

Spousal Maintenance

The Australasian Lawyers Group Pty Ltd trading as Butlers, Barristers & Solicitors

Under the law, a person in a marriage (or marriage like relationship) has a responsibility financially to support and maintain his or her spouse if the spouse is unable to reasonably support and maintain himself or herself from his or her own income and assets to the extent that the first mentioned spouse is reasonably able to support his or her spouse.

Spousal maintenance is a sum of money which is paid by one spouse to another and applies to both parties who have been married and since 1 December 2002, it also now applies to de facto couples (please check separate Information Handout on de facto relationships if this is relevant).

Under the Family Law Act 1975, or the Family Court Act 1997, either party may receive, or be ordered by the Court to pay, spousal maintenance.

When is spousal maintenance likely to be paid?

The most common situations where spousal maintenance will be payable is where one spouse is quite clearly unable to earn any income, or is earning a limited income, for example:-

- where a spouse is physically or mentally handicapped, or in ill health
- where a spouse has ceased to work to care for young children and either does not have the necessary skills to re-enter the workforce, or it is unreasonable for them to seek employment.

How do I apply for spousal maintenance?

- To apply for spousal maintenance you need to complete a *Form 1 Initiating Application* and a *Form 13 Financial Statement*, and file both documents in the Family Court. Once your *Initiating Application* is filed, it will be allocated a hearing date by the Court and will need to be served on your spouse. Your spouse will then be required to file a *Form 1A Response* to your *Initiating Application* particularly if he or she disagree with the Orders you seek as set out in your *Initiating Application*, or if he or she seek different Orders. Your spouse will also be required to file a *Form 13 Financial Statement*. If your financial situation is dire, you can apply to have your *Initiating Application* heard urgently by the Court.



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If you and your spouse are able to agree on the amount of spousal maintenance, then we recommend strongly that the agreement be recorded in writing. This can be in the form of a Deed which both of you can sign, or formal orders made by the Court.

When can I apply for spousal maintenance and is there any time limit for applying?

An *Initiating Application* can be made for spousal maintenance the day the relationship breaks down. You can still be residing under the same roof, or have just separated. It is not necessary for you to wait until you are divorced. Once you are divorced, it is important to note that you only have 12 months from the date your divorce becomes final to make an *Application* for spousal maintenance. If you do not divorce for some years after you separate, then until such time as you do, either party has the right to make an *Application* for spousal maintenance.

For de facto relationships, the time limitations start from the time of separation. It is therefore important to ensure that any application for maintenance in a de facto relationship is made **within 2 years** of the date of separation. However, if the Court is satisfied that significant hardship would be caused to a de facto partner, if leave were not granted to them to proceed outside of this period, the Court may grant the partner leave to apply out of time.

How is spousal maintenance calculated and is it necessary that it be a monetary payment?

The Court will first look at the financial position of the person applying for spousal maintenance, in particular their income, expenses, assets and liabilities. The Court will disregard any income tested pension, allowance or benefit which is being received, i.e. sole supporting parent's benefit or disability pension.

The Court will also look at the income earning capacity of the person applying for maintenance. If the Court decides that the person seeking maintenance has a capacity to support themselves which they are not exercising, then they are likely to be told to support themselves, rather than receiving maintenance.

If the Court decides that the person claiming maintenance has established an entitlement to spousal maintenance, it will then look at the capacity of the person against whom the order is being sought to pay maintenance.

It is possible that when finalising your property settlement, a portion of the assets being received by one party may be allocated as spousal maintenance. For example, if the spouse applying for maintenance receives the house and the car as their property settlement, a percentage of the monetary value of these assets may be allocated by the Court as spousal maintenance. This is referred to as a *lump sum apportionment*.

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What if my spouse has no income?

Payments of spousal maintenance on a periodic basis (ie a set payment made every week or month) are intended to come from income. Even if you are in desperate need of spousal maintenance, if your spouse has no income and no capacity to pay maintenance, then you will not receive anything. However, if your spouse has chosen to place themselves in a situation where he or she has no income, then the Family Court can order the payment of lump sum spousal maintenance out of any assets they own.

What if my financial position changes and is the income of my new partner relevant?

Either spouse can apply to the Court to have an Order for spousal maintenance altered. For example, if the financial situation of the spouse receiving maintenance deteriorates, he or she can apply to the Court to increase the amount they receive. Alternatively, if the spouse applying for the maintenance gains employment, the spouse paying the maintenance can apply to the Court to decrease or discharge the amount being paid.

If you are now living in a new relationship, the Court will look at the financial arrangements between you and your new partner, before deciding whether you are either entitled to receive spousal maintenance, or liable to pay spousal maintenance. This can mean that your new partner may be forced to provide details of their financial position to the Court.

How is spousal maintenance paid?

If the Court makes an Order requiring maintenance to be paid, it is important to have included in the Order when, where and how the payments are to be made.

What if my spouse fails to make payments?

If your spouse is ordered to pay spousal maintenance and fails to do so, you may bring enforcement proceedings against them to ensure that the maintenance, including any arrears, is paid. It is possible for the Court to order your spouse's employer to deduct any amount due from their income and pay it directly to you, or to seize any assets they own. If it is necessary to bring enforcement proceedings then an order for reimbursement of a portion of the costs which you have incurred may be made against your spouse, together with interest on any amount outstanding.

How long is spousal maintenance payable?

As there are different circumstances in each individual case, each case will be decided on its own facts. The Court will take into account such factors as:

- a) whether there are children involved and the level of supervision they require;
- b) whether there is a disability or illness preventing one spouse from obtaining employment; or
- c) the age of each of the parties and how close they are to retirement.

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When does spousal maintenance cease?

Unless otherwise ordered, the obligation to pay spousal maintenance ceases when one of the parties dies, or when the person receiving spousal maintenance remarries. However, the Court is increasingly likely to limit the period in cases where the payee can be expected to take steps to support herself or himself.

Is spousal maintenance tax deductible?

In Australia payment of spousal maintenance cannot be claimed as a tax deduction, nor is there any tax payable on any maintenance received.

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