

Enforcement Remedies for Non-payment of a sum of Money Required by Judgment or Order

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Docketing Money Judgment—Domestic Relations Law §244

The first sentence of Domestic Relations Law §244 limits a money judgment as an enforcement device, stating that it may be obtained only against a spouse in an action for divorce, separation, or annulment, or a person other than a spouse where an action for annulment is maintained after the death of the spouse. In such actions it directs that upon default in paying any sum of money as required by the judgment or order directing the payment thereof, or as required by the terms of an agreement or stipulation incorporated by reference in a judgment, the court upon application shall make an order directing the entry of judgment for the amount of arrears of child support together with costs and disbursements, and shall make an order directing the entry of judgment for the amount of arrears of any other payments so directed unless the defaulting party shows good cause for failure to make application for relief from the judgment or order directing such payment prior to the accrual of such arrears.

Under prior law, the statute was held to apply to assist the enforcement of an award of support made under a sister—state or foreign decree and there is no reason for this to change. The statute was designed to eliminate the burden of plenary or protracted litigation to enforce a spouse's established rights under a matrimonial

judgment; and it was intended to afford summary relief to a spouse upon the nonpayment of support or maintenance. The statute contemplates that its provisions may be invoked only at a time when the obligor spouse is still alive. However, it may be utilized to enforce orders after the termination of the action.

Where a court rendering a judgment in a matrimonial action has in personam jurisdiction over the person of the nonresident defendant spouse, the court has the power to make a support award or property distribution and may enter a money judgment against the spouse for the amount in arrears without violating the due process clauses of the United States and New York State Constitutions. Moreover, a spouse's removal to a foreign jurisdiction after the divorce judgment and support order does not deprive the New York court of jurisdiction to enter judgment for arrears.

Section 244 of the Domestic Relations Law gives the court discretion to refuse to direct the entry of judgment for part or all of the arrears of maintenance, or other payments upon a showing by the defaulting party of good cause for his or her failure to make application for relief from the judgment or order directing such payment prior to the accrual of such arrears. Domestic Relations Law §244 requires the court to make an order directing the entry of judgment for the amount of the arrears of any payments other than child support together with costs and disbursements unless the defaulting party shows good cause for failure to make application for relief from the judgment or order directing such payment prior to the accrual of such arrears. When a judgment for arrears is entered pursuant to Domestic Relations Law §244, it is not thereafter subject to modification. After the entry of money judgment, the judgment creditor is not entitled to collect, by any form of remedy, any greater portion of the arrears than that represented by the money judgment. Thus, if the court makes an award for less than the full amount of the arrears, it has in effect canceled any arrears for which judgment has not been granted.

Domestic Relations Law §236(B)(9)(b) provides that the court may not annul or reduce any arrears of child support.

Domestic Relations Law §244 provides that "upon application, the court shall make an order directing the entry of judgment for the amount of arrears of child support together with costs and disbursements." The statute specifically provides that the court shall not make an order reducing or canceling arrears, other than child support, unless the facts and circumstances constituting "good cause" are set forth in a written memorandum of decision.

The effect of the statute is to prohibit the reduction or cancellation of arrears of child support and to make judgment for arrears of child support mandatory. As to maintenance and other payments, the court is now mandated to direct the entry of judgment for arrears "... unless the defaulting party shows good cause for failure to make application for relief from the judgment or order directing such payment prior to the accrual of such arrears."

If the amount of arrears is disputed or there are disputed questions of fact in defense of the application, the court must hold a hearing before fixing arrears or granting judgment.

An application for an order directing entry of a money judgment in a matrimonial action for arrears of maintenance or support is treated as a motion in an action so that no service of new process is necessary to acquire jurisdiction over the defendant's person. The procedure for the entry of a money judgment under Domestic Relations Law §244 does not contemplate a new judgment, but is a part of or incidental to the original action so that personal service is not necessary. Section 244 of the Domestic Relations Law does provide, however, that in a proceeding to obtain a judgment for arrears due under a judgment of divorce, separation, annulment, or declaration of nullity of a void marriage, the application for the order directing the entry of judgment must be upon notice to the spouse or other person as the court may direct. But there is nothing in the section that requires personal service upon the spouse; the section simply states that the application for the order shall be upon such notice to the spouse as the court may direct, and it may be assumed that the court will direct that the service shall be made in a manner in keeping with the particular circumstances. The proceeding should be begun by an order to show cause in which the court can direct the type of notice. Beyond this, a direction of the court as to the manner of service is unnecessary where personal service may be effected.

An application in a matrimonial action for permission to enter a money judgment is a motion in the action, since as to maintenance, child support, custody, and the like, the matrimonial action is never terminated until the death of one of the parties thereto. Thus, the venue of the application is before the court that granted the original judgment.

Money Judgment—Additional Arrears—Domestic Relations Law §244-a

A money judgment may be obtained for arrears accruing from the date of the commencement of the enforcement proceeding to the date of the hearing or submission of the matter. The procedure is to serve a notice of intention to amend the papers submitted in support of the application eight (8) days prior to the hearing or submission of the matter.

Income execution for support enforcement and income deduction order - CPLR 5241 and 5242

Orders of support are enforceable pursuant to Civil Practice Law and Rules §5241, which provides administrative procedures for income executions. Under this

statute when a support payor (called the “debtor”) is in default, an execution for support enforcement may be issued by the Support Collection Unit, or by a sheriff,² the clerk of court,³ or the attorney for the creditor as an officer of the court.⁴ The primary goal of an execution order under Section 5241 is to expedite judicial resolution and enforcement of child support obligations. Where a Civil Practice Law and Rules Section 5241 execution has been served on the debtor he may assert a mistake of fact⁵ as a defense⁶ to the income execution.⁷

An order of support is defined as any temporary or final order, judgment, agreement or stipulation incorporated by reference in such judgment or decree in a matrimonial action or family court proceeding, or any foreign support order, judgment or decree, registered pursuant to article five-B of the family court act which directs the payment of alimony, maintenance, support or child support.⁸

The Civil Practice Law and Rules does not specifically allow the income execution to be utilized to collect arrears of other financial awards, such as a distributive award or counsel fees.⁹

A foreign support order or judgment that similarly directs the payment of alimony, maintenance, support or child support may be enforced by the income execution after it is registered.¹⁰

² Civil Practice Law and Rules §5241(g)(1).

³ In *O'Brien v. O'Brien*, 134 Misc. 2d 159, 509 N.Y.S.2d 761 (Fam. Ct. 1986) the court held that if an income execution under Civil Practice Law and Rules §5241 is to be issued by a clerk of the court, it may be issued only by the clerk of the court that issued the support order in the same case.

⁴ Civil Practice Law and Rules §5241(g)(1).

⁵ Civil Practice Law and Rules §5241(a)(8) provides that a “mistake of fact” means an error in the amount of current support or arrears or in the identity of the debtor or that the order of support does not exist or has been vacated.

⁶ Civil Practice Law and Rules §5241(e).

⁷ Civil Practice Law and Rules §5241(e).

⁸ Civil Practice Law and Rules §5241(a)(1).

⁹ In *Anostario v. Anostario*, 249 A.D.2d 612, 670 N.Y.S.2d 629 (3d Dep't 1998), the Appellate Division held that CPLR 5241 and 5242 do not authorize income deduction orders for counsel fees. An “[o]rder of support,” as defined in CPLR 5241(a)(1), is one “which directs the payment of alimony, maintenance, support or child support”. Counsel fees are not included in this definition.

¹⁰ In *Reynders v. Reynders*, 155 A.D.2d 987, 548 N.Y.S.2d 130 (4th Dep't 1989), the Appellate Division reversed on the law an Order of the Supreme Court that refused to

The income execution may be issued by the attorney for the creditor, the sheriff, the clerk of the court or the support collection unit against a debtor who is in default.¹¹ “Issuer” means a support collection unit, sheriff, the clerk of court, or the attorney for the creditor.¹² A creditor is any person, including the support collection unit, who is entitled to enforce an order of support.¹³ A debtor is any person who is required to make payments by an order of support.¹⁴ The debtor is in “default” if he fails to remit to the creditor three payments on the date due and in the full amount as directed by the order of support, or when the debtor accumulates arrears equal to and greater than the amount he is directed to pay for one month, whichever occurs first.¹⁵

The income execution is served upon an “income payor” or “employer,” from whom the debtor is receiving or will receive “income,” after notice to the debtor. It must direct the employer or income payor to deduct and withhold sufficient moneys therefrom to ensure compliance with the direction in the order of support and must include an additional amount to be applied toward the reduction or arrears.¹⁶

The income execution may be amended by the issuer, at any time before or after service on the employer, or income payor, to reflect either additional arrears or payments made by the debtor after he is served with notice, or to conform it to a determination made after the debtor claims a “mistake of fact.”¹⁷

An “income payor” is defined to include the auditor, comptroller, trustee or disbursing officer of any pension fund, benefit program, policy of insurance or annuity;

vacate an income execution which was issued by the creditors' attorney and served by mail simultaneously on the debtor and his employer. The levy was improper without prior notice as required by Civil Practice Law and Rules §5241(d) and (f). Further, the Alabama support order was not registered and did not qualify as a basis for the income execution under Civil Practice Law and Rules §5241(a)(1) (citing Survey of N.Y. Law, 37 Syracuse L. Rev. 505, 515 (1986)). Although the debtor failed to seek relief within the 15-day period for asserting a “mistake of fact,” a court “may at any time, grant relief from the use of any enforcement procedure (Civil Practice Law and Rules §5240).”

¹¹ Civil Practice Law and Rules §5241(b)(2).

¹² Civil Practice Law and Rules §5141 (a) (13), as amended by Laws of 2013, Ch 279, §1, effective April 27, 2014.

¹³ Civil Practice Law and Rules §5241(a)(3).

¹⁴ Civil Practice Law and Rules §5241(a)(2).

¹⁵ Civil Practice Law and Rules §5241(a)(7).

¹⁶ Civil Practice Law and Rules §5241(b)(1)..

¹⁷ Civil Practice Law and Rules §5241(b)(1).

the state of New York or any of its political subdivisions or the United States; and any person, corporation, trustee, unincorporated business or association partnership, financial institution, bank, savings and loan association, credit union, stock purchase plan, stock option plan, profit sharing plan, stock broker, commodities broker, bond broker, real estate broker, entity or institution.¹⁸ An “employer” means any employer, future employer, former employer, union or employee's organization.¹⁹

“Income” includes any earned, unearned, taxable or non-taxable income, benefits, or periodic or lump sum payment due to an individual, regardless of source, including wages, salaries, commissions, bonuses, workers' compensation, disability benefits, unemployment insurance benefits, payments pursuant to a public or private pension or retirement program, federal social security benefits as defined in 42 U.S.C. §662(f) (2), and interest. Public assistance benefits paid pursuant to the social services law and federal supplemental security income are excluded from the definition of income.²⁰ “Support collection unit” means any support collection unit established by a social services district pursuant to the provisions of section one hundred eleven-h of the social services law.²¹ “Date of withholding” means the date on which the income would otherwise have been paid or made available to the debtor were it not withheld by the employer or income payor.²²

“Health insurance benefits” means any medical, dental, optical and prescription drugs and health care services or other health care benefits which may be provided for dependents through an employer or organization, including such employers or organizations which are self-insured.²³

Income Execution for Support Enforcement—Requirements and Issuance

The execution must be on the form for income withholding promulgated by the office of temporary and disability assistance for this purpose and must include the necessary information and directions to ensure its characterization as an income

¹⁸ Civil Practice Law and Rules §5241(a)(5).

¹⁹ Civil Practice Law and Rules §5241(a)(4).

²⁰ Civil Practice Law and Rules §5241(a)(6).

²¹ Civil Practice Law and Rules §5241(a)(9).

²² Civil Practice Law and Rules §5241(a)(10).

²³ Civil Practice Law and Rules §5241(a)(11).

withholding notice as described and required by 42 U.S.C. §666(b).²⁴ However, where the court enters an order for spousal support only, for which income withholding will be ordered by the sheriff, the clerk of court or the attorney for the creditor, an alternate spousal support form for income withholding promulgated by the office of temporary and disability assistance may be used but is not required.²⁵

The income execution must specify the court in which it was entered, the amount of the periodic payments directed and the names of the debtor and creditor.²⁶

In addition, to the extent not already provided on the form for income withholding, a separate document must be served with the income execution which must include:²⁷

(i) the name and address of the employer or income payor from whom the debtor is receiving or will receive income; (ii) the amount of the deductions to be made therefrom on account of current support, and the amount to be applied to the reduction of arrears; (iii) a notice that deductions will apply to current and subsequent income; (iv) a notice that the income execution will be served upon any current or subsequent employer or income payor unless a mistake of fact is shown within 15 days, a notice of the manner in which a mistake of fact may be asserted, and a notice that, if the debtor claims a mistake of fact, a determination will be made within 45 days after notice to the debtor as provided in Civil Practice Law and Rules § 5241(d), and that the debtor will receive written notice whether the income execution will be served and of the time that deductions will begin; (v) a notice that the employer or income payor must commence deductions no later than the first pay period that occurs after fourteen days following the service of the income execution and that payment must be remitted within seven business days²⁸ of the date that the debtor paid; (vi) a notice that the income execution is binding until further notice; (vii) a notice of the substance of the provisions of New York Civil Practice Law and Rules §5252 and that a violation thereof is punishable as a contempt of court by fine or imprisonment or both; (viii) a notice of the limitations upon deductions from wages set forth in New York Civil Practice Law and Rules §5241 (g); (ix) a notice that an employer must notify the issuer promptly when the debtor

²⁴ Civil Practice Law and Rules §5241(b) (1), as amended by Laws of 2013, Ch 270, §3, effective April 27, 2014.

²⁵ Civil Practice Law and Rules §5241(b) (1), as amended by Laws of 2013, Ch 270, §3, effective April 27, 2014.

²⁶ Civil Practice Law and Rules §5241(b) (1), as amended by Laws of 2013, Ch 270, §3, effective April 27, 2014.

²⁷ Civil Practice Law and Rules §5241(b) (1), as amended by Laws of 2013, Ch 270, §3, effective April 27, 2014.

²⁸ CPLR §5241(a)(12). “Business day” means a day on which state offices are open for regular business.

terminates employment and provide the debtor's last address and the name and address of the new employer, if known; (x) a notice that when an employer receives an income withholding instrument issued by another state, the employer shall apply the income withholding law of the state of the debtor's principal place of employment in determining: (A) the employer's fee for processing income withholding; (B) the maximum amount permitted to be withheld from the debtor's income; (C) the time periods within which the employer must implement the income withholding and forward the child support payment; (D) the priorities for withholding and allocating income withheld for multiple child support creditors; and (E) any withholding terms or conditions not specified in the withholding instrument; (xi) a notice that an employer who complies with an income execution that is regular on its face shall not be subject to civil liability to any individual or agency for conduct in compliance with the notice; and (xii) the amount of arrears.²⁹

Income Execution for Support Enforcement—Limitations Upon Amount of Deduction

“Disposable earnings” means the earnings of the debtor after the deduction therefrom of any amounts required by law to be withheld.³⁰

Where the income is compensation paid or payable to the debtor for personal services, there are limitations upon the amount of the deduction to be withheld by the employer or income payor.³¹ It may not exceed 50% of “disposable earnings,” if the debtor is currently supporting a spouse (other than the creditor) or dependent child, and may not exceed 55% of “disposable earnings,” if the debtor is currently supporting a spouse (other than the creditor) or dependent child in addition to arrears that accrued more than 12 weeks prior to the beginning of the week for which the earnings are payable, and part of the deduction is to be applied to the reduction thereof.³²

If the debtor is not currently supporting a spouse (other than the creditor) or dependent child, the limitation is 60% of “disposable earnings.” If the debtor is not currently supporting a spouse (other than the creditor) or dependent child in addition to arrears that accrued more than 12 weeks prior to the beginning of the week for which such earnings are payable, and part of the deduction is to be applied to the reduction

²⁹ Civil Practice Law and Rules §5241(b) (1), as amended by Laws of 2013, Ch 270, §3, effective April 27, 2014.

³⁰ Civil Practice Law and Rules §5241(g)(2).

³¹ Civil Practice Law and Rules §5241(g)(1).

³² Civil Practice Law and Rules §5241(g)(1).

thereof, the limitation is 65% of “disposable earnings.”³³

Income Execution for Support Enforcement—Procedure; Notice to Debtor;

Before the income execution can be served on the income payor or employer and a levy made, a copy of the execution must be served by the issuer on the debtor, by regular mail at his last known residence or such other place as he is likely to receive notice. It may also be served in the same manner as a summons is served.³⁴

The creditor may levy upon the income that the debtor is receiving or will receive by serving the execution upon the employer or income payor: (a) if a debtor fails to show a mistake of fact within 15 days after service of the execution; or (b) after a determination pursuant to New York Civil Practice Law and Rules §§5241 (e);³⁵ or (c) if the issuer is unable to serve the execution upon the debtor, the creditor may levy upon the income that the debtor is receiving or will receive by serving the execution upon the employer or income payor personally in the same manner as a summons or by regular mail,³⁶

Income Execution for Support Enforcement—Mistake of Fact

A “mistake of fact” is defined as an error in the amount of current support or arrears or in the identity of the debtor or that the order of support does not exist or has been vacated.³⁷

The procedure for asserting mistake of fact objections is uniform in the Family Court and Supreme Court.³⁸

If the income execution has been issued by the Support Collection Unit, the debtor may assert a mistake of fact objection and shall have an opportunity to make a submission to the Support Collection Unit in support of the objection within 15 days from service of a copy thereof. Thereafter the Support Collection Unit must determine the merits of the objection and must notify the debtor of its determination within 45 days after notice to the debtor, as provided in New York Civil Practice Law and Rules §§5241(d). If the objection is disallowed, the debtor must be notified that the income

³³ Civil Practice Law and Rules §5241(g)(1), (2).

³⁴ Civil Practice Law and Rules §5241(d).

³⁵ Civil Practice Law and Rules §5241(f).

³⁶ Civil Practice Law and Rules §5241(f).

³⁷ Civil Practice Law and Rules §5241(a)(8).

³⁸ Civil Practice Law and Rules §5241(e).

execution will be served on the employer or income payor and of the time that the deductions will begin.³⁹ If he then wants to challenge the determination, as a matter of law, he must bring an Article 78 proceeding.⁴⁰

Where the income execution has been issued by an attorney, as an officer of the court, or by the sheriff or by the clerk of the court, the debtor may assert a mistake of fact objection within 15 days from service of a copy of the income execution by application to the Supreme Court or the Family Court. The venue of the proceeding must be a Family Court in a county having jurisdiction in accordance with Family Court Act §461. If the application is made to the Family Court it must be by petition on notice to the creditor, and it must be heard and determined in accordance with the provisions of Family Court Act §439. A determination must be made and the debtor notified of the determination within 45 days of the application.⁴¹

A mistake of fact determination of a Family Court support magistrate must include findings of fact and, a final order which must be entered and transmitted to the parties. Specific written objections to a final order of a support magistrate may be filed by either party with the court within 30 days after receipt of the order in court or by personal service, or, if the objecting party or parties did not receive the order in court or by personal service, 35 days after mailing of the order to such party or parties. A party filing objections must serve a copy of such objections upon the opposing party, who has thirteen days from such service to serve and file a written rebuttal to such objections. Proof of service upon the opposing party must be filed with the court at the time of filing of objections and any rebuttal. Within fifteen days after the rebuttal is filed, or the time to file such rebuttal has expired, whichever is applicable, the judge, based upon a review of the objections and the rebuttal, if any, may (i) remand one or more issues of fact to the support magistrate, (ii) make, with or without holding a new hearing, his or her own findings of fact and order, or (iii) deny the objections. Pending review of the objections and the rebuttal, if any, the order of the support magistrate remains in full force and effect and no stay of such order may be granted. In the event a new order is issued, payments made by the respondent in excess of the new order shall be applied as a credit to future support obligations. The final order of a support magistrate, after objections and the rebuttal, if any, have been reviewed by a judge, may be appealed pursuant to article eleven of the Family Court Act.⁴²

If the application to determine a mistake of fact is made to the Supreme Court the application must be by order to show cause or motion on notice to the creditor in the

³⁹ Civil Practice Law and Rules §5241(e).

⁴⁰ See Civil Practice Law and Rules, Article 78.

⁴¹ As amended by Laws 1997, c. 398, §44, eff. Jan. 1, 1998.

⁴² Family Court Act §439(e).

action in which the order or judgment sought to be enforced was entered. A determination must be made, and the debtor notified thereof within 45 days of the application.⁴³

CPLR 5242 authorizes the court to issue an income deduction order for Support Enforcement.

CPLR § 5242. Income deduction order for support 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 enforcement issued pursuant to section 5241 of this article.

(b) Upon application of a creditor, for good cause shown, the court may enter an income deduction order for support 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. 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 enforcement pursuant to this section.

(c) When the court enters an order of support on behalf of persons other than those in receipt of public assistance or in receipt of services pursuant to section one hundred eleven-g of the social services law, or registers pursuant to article five-B of the family court act an order of support which has been issued by a foreign jurisdiction and which is not to be enforced pursuant to title six-A of article three of the social services law, where the court determines that the debtor has income that could be subject to an income deduction order, the court shall issue an income deduction order to obtain payment of the order at the same time it issues or registers the order. The court shall enter the income deduction order unless the court finds and sets forth in writing (i) the reasons that there is good cause not to require immediate income withholding; or (ii) that an agreement providing for an alternative arrangement has been reached between the parties. Such agreement may include a written agreement or an oral stipulation, made on the record, that results in a written order. For purposes of this subdivision, good cause shall mean substantial harm to the debtor. The absence of an arrearage or the mere issuance of an income deduction order shall not constitute good cause. When the court determines that there is good cause not to issue an income deduction order immediately or when the parties agree to an alternative arrangement as provided in this

⁴³ Civil Practice Law and Rules §5241(e).

subdivision, the court shall state expressly in the order of support the basis for its decision.

(d) In entering the income deduction order, the court shall use the form for income withholding promulgated by the office of temporary and disability assistance for this purpose, which form shall include the necessary information and directions to ensure the characterization of the income deduction order as an income withholding notice as described and required by subsection (b) of section six hundred sixty-six of title forty-two of the United States Code; provided, however, that where the court enters an order for spousal support only, an alternate spousal support form for income withholding promulgated by the office of temporary and disability assistance may be used but is not required. The court shall serve or cause to be served a copy of the income deduction order on the employer or income payor and transmit copies of such order to the parties; and, in addition, where the income deduction order is for child support or combined child and spousal support, to the state disbursement unit established in this state in accordance with section six hundred fifty-four-b of title forty-two of the United States Code.

(e) An employer or income payor served with an income deduction order entered pursuant to this section shall commence deductions from the income due or thereafter due to the debtor no later than the first pay period that occurs fourteen days after service of the income deduction order, and shall make payments payable to and remit such payments to the state disbursement unit if the deductions are for child or combined child and spousal support, or to the creditor if the deductions are for spousal support only, within seven business days of the date that the debtor is paid. Each payment remitted by the employer or income payor shall include the information as instructed on the income deduction order. The amount remitted by the employer or income payor shall be as set forth in the income deduction order including the additional amount that shall be ordered by the court and applied to the reduction of arrears, if any, unless such deduction is otherwise limited by subdivision (f) of this section.

(f) An employer or income payor shall be liable to the creditor for failure to deduct the amounts specified in the income deduction order, provided however that deduction by the employer or income payor of the amounts specified shall not relieve the debtor of the underlying obligation of support. If an employer or income payor shall fail to so pay the state disbursement unit or, if a spousal support only payment the creditor, the creditor may commence a proceeding against the employer or income payor for accrued deductions, together with interest and reasonable attorney's fees. If the debtor's employment is terminated by resignation or dismissal at any time after service of the income deduction order, the order shall cease to have force and effect 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 must provide the debtor's last address and the name and address of the debtor's

new employer, if known. An income payor must notify the issuer when the debtor no longer receives income and must provide the debtor's last address and the name and address of the debtor's new employer, if known. Where the income is compensation paid or payable to the debtor for personal services, the amount withheld by the employer shall not exceed the following:

(i) Where the debtor currently is supporting a spouse or dependent child other than the creditor's dependent child, the amount withheld 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"), except that if any part of the deduction is to be applied to the reduction of arrears which shall have accrued more than twelve weeks prior to the beginning of the week for which such earnings are payable, the amount withheld shall not exceed fifty-five percent of disposable earnings.

(ii) Where the debtor currently is not supporting a spouse or dependent child other than the creditor's dependent child, the amount withheld shall not exceed sixty percent of the earnings of the debtor remaining after the deduction therefrom of any amounts required by law to be withheld ("disposable earnings"), except that if any part of the deduction is to be applied to the reduction of arrears which shall have accrued more than twelve weeks prior to the beginning of the week for which such earnings are payable, the amount withheld shall not exceed sixty-five percent of disposable earnings.

(g) An order pursuant to this section shall take priority over any other assignment, levy or process. If an employer or income payor is served with more than one income deduction order pertaining to a single employee pursuant to this section, or with an order issued pursuant to this section and also an execution pursuant to section 5241 of this article, and if the combined total amount of the income to be withheld exceeds the limits set forth in subdivision (f) of this section, the employer or income payor shall withhold the maximum amount permitted thereby and pay to each creditor that proportion thereof which such creditor's claim bears to the combined total.

(h) An employer or income payor shall be liable to the creditor for failure to deduct the amounts specified, provided however that deduction of the amounts specified by the employer or income payor shall not relieve the debtor of the underlying obligation of support.

(i) A creditor shall not be required to issue process under section 5241 of this article prior to obtaining relief pursuant to this section.

(As amended by Laws of 2013, Ch. 270, §7, effective April 27, 2014.)

Sequestration - Domestic Relations Law §243

The remedy of sequestration has been severely restricted. It is a drastic remedy which should be directed only when it is absolutely necessary and appropriate.

An application for an order of sequestration can be brought on by notice of motion personally served on the defaulting spouse, as the statute contains no direction that it be brought on upon such notice as the court may direct. Where personal service cannot be affected, the better practice is to bring on the application by order to show cause on such notice as the court shall direct.

An application for an order of sequestration in a matrimonial action for arrears of maintenance or support is treated as a motion in an action so that service of new process is unnecessary to acquire jurisdiction over the defendant's person. The procedure does not contemplate a new judgment, but is a part of or incidental to the original action so that personal service is not necessary.

The proceeding should be commenced by an order to show cause in which the court can direct the type of notice. A direction by the court as to the manner of service is unnecessary where personal service may be effected.

An application in a matrimonial action for sequestration is a motion in the action, since as to maintenance, child support, custody, and the like, the matrimonial action is never terminated until the death of one of the parties thereto.

Thus, the venue of the application is before the court that granted the original judgment.

Security for Payments - Domestic Relations Law §243

Domestic Relations Law §243 makes the remedy of security available to enforce an order or judgment of this state for divorce, separation or annulment or for a declaration of nullity of a void marriage requiring a spouse to pay maintenance or child support or to enforce a judgment rendered in another state that has been reduced to judgment in New York. The court is vested with the discretion to direct a party to give reasonable security for the payment of maintenance or child support after a default in payment. The statute necessarily carries with it the power to enforce compliance with the direction to furnish security. Where a court in a matrimonial action orders the husband to furnish a surety company bond and he fails to do so, he may be punished for contempt or his property may be sequestered. This section also applies to an order awarding temporary maintenance and counsel fees and expenses and, by virtue of the provisions of §236(B)(9)(a), a distributive award. Domestic Relations Law §236(B)(9)(a) appears to divest the court of discretion and directs that it shall require the defaulting party to give security upon a default or direct sequestration. Under the statute, an order directing surety may also be made, in the court's discretion, where there is no default, such as simultaneously with a pendente lite award or judgment dissolving the marriage.

An application for an order directing the posting of security under Domestic Relations Law §243 may be brought on by notice of motion during the pendency of the

action, and by notice of motion personally served on the obligor after the action is terminated, or by an order to show cause directing the method of service.

An application for an order of security can be brought on by notice of motion personally served on the defaulting spouse, as the statute contains no direction that it be brought on upon such notice as the court may direct. Where personal service cannot be effected, the better practice is to bring on the application by order to show cause on such notice as the court shall direct.

An application for an order of security in a matrimonial action for arrears of maintenance or support is treated as a motion in an action so that no service of new process is necessary to acquire jurisdiction over the defendant's person. The procedure does not contemplate a new judgment, but is a part of or incidental to the original action so that personal service is not necessary.

An application in a matrimonial action for security is a motion in the action, since as to maintenance, child support, custody, and the like, the matrimonial action is never terminated until the death of one of the parties thereto. Thus, the venue of the application is before the court that granted the original judgment.

Contempt Proceedings - Domestic Relations Law §245

Where a spouse in an action for divorce, separation, annulment, declaration of nullity of a void marriage, or for the enforcement in this state of a judgment for divorce, separation, annulment, or declaration of nullity of a void marriage rendered in another state, defaults in paying any sum of money as required by the judgment or order, and the court is satisfied that payment cannot be enforced by means of the sequestration of his property or by resorting to the security, if any, that was given, or money judgment or income execution or income deduction order, the aggrieved spouse may make application pursuant to §756 of the Judiciary Law for the punishment of a contempt of court.

Thus, in matrimonial actions, judgments directing the payment of maintenance, although they are for the payment of money, are by express provision of statute enforceable by contempt proceedings.

A court may punish a spouse for contempt where he fails to comply with an order directing him to give security for the payment of maintenance as directed by §243 of the Domestic Relations Law. It would seem that there should be no reason to confuse the special proceedings to punish for contempt under the Domestic Relations Law with the general contempt powers all courts have under the Judiciary Law to compel compliance with orders.

The Domestic Relations Law provides that no demand of any kind upon the defaulting spouse is necessary so that he or she be proceeded against and punished for failure to make any payment or to pay any installment directed; personal service

upon the defaulting spouse of an uncertified copy of the judgment or order under which the default has occurred is sufficient.

Section 245 of the Domestic Relations Law provides that the aggrieved spouse may make application pursuant to the provisions of §756 of the Judiciary Law to punish the defaulting spouse for contempt. Section 756 of the Judiciary Law does not require personal service of the notice of motion or order to show cause upon the defaulting party to punish the defaulting spouse for contempt.

The application may be made without any previous sequestration or order for security where the court is satisfied that such orders would be ineffectual. The statute states that no previous demand upon the defaulting spouse is necessary to bring on the application. The defaulting spouse need not be served, as a condition precedent to the application, with a certified copy of the judgment or order. It is sufficient that he has notice of its contents, and it has been served upon his attorney.

The application may be brought on by the service of a notice of motion and affidavit or order to show cause. If brought on by notice of motion, it must be personally served upon the defaulting spouse at least ten (10) days and no more than thirty (30) days prior to the return date of the motion. Where the application is made by order to show cause, the court may reduce the period within which the papers must be served or are returnable and may direct service upon the attorney for the accused.

The application must contain on its face a notice that the purpose of the hearing is to punish the accused for a contempt of court, and that such punishment may consist of fine or imprisonment, or both, according to law together with the following legend printed or typewritten in a size equal to at least eight point bold type: **WARNING: YOUR FAILURE TO APPEAR IN COURT MAY RESULT IN YOUR IMMEDIATE ARREST AND IMPRISONMENT FOR CONTEMPT OF COURT.**
CAUTION:

The notice provision is jurisdictional. The failure to affix it to the application in proper form is fatal.

Counsel Fees in Enforcement Proceedings - Domestic Relations Law §238

Domestic Relations Law §238 provides that in any action or proceeding to enforce or modify any provision of a judgment or order entered in an action for divorce, separation, annulment, declaration of nullity of a void marriage, declaration of validity or nullity of a judgment of divorce rendered against a spouse who was the defendant in any action outside the state of New York and did not appear therein where such spouse asserts the nullity of such foreign judgment, or an injunction restraining the prosecution in any other jurisdiction of an action for a divorce, or in any proceeding pursuant to sections 234, 244, 245, or 246 of this article, the court may in its discretion require either party to pay counsel fees and fees and expenses of experts directly to the

attorney of the other party to enable the other party to carry on or defend the action or proceeding as, in the court's discretion, justice requires having regard to the circumstances of the case and of the respective parties. There shall be a rebuttable presumption that counsel fees shall be awarded to the less monied spouse. In any such action or proceeding applications for counsel fees and expenses may be maintained by the attorney for the respective parties in counsel's own name and in counsel's own behalf. This section applies to any proceeding to enforce payment of a sum of money required to be paid by a New York, sister state or foreign judgment or order and is not limited to proceedings brought under Domestic Relations Law Sections 243 (security and sequestration), 244 (money judgment) or 245 and 246 (contempt). The section does not provide for an award of counsel fees or expenses in proceedings to enforce property distributions or other non—monetary provisions of a judgment or order nor does the definition of expenses which is set forth in Domestic Relations Law §237(d) apply to enforcement proceedings.

In addition, Domestic Relations Law §237(c) provides for a mandatory award of counsel fees in any action or proceeding for failure to obey any lawful order compelling payment of support or maintenance, or distributive award. The statute provides that the court shall, upon a finding that such failure was willful, order respondent to pay counsel fees to the attorney representing the petitioner. It also applies to New York, sister state and foreign orders or judgments.

Applications for counsel fees in enforcement proceedings are governed by the Uniform Rules which specifically exempt a motion made pursuant to section 237(c) and 238 of the Domestic Relations Law, for counsel fees for services rendered by an attorney to secure the enforcement of a previously granted order or decree, from the requirement that an official form net worth statement and attorney's affidavit be included in the motion papers.

DRL §238 create a rebuttable presumption that counsel fees shall be awarded to the “less monied spouse.”¹

The parties and their attorneys are required to submit an affidavit to the court with financial information to enable the court to make its determination. The monied spouse is required to disclose how much he has agreed to pay and how much he has paid his attorney. The affidavit must include the amount of any retainer, the amounts paid and still owing thereunder, the hourly amount charged by the attorney, the amounts paid, or to be paid, any experts, and any additional costs, disbursements or expenses.²

In addition 22 NYCRR §202.16(k)(3) provides that no motion for counsel fees and expenses shall be heard unless the moving papers also include the affidavit of the movant's attorney stating the moneys, if any, received on account of such attorney's fee

¹ See NY Legis Memo 329 (2010).

² See DRL §§237 and 238.

from the movant or any other person on behalf of the movant, the hourly amount charged by the attorney, the amounts paid, or to be paid, to counsel and any experts, and any additional costs, disbursements or expenses, and the moneys such attorney has been promised by, or the agreement made with, the movant or other persons on behalf of the movant, concerning or in payment of the fee. Fees and expenses of experts shall include appraisal, accounting, actuarial, investigative and other fees and expenses to enable a spouse to carry on or defend a matrimonial action or proceeding in the Supreme Court.

Prior law placed an onus upon the party in a matrimonial action seeking counsel fees pendente lite, to show why the interests of justice require it. The burden is now on the “more-monied” spouse to show why, in the interests of justice, a counsel fee award should not be made.

DRL §238 does not define the term “less monied.” It is submitted that the “less monied” spouse should be defined as the party with less income (and liquid assets) available to pay his or her own counsel fees.

An application for counsel fees in enforcement proceedings is made by motion on notice in the proceeding based upon the papers and pleadings as well as supporting affidavits. It is usually made at the same time and in the same application for enforcement, and the request for the counsel fee award is one of the prayers for relief in the motion papers.

An application for counsel fees in enforcement proceedings may be brought on by notice of motion or order to show cause, as there is no specific requirement that the application be brought on by such notice as the court may direct. A party may serve a notice of cross motion demanding counsel fees.

Motions under Section 238 and 237(c) of the Domestic Relations Law for counsel fees are governed by the Uniform Rules which do not prescribe any specific papers that are required to be served prior to submission. However, a motion for counsel fees should include the affidavit of the movant's attorney stating the moneys, if any, received on account of his fee from the client or any other person on behalf of the client, the moneys the attorney has been promised by or the agreement made with the client or other persons on behalf of the client, concerning or in payment of the fee. In addition, although not required by any court rule, the moving party should submit an affidavit based upon his or her personal knowledge of the facts, stating the reasons why the court should grant the application, demonstrating financial need for the award and counsel should include in his submission documentation to support the claim for legal services rendered.

The Uniform Rules do not require the party opposing a motion for counsel fees in enforcement proceedings to submit his or her own affidavit, the affidavit of his or her attorney or a statement of net worth. However, he should submit an affidavit demonstrating his financial circumstances.

