S T A T E O F N E W Y O R K

5143

2011-2012 Regular Sessions

I N A S S E M B L Y

February 14, 2011

Introduced by M. of A. GABRYSZAK, CASTRO, LANCMAN, BROOK-KRASNY -- Multi-Sponsored by -- M. of A. REILLY, SWEENEY, TITUS, 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:

Section 1. Subdivision 1 of section 60.27 of the penal law, as amended by chapter 279 of the laws of 2008, is amended to read as follows:

1. In addition to any of the dispositions authorized by this article, the court shall [consider restitution or reparation to the victim of the crime and may] require restitution or reparation as part of the sentence imposed upon a person convicted of an offense, and after providing the district attorney with an opportunity to be heard in accordance with the provisions of this subdivision, require the defendant to make restitution of the fruits of his or her offense or reparation for the actual out-of-pocket loss caused thereby and, in the case of a violation of section 190.78, 190.79, 190.80, 190.82 or 190.83 of this chapter, any costs or losses incurred due to any adverse action taken against the victim. The district attorney shall where appropriate, advise the court at or before the time of sentencing that the victim seeks restitution or reparation, the extent of injury or economic loss or damage of the victim, and the amount of restitution or reparation sought by the victim in accordance with his or her responsibilities under subdivision two of section 390.50 of the criminal procedure law and article twenty-three of the executive law. The court shall hear and consider the information presented by the district attorney in this regard. In that event, or when the victim impact statement reports that the victim seeks restitution or reparation, the court shall require[, unless the interests of 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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authorized by this article that the defendant make restitution of the fruits of the offense and reparation for the actual out-of-pocket loss and, in the case of a violation of section 190.78, 190.79, 190.80, 190.82 or 190.83 of this chapter, any costs or losses incurred due to any adverse action, caused thereby to the victim. [In the event that restitution or reparation are not ordered, the court shall clearly state its reasons on the record.] Adverse action as used in this subdivision shall mean and include actual loss incurred by the victim, including an amount equal to the value of the time reasonably spent by the victim attempting to remediate the harm incurred by the victim from the offense, and the consequential financial losses from such action.

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

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

S 3. Paragraph (b) of subdivision 4 of section 60.27 of the penal law, as amended by section 41 of part A-1 of chapter 56 of the laws of 2010, is amended to read as follows:

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

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

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

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

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

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

Income execution for support, RESTITUTION OR REPARATION enforcement.

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

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

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

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

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

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

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

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

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

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

Execution for support, RESTITUTION OR REPARATION enforcement; form.

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

arrears, the nature of the default and the names of the debtor and creditor. In addition, the income execution shall include:

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

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

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

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

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

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

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

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

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

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

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

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

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

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