

Assembly Bill No. 1847

Passed the Assembly August 25, 2010

Chief Clerk of the Assembly

Passed the Senate August 23, 2010

Secretary of the Senate

This bill was received by the Governor this _____ day
of _____, 2010, at _____ o'clock ____M.

Private Secretary of the Governor

CHAPTER _____

An act to amend Section 1202.42 of the Penal Code, relating to criminal procedure.

LEGISLATIVE COUNSEL'S DIGEST

AB 1847, Furutani. Restitution orders.

Existing law provides for victim restitution orders and restitution fines, as specified. Existing law authorizes procedures for the entry and application of court orders for income deduction upon entry of an order for a restitution fine or for victim restitution, and gives the agency responsible for the collection of restitution specified powers and duties in regard to these income deduction orders.

The bill would provide that if there is no agency in the county responsible for the collection of restitution, the county probation office or the prosecuting attorney may carry out the functions and duties of such an agency in regard to the income deduction orders described above, as specified. This bill would further provide, if the defendant fails to meet his or her obligations under the restitution order and the defendant has not provided good cause for the failure, that a court shall be authorized, upon the request of the prosecuting attorney, to order the prosecuting attorney be given authority to use lien procedures applicable to the defendant, including, but not limited to, a writ of attachment of property, as specified. This bill would provide prosecutorial immunity from liability for these proceedings and deny reimbursement for the costs of the prosecuting attorney from the defendant's income or assets, as specified.

The people of the State of California do enact as follows:

SECTION 1. Section 1202.42 of the Penal Code is amended to read:

1202.42. Upon entry of a restitution order under subdivision (c) of Section 13967 of the Government Code, as operative on or before September 28, 1994, paragraph (3) of subdivision (a) of Section 1202.4 of this code, or Section 1203.04 as operative on or before August 2, 1995, the following shall apply:

(a) The court shall enter a separate order for income deduction upon determination of the defendant's ability to pay, regardless of the probation status, in accordance with Section 1203. Determination of a defendant's ability to pay may include his or her future earning capacity. A defendant shall bear the burden of demonstrating lack of his or her ability to pay. Express findings by the court as to the factors bearing on the amount of the fine shall not be required.

(b) (1) In any case in which the court enters a separate order for income deduction under this section, the order shall be stayed until the agency in the county responsible for collection of restitution determines that the defendant has failed to meet his or her obligation under the restitution order and the defendant has not provided the agency with good cause for the failure in accordance with paragraph (2).

(2) If the agency responsible for collection of restitution receives information that the defendant has failed to meet his or her obligation under the restitution order, the agency shall request the defendant to provide evidence indicating that timely payments have been made or provide information establishing good cause for the failure. If the defendant fails to either provide the agency with the evidence or fails to establish good cause within five days of the request, the agency shall immediately inform the defendant of that fact, and shall inform the clerk of the court in order that an income deduction order will be served pursuant to subdivision (f) following a 15-day appeal period. The defendant may apply for a hearing to contest the lifting of the stay pursuant to subdivision (f).

(c) The income deduction order shall direct a payer to deduct from all income due and payable to the defendant the amount required by the court to meet the defendant's obligation.

(d) The income deduction order shall be effective so long as the order for restitution upon which it is based is effective or until further order of the court.

(e) When the court orders the income deduction, the court shall furnish to the defendant a statement of his or her rights, remedies, and duties in regard to the income deduction order. The statement shall state all of the following:

(1) All fees or interest that will be imposed.

(2) The total amount of income to be deducted for each pay period.

(3) That the income deduction order applies to current and subsequent payers and periods of employment.

(4) That a copy of the income deduction order will be served on the defendant's payer or payers.

(5) That enforcement of the income deduction order may only be contested on the ground of mistake of fact regarding the amount of restitution owed.

(6) That the defendant is required to notify the clerk of the court within seven days after changes in the defendant's address, payers, and the addresses of his or her payers.

(7) That the court order will be stayed in accordance with subdivision (b) and that a hearing is available in accordance with subdivision (f).

(f) (1) Upon receiving the notice described in paragraph (2) of subdivision (b), the clerk of the court or officer of the agency responsible for collection of restitution shall serve an income deduction order and the notice to payer on the defendant's payer unless the defendant has applied for a hearing to contest the enforcement of the income deduction order.

(2) (A) Service by or upon any person who is a party to a proceeding under this section shall be made in the manner prescribed for service upon parties in a civil action.

(B) Service upon the defendant's payer or successor payer under this section shall be made by prepaid certified mail, return receipt requested.

(3) The defendant, within 15 days after being informed that the order staying the income deduction order will be lifted, may apply for a hearing to contest the enforcement of the income deduction order on the ground of mistake of fact regarding the amount of restitution owed or on the ground that the defendant has established good cause for the nonpayment. The timely request for a hearing shall stay the service of an income deduction order on all payers of the defendant until a hearing is held and a determination is made as to whether the enforcement of the income deduction order is proper.

(4) The notice to any payer required by this subdivision shall contain only information necessary for the payer to comply with

the income deduction order. The notice shall do all of the following:

(A) Require the payer to deduct from the defendant's income the amount specified in the income deduction order, and to pay that amount to the clerk of the court.

(B) Instruct the payer to implement the income deduction order no later than the first payment date that occurs more than 14 days after the date the income deduction order was served on the payer.

(C) Instruct the payer to forward, within two days after each payment date, to the clerk of the court the amount deducted from the defendant's income and a statement as to whether the amount totally or partially satisfies the periodic amount specified in the income deduction order.

(D) Specify that if a payer fails to deduct the proper amount from the defendant's income, the payer is liable for the amount the payer should have deducted, plus costs, interest, and reasonable attorney's fees.

(E) Provide that the payer may collect up to five dollars (\$5) against the defendant's income to reimburse the payer for administrative costs for the first income deduction and up to one dollar (\$1) for each deduction thereafter.

(F) State that the income deduction order and the notice to payer are binding on the payer until further notice by the court or until the payer no longer provides income to the defendant.

(G) Instruct the payer that, when he or she no longer provides income to the defendant, he or she shall notify the clerk of the court and shall also provide the defendant's last known address and the name and address of the defendant's new payer, if known, and that, if the payer violates this provision, the payer is subject to a civil penalty not to exceed two hundred fifty dollars (\$250) for the first violation or five hundred dollars (\$500) for any subsequent violation.

(H) State that the payer shall not discharge, refuse to employ, or take disciplinary action against the defendant because of an income deduction order and shall state that a violation of this provision subjects the payer to a civil penalty not to exceed two hundred fifty dollars (\$250) for the first violation or five hundred dollars (\$500) for any subsequent violation.

(I) Inform the payer that when he or she receives income deduction orders requiring that the income of two or more

defendants be deducted and sent to the same clerk of a court, he or she may combine the amounts that are to be paid to the depository in a single payment as long as he or she identifies that portion of the payment attributable to each defendant.

(J) Inform the payer that if the payer receives more than one income deduction order against the same defendant, he or she shall contact the court for further instructions.

(5) The clerk of the court shall enforce income deduction orders against the defendant's successor payer who is located in this state in the same manner prescribed in this subdivision for the enforcement of an income deduction order against a payer.

(6) A person may not discharge, refuse to employ, or take disciplinary action against an employee because of the enforcement of an income deduction order. An employer who violates this provision is subject to a civil penalty not to exceed two hundred fifty dollars (\$250) for the first violation or five hundred dollars (\$500) for any subsequent violation.

(7) When a payer no longer provides income to a defendant, he or she shall notify the clerk of the court and shall provide the defendant's last known address and the name and address of the defendant's new payer, if known. A payer who violates this provision is subject to a civil penalty not to exceed two hundred fifty dollars (\$250) for the first violation or five hundred dollars (\$500) for a subsequent violation.

(g) If the defendant has failed to meet his or her obligation under the restitution order and the defendant has not provided good cause for the failure in accordance with the process set forth in paragraph (2) of subdivision (b), the court may, upon the request of the prosecuting attorney, order that the prosecuting attorney be given authority to use lien procedures applicable to the defendant, including, but not limited to, a writ of attachment of property. This authority is in addition to any authority granted to the prosecuting attorney in subdivision (h).

(1) If the court authorizes a lien or other similar encumbrance on real property pursuant to this subdivision, the court shall, within 15 days, furnish to the defendant a statement of his or her rights, remedies, and duties in regard to the order. The statement shall state all of the following:

(A) That the lien is enforceable and collectible by execution issued by order of the court, except that a lien shall not be enforced by writ of execution on a defendant's principal place of residence.

(B) A legal description of the property to be encumbered.

(C) The total amount of restitution still owed by the defendant.

(D) That enforcement of the lien order may only be contested on the ground of mistake of fact regarding the amount of restitution owed or on the ground of mistake of fact regarding the defendant's ownership interest of the property to be encumbered.

(E) That a hearing is available in accordance with paragraph (2).

(F) That, upon paying the restitution order in full, the defendant may petition the court for a full release of any related encumbrance in accordance with paragraph (3).

(2) The defendant, within 15 days after being informed that a lien or other similar encumbrance on real property has been ordered, may apply for a hearing to contest the enforcement order on the ground of mistake of fact regarding the amount of restitution owed, on the ground of mistake of fact regarding the defendant's ownership interest of the property to be encumbered, or on the ground that the defendant has established good cause for the nonpayment. The timely request for a hearing shall stay any execution on the lien until a hearing is held and a determination is made as to whether the enforcement order is proper.

(3) Upon payment of the restitution order in full, the defendant may petition the court to issue an order directing the clerk of the court to execute a full reconveyance of title, a certificate of discharge, or a full release of any lien against real property created to secure performance of the restitution order.

(4) Neither a prosecutorial agency nor a prosecuting attorney shall be liable for an injury caused by an act or omission in exercising the authority granted by this subdivision.

(h) If there is no agency in the county responsible for the collection of restitution, the county probation office or the prosecuting attorney may carry out the functions and duties of such an agency as specified in subdivisions (b) and (f).

(i) A prosecuting attorney shall not make any collection against, or take any percentage of, the defendant's income or assets to reimburse the prosecuting attorney for administrative costs in carrying out any action authorized by this section.

(j) As used in this section, “good cause” for failure to meet an obligation or “good cause” for nonpayment means, but shall not be limited to, any of the following:

(1) That there has been a substantial change in the defendant’s economic circumstances, such as involuntary unemployment, involuntary cost-of-living increases, or costs incurred as the result of medical circumstances or a natural disaster.

(2) That the defendant reasonably believes there has been an administrative error with regard to his or her obligation for payment.

(3) Any other similar and justifiable reasons.

Approved _____, 2010

Governor