the court in writing that he or she no longer wants to proceed on the case, or the parties will submit an agreement for approval. By getting a judge's signature on the agreement, it has the same force and effect as a court order. Close the case.

Request for Jury Trial/Transfer to Superior Court

The defendant may also request to have the case transferred to superior court for a trial by jury. This can only be done if the amount of the claim is \$1500 or more. The defendant must request a jury trial in writing within five (5) business days of the date the defendant is required to respond. The defendant must pay the small claim transfer fee. Upon receipt of this transfer request and fee, the probate court shall make a copy of the

file and send the original file to the receiving superior court. A transfer letter should accompany the original case file, indicating the defendant's request for trial by jury.

PROCESS FOR POST-JUDGMENT COLLECTION

After judgment is issued and the case is closed, it is possible that the defendant does not pay the judgment as ordered. The plaintiff can come back to court for an order that the defendant pay in installments.

Motion for Periodic Payments

If the judge orders payment in favor of one party, the other party is allowed thirty days in which to pay (unless the court has ordered that the debt will be paid prior to the final account or at some other time). On the thirty-first day, the plaintiff may file a Motion for Periodic Payments with the filing fee. This filing fee may be added to the amount they are looking to recover from the defendant. Plaintiff must mail a copy of the Motion for Periodic Payments to defendant and certify pursuant to Rule 21. Enter this document in the case management system and reopen the case.

Scheduling a Hearing on Motion for Periodic Payments

Ten days after the filing of the Motion for Periodic Payments, court staff should schedule the case for a hearing. Prepare hearing notice.

If the defendant responds to the Motion for Periodic Payments within the ten days, then there is no need for service on the defendant and the hearing may be scheduled at any time.

If the defendant does not respond to the Motion for Periodic Payments within ten days, schedule the hearing six to eight weeks out, to allow time for service on the defendant.

Prepare the documents for service and mail them to the plaintiff with Notice to Plaintiff Regarding Service on the Defendant for service either by certified mail (with restricted delivery and return receipt) or by service by the sheriff.

It is the plaintiff's responsibility to get the documents to the post office or to the sheriff for service and to file the Return of Service form at the court. The court must have the proof of service on file for any action to be taken if the defendant fails to appear.

Before the hearing, court staff should prepare an Order for Payments. The Order for Payments will include balance due from prior judgment, filing fee for Motion for Periodic Payments, and service fee (certified mail or sheriff's fee). See Taxation of Costs if the plaintiff filed one. Otherwise find the information on costs and fees in the file.

Hearing on Motion for Periodic Payments

On the day of the hearing, if the defendant appears, he or she should be given a Financial Affidavit of Assets and Liabilities form to fill out prior to seeing the judge. If the plaintiff is at the hearing (they are not required to be), he or she has the right to review the defendant's completed affidavit.

Payment is made to the plaintiff directly; the court does not accept payments. After hearing from the parties, the judge will review and sign the Order for Payments prepared by the court staff. The defendant must sign this before he or she leaves the courtroom. Parties will then be given their copy of the order. In some cases, the judge may make the determination that the defendant has no present ability to pay and that the matter should be reviewed after a certain time period, usually three to six months.

After the hearing, process all documents in case management system. If a further review hearing date has been determined at this time, enter that information and process accordingly. If there is no further review date set, close the case.

Failure to Make Periodic Payments as Ordered

As long as the defendant makes payments as ordered, there is no need for the parties to reappear in court. If, however, the defendant fails to make the ordered payments, the plaintiff may notify the court in writing using a Petition/Motion form.

The court will then issue an Order to Show Cause and the matter will be scheduled for a contempt/show cause hearing. The motion/petition may be filed at any time after the defendant has failed to follow the court order. There is no filing fee for this motion/petition.

Prepare documents for service and mail them to the plaintiff. Attach a Return of Service form to the sheriff's copy. Send the documents to plaintiff or plaintiff's attorney along with Notice to Plaintiff Regarding Service on the Defendant. It is the plaintiff's responsibility to get the documents to the sheriff for service and to file the Return of Service form at the court.

Order of Arrest

If the defendant fails to appear at the show cause hearing, or if he or she fails to comply with the court order for payments, the judge can issue an Order of Arrest for Violation of Court Order. This can only be done if there is proof of service in the file. Court staff can prepare the Order of Arrest for Violation of Court Order. The judge may set the amount of bail and whether it is cash or personal recognizance. Make the appropriate copies and send to sheriff.

Court staff sends the Order of Arrest to the sheriff's department in the county where the defendant resides. Be sure to include defendant's date of birth.

The court will receive the sheriff's copy of the Order of Arrest when the defendant is arrested. Each court will need to determine the procedures with the applicable county sheriff's department. See also Procedure Bulletin 26.

Writ of Execution

A Writ of Execution is more frequently requested in civil cases than on small claims, but sometimes an attorney will request one. A Writ of Execution can be issued on the thirty-first day after judgment and simply needs to be prepared to reflect the judgment information from the Civil Order. Add the court seal. There is a filing fee. Writs of Execution are governed by RSA 527:6.

Make a copy of the writ to retain for the file and send the requesting attorney or plaintiff the original, which he or she then brings to the sheriff for service. The Writ of Execution is good for ninety days from date of issuance. After the sheriff serves the writ, it should be returned to the court with a Return of Service indicating whether or not the debt was satisfied.

Attachments – the small claim process was amended (effective September 5, 2008) to allow attachments – both pre judgment and post judgment. Probate courts will follow procedures similar to those of district court if plaintiff seeks an attachment. Pre-judgment attachment is governed by RSA 511-A. Post judgment attachment for small claims is governed by RSA 503:12.

Certificate of Judgment/ Exemplification of Judgment

If a plaintiff intends to register a judgment in another state he or she may request a Certificate of Judgment or Exemplification of Judgment.

There is a fee for the Certificate of Judgment, which is signed by the register or deputy register, verifying that the Court issued a judgment.

There is a fee for the Exemplification of Judgment, which includes a Certificate of Judgment (see above) and the Certificate of Judge and Register form. A copy of the file is attached to the exemplification of judgment.

Notice of Bankruptcy

If a defendant in a small claim action files bankruptcy, all action in the probate court must be stayed pending the decision of the bankruptcy court. The defendant or his/her attorney should file a notification of the bankruptcy filing and the attached schedule, which lists creditors.

Court staff should prepare an order indicating the case is stayed due to bankruptcy. After the judge signs the order, send to all parties.

If the court has been advised of a bankruptcy, but there is no proof of the bankruptcy filing or creditor list, send an order to the defendant stating that proof of bankruptcy filing and creditor list must be submitted for the court to stay the small claim action. Send copies to all parties.

The notice of bankruptcy should be entered and the case should be closed pending further notification from the bankruptcy court.

B. WRIT OF SUMMONS

Obtaining a Writ

A writ is a legal document issued by the court serving notice to an opposing party that a lawsuit is commenced. A New Hampshire attorney or a representative from their office may obtain blank Writ of Summons forms from the probate court by purchasing writs for \$1.00 each; there is no limit to how many writs may be purchased by an attorney. The Register will sign the writ and add the court seal before the writs are issued.

In the case of a pro se plaintiff (self represented person), the plaintiff must come to the court to obtain a writ, and pay the \$1.00 fee. The names of the plaintiff and defendant are written on the writ and the Register signs the writ and adds the court seal before it is issued to the pro se plaintiff.

NOTE: The fee for writs would be entered under "other fees" in the case management system. No case is opened at this time.

Filing a Writ

The plaintiff must complete the writ prior to filing it with the court. Plaintiff or plaintiff's attorney chooses a Return Date (first Tuesday of a month) and must serve the defendant no later than fourteen days before the Return Date. The court does NOT choose the return date under any circumstances.

See Probate Court Rule 169 for the filing fee amount.

Writs may be filed with the court prior to service on the defendant, or after. If the writ has not been served, the original writ must be returned to the plaintiff or plaintiff's attorney for service after docketing the case and processing the filing fee.

If an attachment is sought, plaintiff will file a Writ of Summons and a separate petition to attach (See Procedure Bulletin 27).

Court staff should send a copy of the writ to all parties and interested persons in the underlying case (estate, trust, guardianship or conservatorship). They are not automatically parties to this new case, but may wish to enter an Appearance. Include the Notice of Civil Action Filed when sending the copy to interested persons in the underlying case.

Notice of Default

Default occurs when a defendant fails to file an appearance with the court within seven days after the return date. Court staff should send Notice of Default-Civil Action after that time. Before issuing the notice of default check that the mail has been processed, so that any appearance, agreement, or other paperwork that could affect a judgment has been matched up with the case file before a default is issued.

At the time of the default, check to see if there was a Petition to Attach (with notice) filed with the Writ of Summons that needs to be reviewed by a judge. If the judge grants the attachment, the notice of the attachment should be sent with the notice of default.

Final Default Judgment

If plaintiff has filed a motion for default judgment and appropriate documents (i.e. affidavit of damages, taxation of costs, affidavit as to military service (if an individual)), the court may issue a final default judgment. Or, the court, in its discretion, may allow a hearing on the final default judgment.

If final default judgment is entered based on the filings alone, the court must calculate the amount of the judgment. Judgment includes the total of: (1) the amount determined by the judge (2) costs and (3) interest.

Plaintiff or plaintiff's attorney should file an itemized Taxation of Costs. No costs should be included in any case except the court filing fees, fees for the service of process and witness fees, unless the defendant agreed in writing to pay other costs.

In order to calculate interest, use the CE Judgment Calculator found off the Start menu under the Probate Court Menu, then the Probate Court Applications Menu. This calculator will tell you the amount of interest to include in the judgment after entering the filing date for the writ, the date of judgment, and the amount of judgment. This is a very helpful tool, as the interest rate is set by the legislature and changes annually.

Prepare a Civil Order and schedule as a routine matter for the judge to sign. Send the Civil Order to all parties in the case.

Close the case. Make a copy of the Order and place it in file of the underlying case (estate, trust, guardianship, conservatorship).

Appearance

If the defendant disputes that he or she owes the plaintiff the damages or relief sought in the writ of summons, an Appearance must be filed with the court within 7 days after the return date. An attorney or a pro se defendant may file the appearance.

Schedule the matter for a structuring conference no sooner than 30 days after the Return Date with notice to all parties.

If a Petition to Attach was filed, the defendant must also file their objection to the attachment in writing by the Return Date. Parties must comply with Rule 21. Schedule a hearing on the petition to attach for the same date as the structuring conference.

Motion for Summary Judgment

Either party can file a Motion for Summary Judgment at any time after the defendant's appearance is filed. The motion must provide the opposing party with notice of the obligation to file an objection and supporting affidavit within 30 days. See Probate Court Rule 58-A.

Note: This can be scheduled as a routine matter. In the discretion of the judge, the motion may be scheduled for a hearing.

If the Motion for Summary Judgment is granted, the final judgment can issue at this time if the Affidavit of Damages, Taxation of Costs, and Affidavit as to Military Service are on file. If they are not, the plaintiff should be advised to submit them, at which time a monetary judgment can be awarded.

Judgments After a Hearing

After the Hearing on the Merits, the judge will render a decision. A decision on the merits in civil matters should be issued within sixty days following the hearing and submission of briefs or memoranda, if any.

After entering the judgment, close the case. Make a copy of the Order and place it in the file of the underlying case (estate, trust, guardianship, conservatorship).

If a hearing is scheduled and neither party appears for the hearing and they have not notified the court, the case is dismissed.

Voluntary Non-Suit

The plaintiff may notify you that he or she no longer wants to proceed on the case; this is often done in the form of a voluntary non-suit (which must be in writing). Have a judge approve this non-suit and send copies to the parties using the case management notice of decision. Close the case.

Agreements

In some cases, the parties may come to mutually agreeable terms that eliminate the need for a hearing. If the register's office is notified orally that a case is settled and a written agreement is not filed, send out Rule 51 notice to parties and attorneys that they have 30 days to file the agreement. The Agreement form may be used.

Parties may file a written agreement for approval by the court or docket markings.

Request for Jury Trial/Transfer to Superior Court

The defendant may request to have the case transferred to superior court for a trial by jury. This can only be done if the amount of the claim is \$1500 or more. The defendant must request a jury trial in writing at the time of filing the appearance. Upon receipt of this request and the transfer fee, the probate court shall make a copy of the file and send the original file to the receiving superior court. A transfer letter should accompany the original case file, indicating the defendant's request for trial by jury.

PROCESS FOR POST-JUDGMENT COLLECTION

After judgment is issued, and the case is closed, it is possible that the defendant does not pay the judgment as ordered. The plaintiff can come back to court for an order that the defendant pay in installments.

Motion for Periodic Payments

If the judge orders payment in favor of one party, the other party is allowed thirty days in which to pay (unless the court has ordered that the debt will be paid at the final account or at some other time). On the thirty-first day, plaintiff or plaintiff's attorney may file a Motion for Periodic Payments with the filing fee. This filing fee may be added to the amount they are looking to recover from the defendant. Plaintiff must mail a copy of the Motion for Periodic Payments to defendant and certify pursuant to Rule 21. Enter this document and reopen the case.

Scheduling a Hearing on Motion for Periodic Payments

Ten days after the filing of the Motion for Periodic Payments, court staff should schedule the case for a hearing.

If the defendant responds to the Motion for Periodic Payments within the ten days, then there is no need for service on the defendant and the hearing may be scheduled at any time.

If the defendant does not respond to the Motion for Periodic Payments within ten days, schedule the hearing six to eight weeks out, to allow time for service on the defendant.

Prepare the documents and mail the packet to the plaintiff with Notice to Plaintiff Regarding Service on the Defendant for service either by certified mail (with restricted delivery and return receipt) or by personal service by the sheriff.

It is the plaintiff's responsibility to get the documents to the post office or to the sheriff for service and to file the Return of Service form at the court. The court must have the proof of service on file for any action to be taken if the defendant fails to appear.

Before the hearing, court staff should prepare an Order for Payments. The Order for Payments will include balance due from prior judgment, filing fee for Motion for Periodic Payments, and service fee (certified mail or sheriff's fee). See Taxation of Costs if the plaintiff filed one. Otherwise find the information on costs and fees in the file.

Hearing on Motion for Periodic Payments

On the day of the hearing, if the defendant appears, he or she should be given a Financial Affidavit of Assets & Liabilities to fill out prior to seeing the judge. If the plaintiff is at the hearing (they are not required to be), he or she has the right to review the defendant's completed affidavit.

Payment is made to the plaintiff directly; the court does not accept payments. After hearing from the parties, the judge will review and sign the Order for Payments prepared by court staff. The defendant must sign this before he or she leaves the courtroom. Parties will then be given their copy of the order. In some cases, the judge may make the determination that the defendant has no present ability to pay and that the matter should be reviewed after a certain time period, usually three to six months.

After the hearing, process all documents in case management system. If a further review hearing date has been determined at this time, enter that information and process accordingly. If there is no further review date set, close the case.

Failure to Make Periodic Payments as Ordered

As long as the defendant makes payments as ordered, there is no need for the parties to reappear in court. If, however, the defendant fails to make the ordered payments, the plaintiff may notify the court in writing using the Affidavit of Non-Compliance form.

The court will then issue an Order to Show Cause and the matter will be scheduled for a contempt/show cause hearing. The petition/motion may be filed at any time after the defendant has failed to follow the court order. There is no filing fee for this petition/motion.

Prepare documents for service by sheriff and mail to the plaintiff. Send the documents to plaintiff or plaintiff's attorney along with Notice to Plaintiff Regarding Service on the Defendant. It is the plaintiff's responsibility to get the documents to the sheriff for service and to file the Return of Service form at the court.

Order of Arrest

If the defendant fails to appear at the show cause hearing, or if he or she fails to comply with the court order for payments, the judge can issue an Order of Arrest for Violation of Court Order. This can only be done if there is proof of service in the file. Court staff can prepare an Order of Arrest for Violation of Court Order. The judge may set the amount of bail and whether it is cash or personal recognizance. Make the appropriate copies and send to sheriff.

Court staff sends the Order of Arrest with the bond form attached to the sheriff's department in the county where the defendant resides. Be sure to include defendant's date of birth.

The court will receive the sheriff's copy of the Order of Arrest when the defendant is arrested. Each court will need to determine the procedures with the applicable county sheriff's department. See also Procedure Bulletin 26.

Writ of Execution

A Writ of Execution can be issued on the thirty-first day after judgment and should be prepared by court staff to reflect the judgment information from the Civil Order. Add the court seal prior to issuing. Writs of Execution are governed by RSA 527:6. There is a filing fee.

Make a copy of the writ to retain for the file and send the requesting attorney or plaintiff the original, which he or she then brings to the sheriff for service. The Writ of Execution is good for ninety days from date of issuance. After the sheriff serves the writ, it should be returned to the court with a Return of Service indicating whether or not the debt was satisfied.

Certificate of Judgment/ Exemplification of Judgment

If a plaintiff intends to register a judgment in another state he or she may request a Certificate of Judgment or Exemplification of Judgment.

There is a fee for the Certificate of Judgment, which is signed by the register, verifying that the Court issued a judgment.

There is a fee for the Exemplification of Judgment and it includes the Certificate of Judgment (see above) and the Certificate of Judge and Register form. A copy of the file is attached to the exemplification of judgment.

Notice of Bankruptcy

If a defendant in a civil action files bankruptcy, all action in the probate court must be stayed pending the decision of the bankruptcy court. The defendant or his/her attorney should file a notification of the bankruptcy filing and the attached schedule, which lists creditors.

Court staff should prepare an order indicating the case is stayed due to bankruptcy. After the judge signs the order, send to all parties.

If the court has been advised of a bankruptcy, but there is no proof of the bankruptcy filing or creditor list, send an order to the defendant stating that proof of bankruptcy filing and creditor list must be submitted for the court to stay the small claim action. Send copies to all parties.

The notice of bankruptcy should be entered and the case should be closed pending further notification from the bankruptcy court.

C. LANDLORD-TENANT ACTION RSA 540

Obtaining a Writ

Before the landlord can begin eviction proceedings in court, the landlord must have served an Eviction Notice and Demand for Rent (if eviction is for non-payment of rent) on the tenant. The landlord may use the Eviction Notice and Demand for Rent on the court's website or use notices he/she creates.

In order to obtain a writ, the landlord must first present an expired Eviction Notice and Demand for Rent (if applicable). Writs may not be purchased until the day after the expiration date on the Eviction Notice. The landlord does not need to file a Demand for Rent if the eviction is for something other than nonpayment of rent.

The cost of the writ is \$1.00. Enter the fee for the writ under "Other Fees" in the case management system. Court staff should fill in the plaintiff's and defendant's names and addresses on the top of the writ as well as county and court. Give the writ to the plaintiff/landlord to complete.

The plaintiff/landlord should fill out the middle section of the writ, which explains to the defendant how to file an appearance with the court and information regarding the relief the landlord is seeking from the court. The landlord should leave the Return Date blank since the sheriff will assign the return date.

If the landlord is seeking damages, advise them that they can only recover \$1500 on a landlord tenant writ. If they want to recover more than that, explain to them how to file a small claim.

Filing a Writ

See Probate Court Rule 169 for filing fee amount.

Assign a case number and write this on the writ. Prepare documents for service by the sheriff and include the court seal. Service can be done either in-hand or by leaving the documents at the residence of the defendant (abode service). Mail the original writ to the landlord for service.

If an Affidavit of Damages is filed, attach a copy to the original writ and the service copy. Some experienced landlords or their attorneys may submit the original writ with multiple copies. If so, simply write the case number on each copy provided. Once the original is marked and copies are made, return them to the landlord with instructions to take them to the sheriff for service.

If the landlord is waiting at the counter for copies, it is advisable to enter documents in the case management system after he or she leaves.

NOTE: Before the hearing, the landlord should file an Affidavit of Damages (if seeking back rent), and an Affidavit as to Military Service (judgment cannot be entered without it).

Court staff should send a copy of the writ to all parties and interested persons in the underlying case (estate, trust, guardianship or conservatorship). They are not automatically parties to this new case, but may wish to enter an Appearance. Include the Notice of Civil Action Filed when sending the copy to interested persons in the underlying case.

Return Date

The sheriff assigns the return date, as they know how quickly they will be able to serve the writ. Since this section was left blank at the time of entry, the court will only know the date given when the plaintiff files the original writ and Return of Service. The plaintiff should file the Return of Service no later than one day after the return day named in the writ, or at the time of the hearing on the merits, whichever is earlier. If the landlord attempts to file the return of service form late, a Motion for Late Entry must be filed with the form.

Failure of the Defendant to Respond

If the defendant does not file an appearance with the court before the return day, the landlord can win a judgment in their favor by default. Court staff shall issue a Notice of Default- Landlord Tenant, which states that the plaintiff may recover possession of the property, costs associated with the entry of the court action, and damages of up to \$1500 (if applicable).

A Writ of Possession form and Notice of Judgment form should be sent to the landlord on the fourth day after the mailing date of the Notice of Default, if the Affidavit as to Military Service is on file. If the Affidavit as to Military Service is not on file, inform the landlord that it must be filed prior to sending the Writ of Possession and Notice of Judgment.

If the Defendant Files an Appearance

If the defendant files an appearance, the case will be scheduled for a Hearing on the Merits within ten (10) days of the date the appearance was filed.

If the defendant files any claim or counterclaim on their appearance, it also must be filed on or before the return date. The appearance and counterclaim (if applicable) must be mailed or delivered to the plaintiff or plaintiff's attorney by the defendant.

Due to the short turnaround between the filing of an appearance and the trial date, it is recommended that the hearing be scheduled while the defendant is present at the

courthouse, so that the defendant receives the Notice of Hearing in hand. This will alleviate any question later on as to whether or not the tenant actually received the notice to appear.

Notice of Judgment and Writ of Possession

If the defendant fails to appear for trial, or if the court determines the plaintiff has sustained his/her burden of proof at the trial, judgment shall be entered in favor of the plaintiff for possession of the property, court costs, and damages of up to \$1500 (if sought). The court will issue a Writ of Possession.

When calculating costs, add the filing fee and the sheriff's service fee. Pay careful attention when calculating these, as often there is more than one defendant and, therefore, more than one Return of Service with a fee attached.

In cases where there was a finding for the plaintiff and where the action is based upon nonpayment of rent, the court should calculate the amount of rent that must be paid into the court on a weekly basis in the event the defendant appeals (see below for Motions/Appeals). This amount is equal to the actual rent converted into a weekly sum. You should be sure this amount is written on the Notice of Judgment prior to either party receiving a copy of it.

In cases that include a claim for unpaid rent, the Notice of Judgment should include a money judgment on the plaintiff's claim and/or defendant's counterclaim. Be aware there are two different Notice of Judgment forms for use in landlord-tenant cases: one is for actions based on non-payment of rent, and the other on actions other than non-payment of rent.

1. If the defendant failed to appear for trial, the Writ of Possession and Notice of Judgment shall be issued on the fourth day after the Notice of Default.
2. If the defendant appeared but the court ruled against them, the Writ of Possession should be issued on the eighth day after the Notice of Judgment was mailed unless the defendant files a Notice of Intent to Appeal within seven days. In that case the Writ of Possession shall not be issued until the expiration of the appeal period set forth in Supreme Court Rule 7, except as otherwise provided in RSA 540:25, I, or following an order from the Supreme Court dismissing the defendant's possessory appeal or deeming the defendant's possessory appeal waived for failure to comply with RSA 540:25, II.

Send the Writ of Possession to the landlord for service by sheriff. After issuing the Writ of Possession, close the case.

Motions/Appeals

Appeals are initiated by filing a Notice of Intent to Appeal within seven days after the Notice of Judgment. If the defendant files a Notice of Intent to Appeal and the basis of the eviction was non-payment of rent, the defendant must pay into the court one week's rent, starting at the time of filing of the Notice of Intent to Appeal. The defendant will continue to make weekly payments on the same day of the week as the Notice of Intent to Appeal was filed, for as long as the appeal is pending, and the money will be held in escrow by the court.

At any time during the appeal, the landlord may file a motion for recovery of the rent money that has been paid into court pursuant to RSA 540:25, I. The court may grant such motion unless the tenant objects and the court rules that the landlord is not lawfully entitled to the full amount of rent. If the court rules that the landlord is not entitled to the full amount of the rent, it shall release such portion of the rent to which the court deems the landlord is lawfully entitled, if any, and make specific findings in support of its decision to deny or partially deny the landlord's motion. The rent money retained by the court shall be apportioned between the landlord and the tenant upon final disposition of the appeal.

All post-trial motions, such as a Motion to Reconsider, should be filed within seven days after the date of the Notice of Judgment. After the seventh day, the Writ of Possession is issued; therefore the motion would be too late, making it moot.

Dismissal of Appeals

If rent is not paid by the weekly due date, the Court should immediately prepare and mail a Notice of Default on Appeal and issue the Writ of Possession to the landlord. The Court shall vacate the appeal and award the plaintiff the rent money that has been paid into the Court. The Probate Court shall notify the Supreme Court of any such action.

If the tenant pays the court the entire amount of rent due prior to the service of the writ by the sheriff, the Writ of Possession shall be recalled and the appeal shall be reinstated.

Dismissal of Writs

If a writ was entered with the Court and the defendant did not file an appearance and the plaintiff did not file the return of service within sixty days after the date of entry, the case may be dismissed upon the Court's own motion.

Agreements

In some cases, the parties may come to mutually agreeable terms that eliminate the need for a hearing. Either the plaintiff may notify the court in writing that he or she no longer wants to proceed on the case, or the parties may submit an agreement for approval. By getting a judge's signature on the agreement, it has the same force and effect as a court order. Close the case.

PROCESS FOR POST-JUDGMENT COLLECTION

After judgment is issued and the case is closed, it is possible that the defendant does not pay the judgment as ordered. The plaintiff can come back to court for an order that the defendant pay in installments.

Motion for Periodic Payments

If the judge orders payment in favor of one party, the other party is allowed thirty days in which to pay (unless the court has ordered that the debt will be paid prior to the final account or at some other time). On the thirty-first day, the plaintiff may file a Motion for Periodic Payments with the filing fee pursuant to Probate Court Rule 169. This filing fee may be added to the amount they are looking to recover from the defendant. Plaintiff must mail a copy of the Motion for Periodic Payments to defendant and certify pursuant to Rule 21.

Enter this document in the case management system and reopen the case.

Scheduling a Hearing on Motion for Periodic Payments

Ten days after the filing of the Motion for Periodic Payments, court staff should schedule the case for a hearing. Prepare hearing notice.

If the defendant responds to the Motion for Periodic Payments within the ten days, then there is no need for service on the defendant and the hearing may be scheduled at any time.

If the defendant does not respond to the Motion for Periodic Payments within ten days, schedule the hearing six to eight weeks out, to allow time for service on the defendant.

Prepare the documents and mail the packet to the plaintiff with Notice to Plaintiff Regarding Service on the Defendant for service either by certified mail (with restricted delivery and return receipt) or by personal service by the sheriff.

It is the plaintiff's responsibility to get the documents to the post office or to the sheriff for service and to file the Return of Service form at the court. The court must have the proof of service on file for any action to be taken if the defendant fails to appear.

Before the hearing, court staff should prepare an Order for Payments form. The Order for Payments will include balance due from prior judgment, filing fee for Motion for Periodic Payments, and service fee (certified mail or sheriff's fee). See Taxation of Costs if the plaintiff filed one. Otherwise find the information on costs and fees in the file.

Hearing on Motion for Periodic Payments

On the day of the hearing, if the defendant appears, he or she should be given a Financial Affidavit of Assets & Liabilities to fill out prior to seeing the judge. If the plaintiff is at the hearing (they are not required to be), he or she has the right to review the defendant's completed affidavit.

Payment is made to the plaintiff directly; the court does not accept payments. After hearing from the parties, the judge will review and sign the Order for Payments prepared by the court staff. The defendant must sign this before he or she leaves the courtroom. Parties will then be given their copy of the order. In some cases, the judge may make the determination that the defendant has no present ability to pay and that the matter should be reviewed after a certain time period, usually three to six months.

After the hearing, process all documents in case management system. If a further review hearing date has been determined at this time, enter that information and process accordingly. If there is no further review date set, close the case.

Failure to Make Periodic Payments as Ordered

As long as the defendant makes payments as ordered, there is no need for the parties to reappear in court. If, however, the defendant fails to make the ordered payments, the plaintiff may notify the court in writing using the Affidavit of Non-Compliance form.

The court will then issue an Order to Show Cause and the matter will be scheduled for a contempt/show cause hearing. The motion/petition may be filed at any time after the defendant has failed to follow the court order. There is no filing fee for this motion/petition.

Prepare a packet to mail to the plaintiff for service. Attach a Return of Service form to the sheriff's copy. Send the documents to plaintiff or plaintiff's attorney along with Notice to Plaintiff Regarding Service on the Defendant. It is the plaintiff's responsibility to get the documents to the sheriff for service and to file the Return of Service form at the court.

Order of Arrest

If the defendant fails to appear at the show cause hearing, or if he or she fails to comply with the court order for payments, the judge can issue an Order of Arrest for Violation of Court Order. This can only be done if there is proof of service in the file. Court staff can prepare an Order of Arrest for Violation of Court Order. The judge may set the amount of bail and whether it is cash or personal recognizance. Make the appropriate copies and send to sheriff.

Court staff sends the Order of Arrest to the sheriff's department in the county where the defendant resides. Be sure to include defendant's date of birth.

The court will receive the sheriff's copy of the Order of Arrest when the defendant is arrested. Each court will need to determine the procedures with the applicable county sheriff's department. See also Procedure Bulletin 26.

Notice of Bankruptcy

If the defendant files bankruptcy, all action in the probate court must be stayed pending the decision of the bankruptcy court. The defendant or his/her attorney should file a notification of the bankruptcy filing and the attached schedule, which lists creditors.

Court staff should prepare an order indicating the case is stayed due to bankruptcy. After the judge signs the order, send to all parties.

If the court has been advised of a bankruptcy, but there is no proof of the bankruptcy filing or creditor list, send an order to the defendant stating that proof of bankruptcy filing and creditor list must be submitted for the court to stay the small claim action. Send copies to all parties.

The notice of bankruptcy should be entered and the case should be closed pending further notification from the bankruptcy court.

D.

Writ of Replevin

What is a Writ of Replevin?

Replevin is a type of civil case. It is defined as a possessory action designed to permit the party entitled to possession of personal property to recover it from the one who has wrongfully taken or detained it.

The petitioner/plaintiff files a complaint or application requesting that the court issue a writ of replevin – an order to the sheriff to seize the property from the person who wrongfully possesses it. The complaint/application can be filed ex parte or with notice. The more common procedure is to file the complaint on an ex parte basis, which allows the property to be seized prior to notice. For more information on the replevin process, refer to RSA 536-A.

Filing the Complaint/Application

As with other civil cases, the probate court only has jurisdiction if there is a related case (estate, trust, conservatorship or guardianship). See Probate Court Rule 169 for the filing fee amount. The plaintiff/petitioner's complaint must be executed under penalties of perjury or verified by oath, and identify the following (pursuant to RSA 536-A:2):

1. That the applicant is the owner of the property or is entitled to possession of the property. The written source of such title or right should be attached.
2. How the defendant came into possession of the item and how and where it is being kept.
3. A description of the item, a statement of its value and its location. The name and address of the defendant or any other person in possession of the item must be included.
4. Whether or not the item is exempt from execution along with the name and address of any known lien holder.

Court staff should send a copy of the Complaint/Application to all parties and interested persons in the underlying case (estate, trust, guardianship or conservatorship). They are not automatically parties to this new case, but may wish to enter an Appearance. Include the Notice of Civil Action Filed when sending the copy to interested persons in the underlying case.

Ex Parte Writ of Replevin

The complaint is filed requesting a writ of replevin without notice to the defendant/respondent. The plaintiff/petitioner may use the Petition/Motion form or submit a complaint on plain paper. The judge reviews the complaint and determines whether all conditions have been met to allow a writ of replevin to be issued on an ex parte basis; plaintiff must show probable cause for any of the following:

1. The defendant gained possession of the property by theft;
2. The property consists of one or more negotiable instruments or credit cards;
3. The property is perishable and will perish before a hearing can be held or is in danger of destruction, serious harm, concealment, removal from the state or of sale to an innocent purchaser and that the holder of the property threatens to destroy, harm, conceal, remove it from the state or sell it to an innocent purchaser.

Before issuing a writ of replevin, the judge sets a bond in an amount twice the value of the property. The plaintiff/petitioner files the bond with the court.

The court staff then prepares the Writ of Replevin, adds the court seal, along with a notice to the defendant/respondent containing a date for the hearing ten (10) to twenty (20) days from date of order and indicating the right to an expedited hearing not less than 48 hours after notice to the plaintiff. Two attested copies of the notice and the complaint should be given to the plaintiff or plaintiff's attorney with the Writ of Replevin for service.

The sheriff seizes the property, serves the paperwork, and files a return of service.

A hearing is held within 10-20 days for final adjudication, OR at the defendant's request, an expedited hearing is held, with no less than 48 hours notice to the plaintiff.

Writ of Replevin with Notice

Notice to Show Cause, Notice of Hearing and Temporary Restraining Order

Upon receipt of the plaintiff/petitioner's complaint/application for a Writ of Replevin with notice, the court shall issue an order to the defendant/respondent to show cause why the property should not be delivered to the plaintiff. The order should indicate the date and time of the preliminary hearing, which is no sooner than ten (10) days nor later than twenty (20) days from the date of the order. It should also specify service must be made on the defendant seven (7) days prior to hearing.

The order should inform the defendant that he or she may file affidavits on his/her behalf and may appear and present testimony on his/her behalf at the time of the show

cause hearing. It should also advise the defendant that if he or she fails to appear at the show cause hearing, the court would issue a writ of replevin.

Finally, the order should have information to notify the defendant that he or she is temporarily restrained from removing the property from the state, or transferring, selling, pledging, assigning, or otherwise altering, damaging, disposing of, or permitting the property to become subject to a security interest or lien, until further order of the court. Service of the orders of notice can be made by personal service or certified mail. Court staff should mail the plaintiff or plaintiff's attorney two attested copies of the complaint/application and the orders of notice for service.

Bond

A writ of replevin should not be issued at any stage of the process until the plaintiff has filed a bond with sufficient sureties in an amount double the value of the item plus an amount necessary to secure any damages that may be incurred by the defendant as a result of the action. The judge makes the determination of the bond amount after the complaint/application is reviewed.

Show Cause Hearing

If both parties appear, a hearing is held on the order to show cause. The court makes a preliminary determination which party is entitled to possession pending final adjudication. If the defendant fails to appear at the hearing, a writ of replevin shall be issued.

The plaintiff fills out the body of the writ. The Register must sign the writ and add the court seal before it is issued. The writ is directed to a sheriff, constable, or police officer within whose jurisdiction the property is located. The writ must specifically describe the property to be seized and the location or locations where there is probable cause to believe the property or some part will be found. The writ directs the officer to seize the property if it is found, and to retain in his or her custody.

The officer serves the defendant or his agent a copy of the writ, the complaint and order/hearing notice by personal service, leaving the documents at the abode, or delivering in hand. If personal service cannot be accomplished then the documents can be mailed to the last known address. The officer need not serve the writ before the property is seized. The officer shall deliver the property to the party entitled to it after the expiration of the time for filing of a "written undertaking". The officer should return the writ of replevin to the court within 20 days after taking the property.

Property Retention ("written undertaking")

Pursuant to RSA 536-A:14, at any time prior to the hearing on show cause or before delivery of the property to the plaintiff, the defendant may petition the court in order to retain possession of the property or to have the property returned. In the statute, this petition is referred to as a "written undertaking".

The court will require that the defendant file securities in an amount at least double the value of the property. The securities may include, but shall not be limited to: bonds, letters of credit, security interests, or cash in a form and amount acceptable to the court. The court may award some or all of this security to the plaintiff/petitioner in a subsequent order for damages incurred.

The defendant must serve the plaintiff or plaintiff's attorney with a copy of the petition (i.e. "written undertaking"), and file proof of service with the court. The defendant should also file notice with the officer or sheriff to prevent delivery of the property to the plaintiff.

If the court grants defendant's petition (or "written undertaking") and allows defendant to retain the property after filing securities, then the show cause hearing shall be cancelled unless plaintiff objects to the "written undertaking" and securities filed with the court. The plaintiff must file the objection within 5 days.

If the show cause hearing is cancelled, court staff schedules the matter for a final hearing.

The defendant must file the "written undertaking" and securities with the court prior to the time that the sheriff or officer has delivered the property to the plaintiff. If the sheriff or officer has already delivered the property to the plaintiff, then the defendant must wait for the show cause hearing to seek return of the property.

Final Adjudication

If the defendant appears at the show cause hearing, the case should be scheduled for a final hearing, at which time either party can be awarded judgment for the return or retention of the property, as well as damages incurred during the replevin process. If needed, follow the instructions above to issue a writ of replevin. Failure by either party to abide by the court's order is grounds for a finding of contempt.

David D. King
Administrative Judge of Probate Court

History:

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