

# Support Overpayment

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BY THOMAS A. ELLIOT

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Last month, we looked at some ways in which New York courts have, in certain circumstances, permitted parties to recoup overpayments of child support and maintenance, despite the State's general public policy prohibiting restitution of such overpayments. We now continue that discussion.

## **Overpayment of Child Support ‘ Credits Against Other Obligations**

One way that courts have dealt with the issue of overpayment of child support is to credit such overpayment against other financial obligations, such as so-called “add-on” expenses pursuant to the Child Support Standard Act. For example, in *Futia v. Kaufteil*, 24 AD3d 762 (2d Dept. 2005), the father was found to have overpaid child support because he continued to pay support for both of the parties' children after one had become emancipated. The Appellate Division, Second Department, held that the father was due a credit based on these payments and declared that a portion of this credit was properly applied toward arrears owed to the wife for uncovered medical and dental expenses for the children. However, the Appellate Division also held that the Family Court improperly directed that the remaining portion of the credit be applied by the Support Collection Unit against the father's child support account for the remaining unemancipated child.

A similar result was reached by the First Department, in *Coull v. Rottman*, 35 AD3d 198 (1st Dept. 2006). Approximately three years after the father filed an application for a downward modification of his child support obligation, a special referee's report granting the father's application retroactive to the date of his motion was confirmed in part by the supreme court. On appeal, the Appellate Division modified the order appealed from and calculated the father's child support obligation for each year that his application had been pending. Based on these calculations, the court found that the father had overpaid child support. It determined that, after deducting a certain sum owed by the father to the mother for camp and extracurricular activities for the parties' children, the father was due a net credit in the sum of \$15,483. The court rejected the father's contention that he should have been allowed to reduce his basic child support payment by \$500 per month until the overpayment was recouped, finding that such an arrangement would be against public policy. However, the court also held that the father was entitled to take the credit for these overpayments against future "add-on" expenses for the children, finding that public policy did not forbid such a credit.

In *Savini v. Burgaleta*, 894 NYS.2d 445 (2d Dept. 2010), the Second Department found that the father had overpaid child support during the pendency of the mother's child support proceeding. The Appellate Division held that the father was entitled to a credit in the sum of \$10,467 and that this credit should be deducted from a counsel fee award granted to the wife by the support magistrate.

Under the foregoing line of cases, a good argument can be made that it does not offend public policy if a credit for an overpayment of child support is taken against financial obligations other than the payee's direct support obligation.

### **Modification of Child Support Order on Appeal**

In general, courts have not permitted restitution or recoupment of child support payments made pursuant to an order subsequently modified on appeal. For example, in *Fruchter v. Fruchter*, 29 AD3d 942 (2d Dept. 2006), the Appellate Division modified the husband's *pendente lite* child

support obligation from \$2,300 per month to \$624 per month, based on its finding that the lower court had not adequately considered the husband's needs in determining the wife's application for *pendente lite* support. However, the court also held that the husband was not entitled to recoupment of payments previously made pursuant to the *pendente lite* order. *See also Baraby v. Baraby*, 250 AD2d 201 (3d Dept. 1998); *Simmons v. Hyland*, 235 AD2d 67 (3d Dept. 1997); *but see Tuchrello v. Tuchrello*, 233 AD2d 917 (4th Dept. 1996) (payee spouse entitled to recoup child support payments made pursuant to order which was subsequently reversed on appeal).

In a departure from the general rule, in *People ex rel. Breitstein v. Aaronson*, 3 AD3d 588, (2d Dept. 2004) the Appellate Division determined that the father was entitled to recoup excess child support payments that he was compelled to make as a result of the fact that the lower court had improperly applied the Child Support Standards Act in determining his child support obligation. In *Breitstein*, the parties' stipulation of settlement provided that the parties were opting out of the CSSA guidelines and that the father would pay \$120 per week in child support for each of the parties' two children, who at the time resided with the mother. After the parties agreed to allow one of the children to remain with the father, the supreme court applied the CSSA guidelines and directed the father to pay \$244 per week in child support for the child who remained with the mother.

On a separate appeal, the Appellate Division held that the supreme court erred in applying the CSSA standard percentages because the parties had previously agreed to opt out of the statute. Consequently, the Appellate Division directed the father to pay child support in the amount of \$120 per week to the mother, retroactive to the date of the change of custody of the parties' son. Thereafter, the father was notified by the Support Collection Unit that he was due a credit in the sum of \$11,118, which had accrued during the pendency of the prior appeal. As a result, the father ceased making child support payments to the mother.

The mother then made a motion to enforce the husband's child support obligation and the husband cross-moved for a money judgment for the overpayment of support. Supreme court granted the mother's application and denied the father's cross-motion in its entirety. On the

father's appeal, the Appellate Division noted that there is a strong public policy, which the CSSA did not alter, against restitution or recoupment of the overpayment of child support. However, the court held that recoupment was appropriate under the circumstances because the father had been temporarily compelled to pay excess support solely due to the trial court's improper application of the CSSA. (The Appellate Division in *Breitstein* failed to explain why the error made by the lower court in that case, as opposed to errors made by courts in other cases, warranted a departure from the general rule barring recoupment.)

### **A Statutory Exception ‘ Family Court Act ‘ 439(e)**

A statutory exception to the general rule barring the recoupment of the overpayment of support is contained in the Family Court Act. Specifically, Family Court Act ‘ 439(e) provides that if a party files objections to an order of a support magistrate, and a new order is issued, the party who filed the objections is entitled to a credit against future support obligations for payments made in excess of the new order. Thus, a payee who prevails on objections to an order of a support magistrate may recoup any overpayments made pursuant to the order.

### **Breach of a Condition**

Finally, the general rule barring recoupment or restitution of an overpayment of support may not be applicable where the payee spouse breaches a condition upon which payment of support is based. For example, in *Stimmel v. Stimmel*, 163 AD2d 381 (2dDept. 1990), the husband sought recoupment of the excess alimony payments he had made pursuant to the parties' stipulation of settlement. The stipulation provided that the husband's support obligation to the wife would be reduced by a certain sum to the extent that the wife's income exceeded a certain level in any calendar year. The husband alleged that he was entitled to recoup a portion of his payments because he only learned in mid-1987 that his ex-wife has been employed since at least 1982. The Appellate Division held that the husband was entitled to recoup the overpayment of support. It stated that the general rule that overpayments of alimony are not subject to restitution or recoupment is inapplicable where the overpayment directly resulted from the breach of the payee

spouse of one of the conditions upon which the payment was based, as occurred due to the wife's affirmative concealment of her employment income.

A similar conclusion was reached by the court in *Jacobs v. Petterson*, 143 AD2d 397 (2d Dept. 1988). In that case, the wife brought a claim against the husband for certain sums due under the parties' separation agreement. The husband counterclaimed to recover alimony payments he had made to the wife after her remarriage.

In affirming a money judgment awarded to the husband for the overpayment of alimony, the Appellate Division rejected the wife's argument that the money judgment violated the general rule that overpayments of support are not subject to restitution or recoupment. The court held that the general rule cannot apply where the excess payments resulted from the remarriage of the recipient spouse. It stated that, as a matter of law, alimony terminates upon remarriage of the recipient spouse; payment of alimony beyond remarriage, absent an agreement to the contrary, violates public policy.

## **Conclusion**

The general rule against the restitution or recoupment of an overpayment of support remains viable. However, as we have seen, this rule is not absolute and is subject to various exceptions. Understanding when these exceptions apply may afford relief to a payor spouse who seeks to recoup excess support payments.

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**Thomas A. Elliot**, a member of this newsletter's Board of Editors, is a partner in Joseph Law Group, P.C.

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