

## CHAPTER 1 – GENERAL PROVISIONS

**STATUTORY REFERENCES:**     **N.H. CONST. pt I, art. 35**  
  **RSA 173-B:3 (Commencement of Proceedings; Hearing)**  
  **RSA 173-B:4 (Temporary Relief)**  
  **RSA 595-A:4 (Affidavit in Support of Application for**  
  **Warrant; Contents and Form)**  
  **RSA 461-A (Parental Rights and Responsibilities)**

### **A.     PURPOSE**

"It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit" (N.H. CONST. pt I, art 35).

### **B.     IMPARTIALITY**

It is the responsibility of every judge to remain unbiased and impartial in the determination of all issues put forth for decision. The assurance of due process is guaranteed by both state and federal constitutions, and the judge's role as guarantor of those rights is immutable. Furthermore, it is imperative that all court personnel (judges, staff and security) treat all petitioners and defendants with respect and dignity.

### **C.     NOTICE OF ALLEGATIONS**

In domestic violence cases, the judge must be careful to insure that the defendant receives adequate notice of the allegations upon which the plaintiff bases the domestic violence petition. Since the vast majority of these cases are brought and defended by self-represented litigants, this responsibility makes it incumbent upon the judge who issues *ex parte* temporary restraining orders, pursuant to RSA 173-B:4, to make certain that the petition's written allegations reflect the facts upon which the *ex parte* order is issued. If, for example, the judge inquired of the plaintiff and received facts which were not included in the original petition and which served as the basis for the judge's preliminary finding, then the judge should be careful to ensure that those facts are reflected in the notice to be given to the defendant.

While it is not the judge's role to "fill in the holes" in the plaintiff's petition, it is an appropriate expectation that a judge will make inquiries to clarify facts, test credibility and assist the plaintiff in applying the proof in an *ex parte* hearing. In conjunction with that expectation, since all courts are courts of record, unless there is an audio or stenographic record of the

proceedings, it is the responsibility of the judge to make note of any additional facts upon which the decision to issue an *ex parte* order is made.

This responsibility is not unlike the addition of judge's notes to a search warrant application when the information originally included on the application is supplemented by oral testimony. (NH RSA 595-A:4) A failure to make such a record and thereby notify the defendant of the new, more complete information relied upon by the judge could result in defective notice to the defendant and amount to a violation of due process.

#### **D. DEFENDANT'S OPPORTUNITY TO BE HEARD**

The opportunity to be heard encompasses not only the timing of the hearing, but the conduct of the hearing itself. It is the trial judge's obligation to ensure that the defendant be given a speedy and complete opportunity to be heard. Domestic violence cases must be scheduled within **30 days** of filing (RSA 173-B:3) or **within no less than three (3) business days nor more than five (5) business days** of a written request for expedited hearing made by the defendant. (RSA 173-B:4) It is court policy that domestic violence cases take priority over other cases without time requirements.

##### *COMMENT*

The expedited hearing may, but does not need to be, the final hearing. (RSA 173-B:4).

#### **E. EVIDENTIARY HEARING**

The other prong of the opportunity to be heard is the conduct of the evidentiary hearing. Domestic violence cases are not bound by the Rules of Evidence. However, the non-application of the Rules of Evidence to these cases is not a carte blanche approval of the parties presenting any information they want the court to hear about their relationship. The judge must carefully consider whether the information the parties seek to introduce is relevant to the allegations made in the petition and to the ultimate question before the court, which is whether the actions complained of took place and whether they constitute abuse within the meaning of RSA 173-B:3, VIII.

#### **F. DISTINCTIONS BETWEEN ORDERS ISSUED UNDER RSA 173-B, AND RSA 458 AND RSA 461-A**

An order issued under RSA 173-B is called a domestic violence protective order. The range of potential plaintiffs is broad (married, divorced, child-in-common, intimate partner, dating relationship, etc.). It can be issued only after a finding of abuse and a finding of credible threat to the plaintiff's safety. It requires that the defendant be served, notified and given the opportunity to be heard (due process). If granted, it is in effect for one year, subject

to renewal by the plaintiff. The order, if qualifying, may be entered into a national database (the National Crime Information Center, or NCIC, Protective Order File) maintained by the FBI, and is enforceable by law enforcement and the courts around the country. The order subjects a defendant, having been found to have committed one or more acts of abuse, to multiple restrictions, including no contact, and no access to or possession of firearms. Sanctions for violations can be significant, particularly if violations of federal law occur. Mutual orders (i.e., orders issued against a plaintiff and defendant when only the plaintiff has sought an order of protection) are prohibited. The court may only consider issuing orders against each party if each files a petition and if each establishes abuse and a credible threat against the other.

An order issued under either RSA 458 or RSA 461-A is limited to parties involved in divorce or parenting proceedings. There is no requirement for a defendant to receive notice or be given an opportunity to be heard, nor is there any requirement that the court make a finding of abuse. Interestingly, RSA 458 does not even define abuse. A court may issue an order upon oral or written request based merely on the request of one party. Hence, it is called a restraining order, not a domestic violence protective order. It generally restrains parties from having further contact with one another or speaking to one another in inappropriate terms. Unlike a domestic violence protective order issued under RSA 173-B, a restraining order issued under RSA 458 or 461-A may last indefinitely. Such orders are generally not entered into the national database, nor are defendants subject to firearms prohibitions. The court may issue mutual restraining orders under RSA 458.