

## XX. RESTITUTION HEARINGS

A. **Code Sections: O.C.G.A. §15-11-64.2, 15-11-66, 17-14-2 to 17-14-15, 51-2-3. See also 15-11-7 regarding supervision fees**

B. **Uniform Juvenile Court Rule: None**

C. **Procedure**

1. Definition of Restitution. O.C.G.A. §17-14-2(7) defines restitution as follows:

Restitution means any property, lump sum, or periodic payment ordered to be made by any offender to any victim by any ordering authority. Where the victim is a public corporation or governmental entity or where the offender is a juvenile, restitution may also be in the form of services ordered to be performed by the offender.

2. Juvenile Court Authority. The Georgia Legislature has clearly stated that restitution is to be considered by juvenile court judges when appropriate. O.C.G.A. §17-14-5 provides that:

(a) The juvenile courts are expressly directed to consider the strong policy of this state in favor of restitution but are not required to place the goal of restitution by juveniles above the goal of rehabilitation or treatment of delinquent or unruly juveniles. It is, however, declared to be the policy of this state to recognize that the goal of restitution is consistent with the goal of rehabilitation of delinquent or unruly juveniles and to seek to provide restitution in such cases.

(b) The juvenile courts are expressly authorized to order restitution as a condition or limitation of the probation of delinquent or unruly juveniles in the same manner as is authorized by this article for adult offenders.

(c) For purposes of ensuring compliance with the order, the juvenile courts are authorized to retain jurisdiction over a juvenile subject to a restitution order for a reasonable period after the juvenile reaches the age of majority.

(d) As an alternative to subsection (c) of this Code section, the juvenile courts are authorized to transfer to the superior courts, and the superior courts are authorized to accept, jurisdiction over enforcement of restitution orders against juveniles who, since entry of the order, have attained the age of majority.

3. Step-By-Step Hearing Procedure.

a. Restitution hearings follow adjudication and are a part of the dispositional process. The court should explain that the purpose of the hearing is to determine what the victim's losses, if any, are as a result of the child's behavior, and to determine how much, if any, of those losses the child should repay, and the reasonable rate of repayment.

b. The court should bring to the attention of the parties that Code section 17-14-7 allows the offender to offer a restitution plan and the court should ask if the offender has such a proposal. The parties may also enter into an agreement regarding restitution issues, and the court may make the agreement the order of the court.

c. If there is no settlement of the issue, each party may make an opening statement. The state may present evidence and the child may cross-examine the state's witnesses. The state must prove damages and the ability of the child to pay. The state has an obligation to present evidence at the restitution hearing which, when considered with the other evidence at adjudication and disposition, would allow the court to make sufficient findings to satisfy O.C.G.A. §17-14-10. The child may also present evidence. Each party should be afforded an opportunity to argue the issues.

d. The court issues an order that reflects its findings and conclusions.

4. Evidence to Be Considered in Determining Restitution. The court is required to consider certain factors as set out in O.C.G.A. §17-14-10:

- (1) The present financial condition of the offender and his or her dependents;
- (2) The probable future earning capacity of the offender and his or her dependents;
- (3) The amount of damages;
- (4) The goal of restitution to the victim and the goal of rehabilitation of the offender;
- (5) Any restitution previously made;
- (6) The period of time during which the restitution order will be in effect; and
- (7) Other appropriate factors which the ordering authority deems to be appropriate.

5. Use of Victim Impact Statements. O.C.G.A. §15-11-64.2 requires:

(e) (1) In any delinquency proceeding in which a petition has been filed, **the juvenile court** shall notify any victim of a delinquent child's alleged offense that the victim may submit a victim impact statement if:

(A) The delinquent child, in committing a felony, caused physical, psychological, or economic injury to the victim; or

(B) The delinquent child, in committing a misdemeanor, caused serious physical injury or death to the victim.

(2) A victim impact statement submitted by a victim shall be attached to the case file and may be used by the district attorney or the judge during any stage of the proceedings against the child involving predisposition, disposition, **or determination of restitution**.

(Editor's note: Every court should have in place a mechanism to routinely send user-friendly, self-guiding victim-impact forms to the class of victims described above. The forms must be sent in a timely manner so that they may be returned by the victims and distributed to the child before disposition.)

The Code section includes an extensive list of information that may be included in the victim impact statement. Once the statement has been received by the court, the court shall, in the manner prescribed by rule of court, provide the child with a copy of the victim impact statement within a reasonable time prior to any hearing at which it is to be considered and allow the child to have the opportunity to rebut the victim's written statements. (Editor's note: There is no rule of court on this point.)

Though the victim impact statement is clearly a hearsay document, through this same Code section it is clear that the Legislature intends that it be "used by the district attorney or the judge during any stage of the proceedings against the child involving predisposition, or **determination of restitution.**" A framework for consideration of documents of this nature is found in the Code section on dispositional evidence, O.C.G.A. §15-11-65. There have been no cases appealed on the issue of utility of the victim impact statement.

6. Order That Must Be Filed. The sufficiency of evidence to support an order of restitution in a criminal case should be measured by the civil standard of **preponderance of the evidence.** Lawrenz v. State, 194 Ga. App. 724 (1990). It is reasonable to expect that the same standard should be required in a delinquency case.

O.C.G.A. §17-14-9 requires that the amount of restitution ordered may be equal to or less than, but not more than, the victim's damages.

In measuring the appropriate damages for restitution, the court must determine what type of civil action could be maintained by the victim and what the proper measure of damages would be in such a civil action. Garrett v. State, 175 Ga. App. 400 (1985).

After considering the evidence enumerated in the above section, the court is required to file an order consistent with the requirements in O.C.G.A. §17-14-8:

(a) In deciding any case subject to this article, before granting any relief the ordering authority shall make a written finding either:

- (1) That there are no victims to whom restitution should be made under the policy of this state;
- (2) That the circumstances of the case are such that no restitution order or plan is reasonably possible;
- (3) That the offender, in cooperation with the ordering authority, has developed and consented to a plan of restitution, which plan shall be made a part of a restitution order; or
- (4) That restitution will be ordered as a condition of the relief.

(b) The failure to make a finding as required by this Code section, however, shall not invalidate any order or other action of the ordering authority.

Despite the reservation expressed immediately above, the appellate courts have sent restitution cases back to the trial court when orders have been incomplete. When the appellate court is unable to discern from the designated record any written findings as required by this section, the portion of the sentence imposing restitution will be vacated and remanded to the trial court for the preparation of written findings in compliance with this section. Howard v. State, 213 Ga. App. 542 (1994).

O.C.G.A. §17-14-12 allows any court to modify a restitution order at any time before the expiration of the relief ordered.

7. Peonage. In considering whether to order restitution, how much and what form of restitution to order, and how the payments should be made, the court must be sure to avoid placing the person paying restitution in peonage. O.C.G.A. §17-14-15. Peonage is defined in Black's Law Dictionary, Fourth Edition, as ". . . a condition of enforced servitude, by which the servitor is restrained of his liberty and compelled to labor in liquidation of some debt or obligation, real or pretended, against his will."

8. Enforcement of Restitution Orders. Once the court enters an order of restitution it may enforce the order in a variety of ways as set out in O.C.G.A. §17-14-13. The most frequently used method is enforcement by a contempt proceeding as authorized in subsection (b) of that Code section:

(b) If an offender willfully refuses to comply with a restitution order, the order, in the discretion of the court, may be enforced by attachment for contempt, upon the application of the prosecuting attorney or the victim.

Any contempt action in juvenile court should be filed as a new delinquent charge. (See chapter on Contempt in this Benchbook) No person should be held in contempt for failure to pay restitution unless the person had the ability to pay the ordered restitution and willfully failed to do so.

9. Payment Issues. When the court orders restitution payment, it should strongly consider having the payments made through the clerk of court so that the court and payor both have a record of the payment. O.C.G.A. §17-14-14 allows the court to order that payments be made to any person for the benefit of the victim. However, O.C.G.A. §15-11-66, which applies specifically to juvenile courts, requires that the payment be made to the clerk of court or to another employee of the court designated to receive such payments.

If payments are made to the clerk and the victim cannot be located to receive the money, the restitution should not be returned to the payor. The funds should be retained for the benefit of the victim until the completion of the seven-year holding period, and at that point, the account should be reported and subsequently delivered to the State Revenue Commissioner in accordance with the laws of this state concerning disposition of unclaimed property. 1987 Op. Att'y Gen. No. U87-17.

10. Commitment to Georgia Department of Juvenile Justice. O.C.G.A. §15-11-66 contemplates that an order requiring a child to pay restitution may be in effect when a child is committed to the Department of Juvenile Justice. Enforcement may be transferred to the Department, however, no order may be enforced while such child is in placement at a youth development center unless the commissioner of the Department of Juvenile Justice certifies that a restitution program is available at such facility.

11. Parental Obligation to Pay Restitution. The juvenile court does not have authority to order a parent to pay a child's restitution obligation. In re C.R.D., 197 Ga. App. 571 (1990):

If the legislature had intended to make parents liable for restitution for losses incurred by their minor children, it could and should have so stated. It did grant the juvenile court the power to order parents or other persons legally obligated to care for and support the juvenile to pay certain costs and expenses if financially able, after due process is afforded. O.C.G.A. §15-11-8(b). Restitution is not listed.

O.C.G.A. §51-2-3 establishes some parental liability for malicious acts of minor children and it is a statute about which the court may find occasion to inform parties to an action even though the juvenile court has no jurisdiction over the issue. It provides that:

Every parent or guardian having the custody and control over a minor child or children under the age of 18 shall be liable in an amount not to exceed \$10,000.00 plus court costs for the willful or malicious acts of the minor child or children resulting in reasonable medical expenses to another, damage to the property of another, or both reasonable medical expenses and damage to property.