

CHAPTER 10 – VIOLATIONS OF PROTECTIVE ORDERS AND CONTEMPT

STATUTORY REFERENCES: **RSA 173-B: 9 (Violation of Protective Orders) RSA 458
RSA 461-A (Parenting Rights & Responsibilities)**

INTRODUCTION

RSA 173-B: 9 provides two distinct responses to violations of protective orders: (1) the statute makes the violation of a protective order issued under RSA 173-B or RSA 458:16 or any foreign protective order enforceable in New Hampshire a class A misdemeanor if the defendant was shown to have knowingly violated the order; and (2) the statute also gives recognition to the court's authority to enforce protective orders through its contempt powers. Under RSA 173-B the prosecution and sentencing of a defendant for criminal contempt for violation of a protective order does not bar the prosecution and sentencing of that defendant for other criminal charges underlying the contempt.

COMMENT

An order issued pursuant to RSA 173-B: 5 may include both *protective orders*, as provided in RSA 173-B: 5, I (a), and *other orders* of relief related to such issues of custody or child support, as defined in RSA 173-B: 5, I (b). *Protective provisions* of an order may be enforced through arrest and prosecution. The court may also enforce protective provisions through its inherent authority to punish contempt, either civilly or criminally. The court may also enforce protective provisions through its inherent authority to punish contempt civilly. *See Mortgage Specialists v. Davey*, 153 NH 764 (2006); *Rogowicz v. O'Connell*, 147 NH 270 (2001); *State v. Wallace*, 136 N.H. 267, 269-70 (1992); *Bonser v. Courtney*, 124 NH 796 (1984); and *Opinion of the Justices*, 86 N.H. 597, 602 (1933). However, in some circumstances, double jeopardy may bar such a dual prosecution. *See State v. Goodnow*, 140 NH 38 (1995). Enforcement of non-protective orders of relief must be sought through the court's contempt powers.

A. JURISDICTION OF THE FAMILY DIVISION

The Family Division has jurisdiction of domestic violence cases brought under RSA 173-B, and inherently, any civil contempt of the court's orders. However, the Family Division does not have jurisdiction to hear criminal cases filed as misdemeanor violations of the protective order as set forth in RSA 173-B:9. These cases are heard in the District Court. Where the parties are involved in a Family Division case and a misdemeanor allegation of contempt is filed in District Court, it is recommended that where the Family Division judge is also a District Court judge, that judge be assigned to the case. In the Family Division, the court may hear civil contempt cases only. Any allegations of criminal contempt must be prosecuted by local law enforcement.

B. TYPES OF CONTEMPT

Contempt proceedings can be either summary or non-summary. A summary contempt is only appropriate when the contemptuous conduct occurs in the presence of the court. Otherwise, all contempt proceedings are considered non-summary and may be either civil or criminal in nature.

1. Civil Contempt

Civil contempt is remedial in nature. Its purpose is to coerce compliance with a court order for the benefit of the other party. Civil contempt is appropriately instituted where the party against whom the contempt complaint has been filed has failed or refused to comply with a valid, unambiguous court order. A classic example is the filing of a civil contempt action for failure to make a child support payment.

2. Criminal Contempt

The purpose of non-summary criminal contempt is to vindicate the authority of the court and to punish a party for violating an order of the court. Criminal contempt can implicate a person's liberty interests and thus a person charged with criminal contempt is entitled to many of the rights afforded a criminal defendant. For that reason, criminal contempt should not be considered the first option in addressing contemptuous conduct. Criminal contempt prosecution is appropriate where it is unlikely that civil remedies will lead to the abatement of the alleged contemptuous conduct, if the conduct poses a threat to the other party's safety or property, or if the conduct is of a repetitive nature.

C. CRIMINAL CONTEMPT

PROTOCOL 10-1

The contempt process is initiated by the filing of a notice with the court, by the plaintiff, alleging that the defendant has violated a provision of a protective order. The plaintiff must set forth in writing and with specificity the acts alleged to constitute a violation of the court's orders.

PROTOCOL 10-2

Upon receipt of written notice that a defendant has violated a protective order, the court should review the document to make an initial determination whether the allegations, if founded, would warrant a finding of criminal contempt. If so, the court should instruct the clerk to forward the notice, along with a copy of the underlying protective order, to the local prosecuting agency having jurisdiction over the alleged misconduct. A copy of the referral letter shall be sent to the plaintiff and defendant. Thereafter, it shall be within the prosecutor's discretion whether to file criminal charges in the District Court.

COMMENT

In Rogowicz, the New Hampshire Supreme Court held that because criminal contempt proceedings are between the public and the defendant, the complaints should be referred to the executive branch for prosecution.

NOTE: In making this determination, the court should consider whether the alleged contemptuous conduct, if established: (a) would constitute a violation of the protective provisions of the protective order, see RSA 173-B:5, 1(a), and thus a criminal violation; (b) involved otherwise criminal conduct; or (c) constitutes a violation of the order that would justify a punitive remedy. If so, a referral for criminal prosecution is appropriate. If not, or if the conduct is more akin to a failure to make payments or turn over property, the court should consider allowing the matter to proceed as a civil contempt. [*See* The State of New Hampshire (Premo Complainant) v. Martineau, 148 N.H. 259 (2002)]

D. CIVIL CONTEMPT

PROTOCOL 10-3

Upon the court's determination that the matter should be dealt with as civil contempt, the court shall docket the matter in the protective order file and shall issue an order summoning the defendant to appear and show cause why a finding of contempt should not be made. A copy of the plaintiff's allegations must be appended to the order. The court's notice shall include a summary of the potential consequences if a finding of contempt is made.

PROTOCOL 10-4

The hearing should be scheduled, if possible, **within 14 days**.

PROTOCOL 10-5

The court's orders of notice should be transmitted by restricted first-class delivery. If returned as undeliverable, the OON should be transmitted to law enforcement for in-hand service upon the defendant.

PROTOCOL 10-6

There is no right to counsel for cases alleging civil contempt of court. The defendant may appeal issues of law to the Supreme Court.

PROTOCOL 10-7

If the defendant fails to appear, the court must satisfy itself that the defendant received actual notice of the hearing and if that determination is made, a bench warrant should issue for the defendant's arrest, and default through the Division of Motor Vehicles should be noted.

PROTOCOL 10-8

The burden of proof rests with the plaintiff to prove the case by clear and convincing evidence. The plaintiff should be called upon to offer testimony or witnesses to support the allegations made in the contempt notice. At the close of the plaintiff's case, the defendant should be afforded the opportunity to offer testimony and/or witnesses to rebut the allegations.

PROTOCOL 10-9

In reaching a verdict, the judge should keep in mind the following:

- a. The order alleged to have been violated should be valid and unambiguous; and,
- b. The burden of proof is upon the plaintiff, and the standard to be followed is "clear and convincing evidence". If the court finds the defendant guilty of civil contempt, the sanctions imposed should be either remedial or coercive in nature and for the benefit of the plaintiff. A written opinion should be issued, which refers to the standard of "clear and convincing evidence", provides the requisite factual basis for any contempt findings and sets forth clearly the sanctions imposed and a method by which the contempt may be purged by the defendant.

