

Support Overpayment

Over the years, courts have carved out numerous exceptions to the general rule barring recovery of excess support payments. An additional exception that permits recoupment under certain circumstances, is contained in the Family Court Act. So, in some cases, relief for the party who has overpaid may be possible.

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In general, as a matter of public policy, an overpayment of support, such as that resulting from a reversal or modification of an order or judgment, is not subject to restitution or recoupment. Therefore, at first glance, it would appear that an individual who has overpaid support is without a remedy to recover excess payments.

However, over the years, courts have carved out numerous exceptions to the general rule barring recovery of excess support payments. An additional exception that permits recoupment under certain circumstances, is contained in the Family Court Act. So, in some cases, relief for the party who has overpaid may be possible.

The Development of the Public Policy

It has long been held that restitution or recoupment of an overpayment in support is against public policy. For example, in *Hass v. Hass*, 271 A.D. 107, 64 N.Y.S.2d 11 (2nd Dept. 1946), the court rejected a claim for restitution or recoupment of temporary alimony. In *Hass*, the husband filed an appeal from an order that had granted the wife *pendente lite* relief. The wife moved to dismiss the appeal, arguing that reversal or modification on appeal of the order in question would have no practical effect because the husband's obligations under the order had

terminated upon the disposition of the matter after trial. (Apparently because the husband had prevailed at trial with respect to the wife's claims for a separation, the wife was not entitled to prospective alimony.) The husband argued that the appeal was not academic, however, because he would be entitled to restitution of the temporary alimony paid by him if the order were reversed.

The Appellate Division granted the wife's motion to dismiss the appeal, finding that the husband would not have a right to restitution even if he prevailed. In so holding, the court stated that an award of temporary alimony "is not in the nature of a judgment; it is merely a temporary provision resting on public policy which exacts support from the husband pending a determination of conflicting contentions respecting permanent support. Its nature and purpose negatives the existence of a right to restitution, such as would exist if it were a judgment, or to recoupment, in the absence of a statute giving such a remedy." The court, citing *Griffin v. Griffin*, 219 AD 370 (1927), stated that this same rule barred claims for recoupment of the overpayment of permanent alimony.

Why does this public policy exist in New York? As stated by the Second Department in *Radar v. Radar*, 54 AD3d 919 (2d Dept. 2008): "The reason for this policy is that maintenance and child support payments are 'deemed to have been devoted to that purpose, and no funds exist from which one may recoup moneys so expended' if the award is thereafter reversed or modified" (*Coleman v. Coleman*, 61 A.D. 2d at 757, 402 N.Y.S.2d 6).

The rule set forth in *Hass* has been extended to bar claims for recoupment of overpayments of maintenance (*see, e.g., Redgrave v. Redgrave*, 25 AD2d 973 (3rd Dept. 2004)) and child support (*see e.g., Katz v. Katz*, 55 AD3d 680 (2nd Dept. 2008)). However, as we shall discuss, this general rule is subject to various exceptions.

Overpayment of Pendente Lite Maintenance

In *Johnson v. Chapin*, 12 NY3d 461 (2009), the Court of Appeals addressed the issue of an excessive pendente lite award. In that case, the trial court had imputed income of \$2 million per year to the husband in setting his temporary maintenance and child support obligations to the wife. However, at trial it was demonstrated that the husband's actual income was significantly lower. The trial court granted the husband a credit against equitable distribution equal to the amount of the *pendente lite* maintenance he paid that exceeded what he was required to pay under the final maintenance award. The Court Appeals, pointing to the fact that any award of a maintenance is a statutory factor, under Domestic Relations Law (D.R.L.) ' 236(B)(5)(d), that a court may consider in determining the equitable distribution of property, held that such a credit was a proper exercise of discretion. There, the court stated, "When a *pendente lite* award of maintenance is found at trial to be excessive or inequitable, the Court may make an appropriate adjustment in the equitable distribution award." In essence, the court permitted the husband, through an adjustment in equitable distribution, to recoup a portion of his temporary maintenance payments.

However, with respect to the issue of excess *pendente lite* child support payments, the Court of Appeals reached a different conclusion. In rejecting the husband's claim for credits for the amount of temporary child support that exceeded the final order, the court stated, "It has long been held that there is a strong public policy against restitution or recoupment of support overpayments." Apparently, the court treated the excess child support payments differently than maintenance, because an award of child support is not an enumerated factor under D.R.L. ' 236(B)(5)(d).

Next month we will look at some options for recovering overpayments of child support.

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