

7160

2009-2010 Regular Sessions

I N   A S S E M B L Y

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Introduced by M. of A. KOON, FIELDS, CASTRO, LANCMAN, GABRYSZAK, BROOK-KRASNY -- Multi-Sponsored by -- M. of A. REILLY, SWEENEY, WEISENBERG -- read once and referred to the Committee on Codes

AN ACT to amend the penal law, the criminal procedure law and the civil practice law and rules, in relation to requiring restitution or reparation for all crimes and providing additional methods of enforcement

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1     Section 1. Subdivision 1 of section 60.27 of the penal law, as amended  
2     by chapter 279 of the laws of 2008, is amended to read as follows:  
3     1. In addition to any of the dispositions authorized by this article,  
4     the court shall [consider restitution or reparation to the victim of the  
5     crime and may] require restitution or reparation as part of the sentence  
6     imposed upon a person convicted of an offense, and after providing the  
7     district attorney with an opportunity to be heard in accordance with the  
8     provisions of this subdivision, require the defendant to make restitu-  
9     tion of the fruits of his or her offense or reparation for the actual  
10    out-of-pocket loss caused thereby and, in the case of a violation of  
11    section 190.78, 190.79, 190.80, 190.82 or 190.83 of this chapter, any  
12    costs or losses incurred due to any adverse action taken against the  
13    victim. The district attorney shall where appropriate, advise the court  
14    at or before the time of sentencing that the victim seeks restitution or  
15    reparation, the extent of injury or economic loss or damage of the  
16    victim, and the amount of restitution or reparation sought by the victim  
17    in accordance with his or her responsibilities under subdivision two of  
18    section 390.50 of the criminal procedure law and article twenty-three of  
19    the executive law. The court shall hear and consider the information  
20    presented by the district attorney in this regard. In that event, or  
21    when the victim impact statement reports that the victim seeks restitu-  
22    tion or reparation, the court shall require[, unless the interests of  
23    justice dictate otherwise], in addition to any of the dispositions

EXPLANATION--Matter in *ITALICS* (underscored) is new; matter in brackets [ ] is old law to be omitted.

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1 authorized by this article that the defendant make restitution of the  
2 fruits of the offense and reparation for the actual out-of-pocket loss  
3 and, in the case of a violation of section 190.78, 190.79, 190.80,  
4 190.82 or 190.83 of this chapter, any costs or losses incurred due to  
5 any adverse action, caused thereby to the victim. [In the event that  
6 restitution or reparation are not ordered, the court shall clearly state  
7 its reasons on the record.] Adverse action as used in this subdivision  
8 shall mean and include actual loss incurred by the victim, including an  
9 amount equal to the value of the time reasonably spent by the victim  
10 attempting to remediate the harm incurred by the victim from the  
11 offense, and the consequential financial losses from such action.

12 S 2. Subdivision 2 of section 60.27 of the penal law, as amended by  
13 chapter 618 of the laws of 1992, is amended to read as follows:

14 2. [Whenever the court requires restitution or reparation to be made,  
15 the] FOR EVERY OFFENSE court must make a finding as to the dollar amount  
16 of the fruits of the offense and the actual out-of-pocket loss to the  
17 victim caused by the offense. In making this finding, the court must  
18 consider any victim impact statement provided to the court. If the  
19 record does not contain sufficient evidence to support such finding or  
20 upon request by the defendant, the court must conduct a hearing upon the  
21 issue in accordance with the procedure set forth in section 400.30 of  
22 the criminal procedure law.

23 S 3. Paragraph (b) of subdivision 4 of section 60.27 of the penal law,  
24 as amended by chapter 619 of the laws of 2002, is amended to read as  
25 follows:

26 (b) the term "victim" shall include the victim of the offense, the  
27 representative of a crime victim as defined in subdivision six of  
28 section six hundred twenty-one of the executive law, an individual whose  
29 identity was assumed or whose personal identifying information was used  
30 in violation of section 190.78, 190.79 or 190.80 of this chapter, THE  
31 PARENT OR PARENTS OF A VICTIM OF A HOMICIDE OFFENSE, or any person who  
32 has suffered a financial loss as a direct result of the acts of a  
33 defendant in violation of section 190.78, 190.79, 190.80, 190.82 or  
34 190.83 of this chapter, a good samaritan as defined in section six  
35 hundred twenty-one of the executive law and the crime victims' board or  
36 other governmental agency that has received an application for or has  
37 provided financial assistance or compensation to the victim.

38 S 4. Paragraph (b) of subdivision 6 of section 420.10 of the criminal  
39 procedure law, as amended by chapter 618 of the laws of 1992, is amended  
40 to read as follows:

41 (b) The district attorney [may, in his or her discretion, and must],  
42 upon order of the court, SHALL institute proceedings to collect such  
43 fine, restitution or reparation INCLUDING, BUT NOT LIMITED TO, THE  
44 RETENTION OF A COLLECTION AGENCY PREVIOUSLY APPROVED BY THE COURT IN  
45 ACCORDANCE WITH THE GUIDELINES ESTABLISHED BY THE OFFICE OF COURT ADMIN-  
46 ISTRATION.

47 S 5. Subdivision 6 of section 420.10 of the criminal procedure law is  
48 amended by adding a new paragraph (c) to read as follows:

49 (C) THE COURT MAY MAKE AN INCOME DEDUCTION ORDER FOR RESTITUTION OR  
50 REPARATION ENFORCEMENT UNDER SECTION FIFTY-TWO HUNDRED FORTY-TWO OF THE  
51 CIVIL PRACTICE LAW AND RULES.

52 S 6. The section heading of section 5241 of the civil practice law and  
53 rules, as added by chapter 809 of the laws of 1985, is amended to read  
54 as follows:

55 Income execution for support, RESTITUTION OR REPARATION enforcement.

1 S 7. Subdivision (a) of section 5241 of the civil practice law and  
2 rules is amended by adding a new paragraph 1-a to read as follows:

3 1-A. "ORDER OF RESTITUTION OR REPARATION" MEANS ANY ORDER OF A COURT  
4 REQUIRING, AS PART OF A SENTENCE IMPOSED UPON A PERSON CONVICTED OF AN  
5 OFFENSE, A DEFENDANT TO MAKE RESTITUTION OF THE FRUITS OF HIS OFFENSE OR  
6 REPARATION FOR THE LOSS OR DAMAGE CAUSED THEREBY.

7 S 8. Paragraphs 2, 3, 7 and 8 of subdivision (a) of section 5241 of  
8 the civil practice law and rules, as added by chapter 809 of the laws of  
9 1985, are amended to read as follows:

10 2. "Debtor" means any person directed to make payments by an order of  
11 support, RESTITUTION OR REPARATION.

12 3. "Creditor" means any person entitled to enforce an order of  
13 support, including a support collection unit OR AN ORDER OF RESTITUTION  
14 OR REPARATION.

15 7. "Default" means the failure of a debtor to remit to a creditor  
16 three payments on the date due in the full amount directed by [the] AN  
17 order of support, RESTITUTION OR REPARATION or the accumulation of  
18 arrears equal to or greater than the amount directed to be paid for one  
19 month, whichever first occurs.

20 8. "Mistake of fact" means an error in the amount of current support,  
21 RESTITUTION OR REPARATION or arrears or in the identity of the debtor or  
22 that the order of support, RESTITUTION OR REPARATION does not exist or  
23 has been vacated.

24 S 9. Paragraph 1 of subdivision (b) of section 5241 of the civil prac-  
25 tice law and rules, as amended by chapter 59 of the laws of 1993, is  
26 amended to read as follows:

27 (1) When a debtor is in default, an execution for support enforcement  
28 may be issued by the support collection unit, or by the sheriff, the  
29 clerk of THE court or the attorney for the creditor as an officer of the  
30 court. WHEN A DEBTOR IS IN DEFAULT, AN EXECUTION FOR RESTITUTION OR  
31 REPARATION ENFORCEMENT MAY BE ISSUED BY THE SHERIFF, THE CLERK OF THE  
32 COURT OR THE ATTORNEY FOR THE CREDITOR AS AN OFFICER OF THE COURT. Where  
33 a debtor is receiving or will receive income, an execution for  
34 deductions therefrom in amounts not to exceed the limits set forth in  
35 subdivision (g) of this section may be served upon an employer or income  
36 payor after notice to the debtor. The amount of the deductions to be  
37 withheld shall be sufficient to ensure compliance with the direction in  
38 the order of support, RESTITUTION OR REPARATION and shall include an  
39 additional amount to be applied to the reduction of arrears. The credi-  
40 tor may amend the execution before or after service upon the employer or  
41 income payor to reflect additional arrears or payments made by the  
42 debtor after notice pursuant to subdivision (d) of this section, or to  
43 conform the execution to the facts found upon a determination made  
44 pursuant to subdivision (e) of this section.

45 S 10. The subdivision heading, the opening paragraph and subparagraph  
46 (ii) of paragraph 1 of subdivision (c) of section 5241 of the civil  
47 practice law and rules, the subdivision heading as amended by chapter 59  
48 of the laws of 1993 and the opening paragraph and subparagraph (ii) of  
49 paragraph 1 as amended by chapter 214 of the laws of 1998, are amended  
50 to read as follows:

51 Execution for support, RESTITUTION OR REPARATION enforcement; form.

52 The income execution shall contain the caption of the order of  
53 support, RESTITUTION OR REPARATION and specify the date that the order  
54 of support, RESTITUTION OR REPARATION was entered, the court in which it  
55 was entered, the amount of the periodic payments directed, the amount of

1 arrears, the nature of the default and the names of the debtor and cred-  
2 itor. In addition, the income execution shall include:

3 (ii) the amount of the deductions to be made therefrom on account of  
4 current support, RESTITUTION OR REPARATION and the amount to be applied  
5 to the reduction of arrears;

6 S 11. Subdivision (e) of section 5241 of the civil practice law and  
7 rules, as amended by chapter 94 of the laws of 2008, is amended to read  
8 as follows:

9 (e) Determination of mistake of fact. Where the execution has been  
10 issued by the support collection unit, the debtor may assert a mistake  
11 of fact and shall have an opportunity to make a submission in support of  
12 the objection within fifteen days from service of a copy thereof. Ther-  
13 eafter, the agency shall determine the merits of the objection, and  
14 shall notify the debtor of its determination within forty-five days  
15 after notice to the debtor as provided in subdivision (d) of this  
16 section. If the objection is disallowed, the debtor shall be notified  
17 that the income execution will be served on the employer or income  
18 payor, and of the time that deductions will begin. Where the income  
19 execution has been issued by an attorney as officer of the court, or by  
20 the sheriff, or by the clerk of the court, the debtor may assert a  
21 mistake of fact within fifteen days from service of a copy thereof by  
22 application to the supreme court or to the family court having jurisdic-  
23 tion in accordance with section four hundred sixty-one of the family  
24 court act. If application is made to the family court, such application  
25 shall be by petition on notice to the creditor and it shall be heard and  
26 determined in accordance with the provisions of section four hundred  
27 thirty-nine of the family court act, and a determination thereof shall  
28 be made, and the debtor notified thereof within forty-five days of the  
29 application. If application is made to the supreme court such applica-  
30 tion shall be by order to show cause or motion on notice to the creditor  
31 in the action in which the order or judgement sought to be enforced was  
32 entered and a determination thereof shall be made, and the debtor noti-  
33 fied thereof within forty-five days of the application. WHERE THE  
34 INCOME EXECUTION HAS BEEN ISSUED BY AN ATTORNEY AS OFFICER OF THE COURT,  
35 OR BY THE SHERIFF, OR BY THE CLERK OF THE COURT TO ENFORCE AN ORDER OF  
36 RESTITUTION OR REPARATION, THE DEBTOR MAY ASSERT A MISTAKE OF FACT WITH-  
37 IN FIFTEEN DAYS FROM SERVICE OF A COPY THEREOF BY APPLICATION TO THE  
38 SUPREME COURT HAVING ISSUED SUCH ORDER. SUCH APPLICATION SHALL BE BY  
39 PETITION ON NOTICE TO THE CREDITOR AND, IT SHALL BE HEARD AND DETERMINED  
40 IN ACCORDANCE WITH THE PROVISIONS OF ARTICLE FOUR OF THIS CHAPTER, AND A  
41 DETERMINATION THEREOF SHALL BE MADE, AND THE DEBTOR NOTIFIED THEREOF  
42 WITHIN FORTY-FIVE DAYS OF THE APPLICATION.

43 S 12. The opening paragraph of paragraph 1 of subdivision (g) of  
44 section 5241 of the civil practice law and rules, as amended by chapter  
45 398 of the laws of 1997, is amended to read as follows:

46 An employer or income payor served with an income execution shall  
47 commence deductions from income due or thereafter due to the debtor no  
48 later than the first pay period that occurs fourteen days after service  
49 of the execution, and shall remit payments to the creditor within seven  
50 business days of the date that the debtor is paid. Each payment remit-  
51 ted by an employer or income payor shall include, in addition to the  
52 identity and social security number of the debtor, the date and amount  
53 of each withholding of the debtor's income included in the payment. If  
54 the money due to the debtor consists of salary or wages and his or her  
55 employment is terminated by resignation or dismissal at any time after  
56 service of the execution, the levy shall thereafter be ineffective, and

1 the execution shall be returned, unless the debtor is reinstated or  
2 re-employed within ninety days after such termination. An employer must  
3 notify the issuer promptly when the debtor terminates employment and  
4 provide the debtor's last address and name and address of the new  
5 employer, if known. Where the income is compensation paid or payable to  
6 the debtor for personal services, the amount of the deductions to be  
7 withheld FOR SUPPORT ENFORCEMENT shall not exceed the following:

8 S 13. Subdivision (g) of section 5241 of the civil practice law and  
9 rules is amended by adding a new paragraph 5 to read as follows:

10 (5) WHERE THE INCOME IS COMPENSATION PAID OR PAYABLE TO THE DEBTOR FOR  
11 PERSONAL SERVICES, THE AMOUNT OF THE DEDUCTIONS TO BE WITHHELD FOR  
12 RESTITUTION OR REPARATION SHALL NOT EXCEED FIFTY PERCENT OF THE EARNINGS  
13 OF THE DEBTOR REMAINING AFTER THE DEDUCTION THEREFROM OF ANY AMOUNTS  
14 REQUIRED BY LAW TO BE WITHHELD ("DISPOSABLE EARNINGS").

15 S 14. The section heading and subdivisions (a) and (b) of section 5242  
16 of the civil practice law and rules, as amended by chapter 170 of the  
17 laws of 1994, are amended to read as follows:

18 Income deduction order for support, RESTITUTION OR REPARATION enforce-  
19 ment. (a) Upon application of a creditor, for good cause shown, and  
20 upon such terms as justice may require, the court may correct any  
21 defect, irregularity, error or omission in an income execution for  
22 support, RESTITUTION OR REPARATION enforcement issued pursuant to  
23 section [5241] FIFTY-TWO HUNDRED FORTY-ONE of this article.

24 (b) Upon application of a creditor, for good cause shown, the court  
25 may enter an income deduction order for support, RESTITUTION OR REPARA-  
26 TION enforcement. In determining good cause, the court may take into  
27 consideration evidence of the degree of such debtor's past financial  
28 responsibility, credit references, credit history, and any other matter  
29 the court considers relevant in determining the likelihood of payment in  
30 accordance with the order of support, RESTITUTION OR REPARATION. Proof  
31 of default establishes a prima facie case against the debtor, which can  
32 be overcome only by proof of the debtor's inability to make the  
33 payments. Unless the prima facie case is overcome, the court shall  
34 enter an income deduction order for support, RESTITUTION OR REPARATION  
35 enforcement pursuant to this section.

36 S 15. Subdivision (g) of section 5242 of the civil practice law and  
37 rules, as amended by chapter 170 of the laws of 1994, is amended to read  
38 as follows:

39 (g) Where the court issues an income deduction order for RESTITUTION  
40 ENFORCEMENT, REPARATION ENFORCEMENT OR support enforcement payable to  
41 the support collection unit, as defined in paragraph nine of subdivision  
42 (a) of section [5241] FIFTY-TWO HUNDRED FORTY-ONE of this article, each  
43 payment remitted by an employer or income payor shall include, in addi-  
44 tion to the identity and social security number of the debtor, the date  
45 and amount of each withholding of the debtor's income included in the  
46 payment.

47 S 16. This act shall take effect on the one hundred twentieth day  
48 after it shall have become a law, except that any guidelines necessary  
49 for the timely implementation of this act on its effective date shall be  
50 established on or before such date.