Family Law

Plain English Guide to Spousal Maintenance in Australia

Once separated, you or your former partner may require immediate, temporary or ongoing, financial support. This can be achieved through spousal maintenance. The Family Law Act provides that a party to a marriage or a de facto relationship has a responsibility to financially support and maintain the other party who is in need of such support, provided certain criteria are met. This Plain English Guide sets out some of the commonly asked questions regarding spousal maintenance in Australia.

What is Spousal Maintenance?

Spousal maintenance is the financial support of one spouse to the other following the breakdown of a marriage or de facto relationship. Parties to a marriage or de facto relationship have the right to make an application for spousal maintenance under the Family Law Act. Spousal maintenance is not child support.

An application for spousal maintenance can be made independently or at the same time as an application for property orders. If the person seeking maintenance ("the applicant") makes an application for both property orders and spousal maintenance, any final spousal maintenance order will be considered after property orders made by the court. See our 'Plain English Guide to Property Settlement under the Family Law Act' for more information in this regard.

When can an Application for Spousal Maintenance be made?

Parties to a marriage can seek maintenance at any time during the marriage and post separation within 12 months of a Divorce Order being made, subject to orders or financial agreements. De facto spouses can only seek maintenance within two years of the breakdown of the relationship, subject to orders or financial agreements.

A party will need to obtain permission from the Court ("leave") if he or she wishes to apply out of these time limits.

What does the Court consider when hearing an Application for Spousal Maintenance?

The Family Law Act sets out threshold requirements for a spousal maintenance claim.

The court will firstly consider the needs of the person applying for spousal maintenance. This involves an evaluation of whether the applicant has the capacity to meet his or her own needs. The three circumstances in which a need for maintenance may arise are:

1. Where a party has the care of a child of the relationship under 18 years of age;
2. Where the age of the party, or their physical or mental incapacity, impedes upon his or her ability to gain employment; and
3. Any other appropriate reason, having regard to the particular circumstances of the parties.

If the applicant is found to be able to adequately support him or herself, the court may dismiss the application.

Once the issue of "need" is established, the court will then determine whether the party against whom the application is being made ("the Respondent"), has the capacity to contribute to the needs of the applicant. This will include an assessment of the respondent's income, property, financial resources and earning capacity.

The Court will then consider a range of other factors, including:

- The age and health of both parties;
- The income, property and financial resources of both parties and their capacity for them to gain employment;
- Whether either party has the care of a child;
- Whether either party is responsible for supporting any other person;
- Whether either party is eligible for any social security or superannuation benefit;
- How much the applicant party has contributed to the other party's financial resources;
- The length of the relationship and to what extent is has affected the earning capacity of the applicant;
- Any present or future liability of either party for child support payments; and
- Any financial agreements between the parties.

It is important to note, however, that the court has wide discretion in making an order for spousal maintenance. The court can make any order it considers "proper" for the provision of maintenance. This means that, even after satisfying a need for maintenance and a capacity to pay, the court may refuse to make an order for maintenance if it considers that it would not be proper to do so.

How is Spousal Maintenance paid?

Spousal maintenance may be payable for a short period of time or indefinitely, and can either be paid in regular periodic instalments, or in a lump sum payment of a specified expense. Spousal maintenance may also be payable on an urgent basis. This usually occurs in an emergency and when there is a clear need but no time for parties to provide evidence. If the court makes an order for urgent spousal maintenance, the orders are usually for a very limited period whilst the parties gather the complete evidence prepare for an interim maintenance hearing.

Do I still have Spousal Maintenance if I start a new relationship?

A party is not entitled to spousal maintenance if he or she marries another person. If a party commences a new de facto relationship with another person, the court will take into account the financial relationship between the party and their new de facto partner.

When does a Spousal Maintenance Order end?

A spousal maintenance order will continue until the following circumstances occur:

1. The death of one of the parties;
2. The remarriage of the recipient; and
3. Changes to the financial circumstances of one or both of the parties, for example, the recipient gaining new employment; and
4. Subject to orders or a financial agreement.

How can Mills Oakley help you?

At Mills Oakley, we understand the difficulties and complexities that can arise when people are required to deal with the issue of spousal maintenance after separation. Our experienced team of family lawyers are able to advise you on your entitlement to receive, or requirement to pay, spousal maintenance in the context of your specific circumstances.

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