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Spousal Maintenance

Information sheet

➤ What is spousal maintenance?

Spousal maintenance is financial support paid by one party to a marriage or de facto relationship to the other in circumstances where they are unable to adequately support themselves.

If a person cannot meet their own reasonable expenses from their own income, then the other party has a duty to support and maintain them if they can afford to do so.

➤ When can you receive spousal maintenance?

The following circumstances give rise to spousal maintenance:

1. Having care and control of a child of the relationship;
2. Being incapable (by age, physical or mental incapacity) to gain appropriate employment;
3. For any other adequate reason, having regard to relevant factors in sections 72(2) of the *Family Law Act 1975 (Cth)* (for married couples) or section 205ZD(3) of the *Family Court Act 1997 (WA)* (for de facto couples).

➤ How is spousal maintenance calculated?

The payments received as spousal maintenance may be periodic (for example, \$200 per week) or lump sum (for example, a one-off payment of \$20,000), or a combination of both.

The spousal maintenance required by a party is generally calculated by determining what the shortfall in the applicant's financial circumstances is, being their total expenses less their total income.

The spousal maintenance actually paid by a party is generally calculated by determining what the surplus in the respondent's financial circumstances is, being their total expenses less their total income.

For example, the applicant may have income of \$500 per week but expenses of \$700 per week. Their shortfall is therefore \$200. The respondent may have income of \$1,000 per week but expenses of \$900 per week. Their surplus is therefore \$100. You can expect that the respondent would be required to pay the applicant \$100 per week, which is the amount they can afford to pay.

Parties may also require lump sum payments to meet the costs of medical procedures or education costs.



➤ How are income and expenses calculated?

There is often significant dispute regarding a party's income and expenses.

The income and expenses of a party must be reasonable and supported by evidence.

There is no obligation for the payer of spousal maintenance to fund a lifestyle for their ex-partner that is at the same standard as the one they enjoyed during the relationship.

➤ How do you make an application for spousal maintenance?

If you do not have proceedings on foot in the Family Court, you must file a Form 1 Initiating Application seeking property orders. The Form 1 Initiating Application must be filed with a Form 13 Financial Statement and a detailed affidavit.

If you already have proceedings on foot in the Family Court, you must file an amended Form 1 Initiating Application (if you wish to amend your orders to include a final order for spousal maintenance) and/or a Form 2 Application in a Case (if you are seeking an interim order for spousal maintenance that you previously were not seeking).

The Court utilises the Form 13 Financial Statement to obtain evidence from parties regarding their income, expenses, assets and liabilities, which is available on their website.

Part N of this document itemises specific weekly expenses.

The affidavit that you would file to accompany the application for spousal maintenance (or a response to an application for spousal maintenance) would need to specifically refer to the following, at minimum:

- Your income and why you cannot earn an increased amount;
- Your expenses and why they are reasonable (including supporting evidence, such as utilities, invoices, and bank statements);
- Your partner's income and whether they can increase it (for example);
- Your partner's expenses and whether you consider them to be reasonable (and why).

It is important that you can safely establish your weekly expenses through supporting disclosure documents such as invoices, receipts, bank statements etc.

In the event your spousal maintenance claim is the subject of a hearing, these documents will be relied upon and increase your prospects of securing spousal maintenance.



Time limits

If you were married, then you must make an application for spousal maintenance within 12 months of the divorce becoming final.

If you were in a de facto relationship, then you must make an application for spousal maintenance within 2 years of the relationship breaking down.

If you apply for spousal maintenance outside of these time limits, you will require leave of the Court which will only be granted in limited circumstances.

If you have previously had an order for spousal maintenance, then the time limits do not apply.

Do spousal maintenance payments have any impact on Centrelink payments and/or income tax?

While spousal maintenance payments received are not taxable and do not need to be declared as income to the Australian Tax Office (as your partner has already paid tax on this income), they may impact receipt of Centrelink benefits.

If an order is made for you to receive spousal maintenance payments, you should urgently inform Centrelink of the same.

Urgent spousal maintenance

Pursuant to section 77 of the *Family Law Act (1975 (Cth))* and section 205ZE of the *Family Court Act 1997 (WA)*, parties may apply to the Court for an urgent spousal maintenance application if they are in immediate need of financial assistance. Any orders made, usually at the first Court hearing, are likely to be in place only until each party has had the opportunity to put forward their evidence.

When the need for spousal maintenance is urgent, the Court is authorised to make orders on the evidence available to them in the absence of the other party (known as *ex parte*).

While government benefits and pensions are usually not included as income for the purposes of spousal maintenance or property proceedings in general, the Court may consider them in the evaluation of immediate need for urgent spousal maintenance applications.



➤ Urgent spousal maintenance – Case Study

Hayson & Hayson (1987)

- In this case, the Wife applied for spousal maintenance to assist her in paying for a lease agreement that she had entered into and could not afford, so that she could be closer to the Husband's residence and have the children stay with her overnight. The Husband had been making adequate spousal maintenance payments voluntarily.
- The Court held that this was not an immediate need to justify her application for urgent financial assistance.

Milano & Nolan (2018)

- In this case, the Court held that there was insufficient evidence to support weekly spousal maintenance as the Applicant received Centrelink payments.
- The Court did award lump-sum payments to assist the Applicant with urgent medical procedures and bills.

➤ Interim Spousal Maintenance

An application for interim maintenance is the same as an application for final or permanent maintenance except that the order is made only until further order or for a specified amount of time. This is particularly important if the Court is experiencing delays and a party may require interim funding to meet their reasonable expenses or legal fees.

The Court will not make orders for interim spousal maintenance without hearing the evidence of both parties.

➤ Factors considered by the Court

Pursuant to sections 72(2) of the *Family Law Act 1975 (Cth)* (for married couples) or section 205ZD(3) of the *Family Court Act 1997 (WA)* (for de facto couples), the Court will consider the following factors in determining whether to make an order for spousal maintenance:

- a) The age and state of health of each of the parties;
- b) The income, property and financial resources of each of the parties (For the purpose of assessing a person's income, The Court must ignore any pension or Centrelink payments received by the person seeking maintenance but will otherwise take into account the income a person receives through employment, investments or other sources of income);



- c) The respective physical and mental capacities of the parties for gainful employment;
- d) Which party has primary care of any children under the age of 18;
- e) The commitments of each of the parties which are necessary to enable that party to support themselves, any child, or any third party that person has a duty to maintain;
- f) The eligibility of either party for a pension, allowance or benefit;
- g) A standard of living that in all the circumstances is reasonable;
- h) Whether receipt of maintenance will increase the recipient's earning capacity;
- i) The extent to which the proposed recipient of maintenance has contributed to the income-earning capacity, property and financial resources of the other party;
- j) The duration of the marriage/relationship and its effect on the claimant's earning capacity;
- k) The rights of any creditors;
- l) The need to protect a party who wishes to continue that party's role as a parent;
- m) Whether either party is cohabitating with another person and, if so, the financial circumstances relating to that cohabitation;
- n) The terms of any property settlement orders or binding financial agreement that may have been effected between the parties;
- o) The extent of any child support being paid; and
- p) Any other fact or circumstance which, in the Court's opinion, the justice of the case requires to be taken into account.

Interim Spousal Maintenance – Case Study

Molloy & Molloy (2020)

- The Court made interim spousal maintenance orders by consent for the Husband to pay to the Wife the sum of \$2,650 per week.
- The Husband later filed an application to vary the orders, alleging he had been pressured by his lawyers and his financial circumstances had changed. The Husband had lodged previous application to vary the interim spousal maintenance orders which had been unsuccessful, and he had not mentioned any pressure from his lawyers in those applications.



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- The Court dismissed the Husband's application, as they were not satisfied he had demonstrated a just cause to discharge the interim orders (as he did not present specific evidence on how he was unduly pressured by his lawyers or how his financial circumstances had changed in any material way).

Gamage & Gamage (2017)

- The Wife sought urgent and interim spousal maintenance from the Husband.
- The Wife's application for urgent spousal maintenance was dismissed as she had \$11,259 in her bank account.
- In considering the Wife's application for interim spousal maintenance, the Court found:
 1. The Wife was unable to adequately support herself (despite the Husband asserting the Wife was not exploiting her earning capacity as she was working part time due to commitments as primary carer for the children).
 2. On the Wife's evidence, the Court assessed her needs to be \$163 per week, which was the difference between her weekly expenditure and her income.
 3. The Court, upon reviewing the Husband's financial statement, noticed the overlap of some listed expenditures, some which were paid by the Wife, and some which were overstated.
- The Court was satisfied that the Husband had the capacity to pay to the Wife \$163 per week and also continue to pay the mortgage, insurance, and outgoings related to the former matrimonial home.

 If you would like more information in relation to spousal maintenance contact us on [\(08\) 9443 1111](tel:0894431111) to make an appointment with one of our experienced family law solicitors.



The confidence
to move forward.