

SPOUSAL MAINTENANCE

Family Law Act 1975

This general guide to spousal maintenance has been prepared by [Jano Family Law](#).

- *Claim spousal maintenance.*
- *Defend against a claim.*
- *Avoid future liability.*

Get in touch to discuss your options on a confidential and no obligation basis.

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Introduction

Spousal maintenance is when a former spouse or former de facto partner agrees to, or is ordered to, provide ongoing support to their ex partner following the breakdown of their relationship.

This is known in some countries as alimony. The word “alimony” is not commonly used in the Australian family law system, we call it spousal maintenance.

Establishing a Claim

Section 72 of the *Family Law Act 1975* (“FLA”) provides that:

1. The payer must be “reasonably able” to pay; and
2. The applicant must be “unable to support herself or himself adequately”.

This is known as the “threshold test”. The onus of proof in relation to this lies on the applicant.

Time Limits

The deadline for an application is:

- 12 months after a divorce order has taken effect, or
- any time with the consent of both parties, or
- by leave of the court.

De Facto Time Limits

The deadline for a de facto application is:

- 2 years after the end of the relationship, or
- 12 months after a Binding Financial Agreement is set aside,
- any time with the consent of both parties, or
- by leave of the court.

De Facto Relationship Declaration

A de facto spousal maintenance application also needs to overcome the preliminary issue of proving the existence of the relationship.

Judicial Approach

The Full Court of the Family Court in *Bevan* [1993] FamCA 95 held that the law relating to an award of spousal maintenance requires:

1. A threshold finding under s 72 (s 90SF for de facto claims);
2. Consideration of ss 74 and 75(2) (or ss 90SE and 90SF(3));
3. There is no fettering principle that the pre-separation standard of living must automatically be awarded where the respondent’s means permit; and
4. Discretion should be exercised in accordance with s 74 (or s 90SE), “reasonableness in the circumstances” being the guiding principle.

This approach was followed by the Full Court of the Family Court in *Mitchell* [1995] FamCA 32 which said:

“The days are long gone when it is necessary for an applicant for maintenance to use up all of her assets and capital in order to satisfy the requirement that she is unable to support herself ‘adequately’. Where the line is to be drawn will depend on the circumstances of individual cases.”

Interim Maintenance

The Full Court of the Family Court in *Oates & Crest* [2008] FamCAFC 29 held that interim (or partial) property settlement should be determined first, so that the need for interim periodic maintenance may be assessed in light of what lump sum provision had been made.

As to the approach that can be taken, in *Wicklow* [2007] FamCA 792, the Court held:

“In circumstances where the husband has control of his income, control of a considerable amount of property of the parties... then in my view the Court should not be shy about making... an order (for interim) spousal maintenance. The task at the present time is one in which the Court does not have to be too particular about making findings... especially where there will be ample opportunity for the Court to consider the matter in greater detail in a substantive (i.e. final) hearing.”

Maintenance Factors

These are the matters to be taken into account under s 75(2) (or s 90SF(3) for de facto claims):

- (a) The age and state of health of each party;
- (b) The income, property and financial resources of each party and the

- physical and mental capacity of each for appropriate gainful employment;
- (c) Whether either party has care or control of a child of the marriage;
- (d) The commitments of each party that are necessary to enable the party to support”
 - (i) Himself or herself; and
 - (ii) A child or another person that the party has a duty to maintain.
- (e) The responsibilities of either party to support any other person;
- (f) The eligibility of either party for a pension, allowance, benefit or superannuation;
- (g) A standard of living that in all the circumstances is reasonable;
- (h) The extent to which payment of maintenance would increase the earning capacity of the applicant by enabling that party to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income;
- (i) (ha) The effect of any proposed order on the ability of a creditor of a party to recover the creditor’s debt, so far as that is relevant;
- (j) Extent to which the applicant has contributed to the income, earning capacity, property and financial resources of the respondent;
- (k) The duration of the marriage and the extent to which it has affected the applicant’s earning capacity;
- (l) The need to protect a party who wishes to continue that party’s role as a parent;

- (m) Financial circumstances relating to cohabitation with another person;
- (n) The terms of any order made or proposed to be made in relation to the property of the parties;
 - (na) any child support that a party has provided, is to provide, or might be liable to provide in the future for a child of the marriage;
- (o) Any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account;
- (p) The terms of any financial agreement that is binding on the parties.

Backdated Maintenance

Maintenance orders are able to be backdated to commence at the date that the application is made.

Lump Sum or Periodic Orders

The court is able to order payment of a lump sum or periodic payments for a specific duration. A lump sum is just a capitalisation of the periodic maintenance award.

But a lump sum order should not be made where it is not possible to determine the limits of the dependency of the recipient of the order.

A lump sum should not be awarded where the payer has no capital assets out of which to make the payment without crippling his or her earning power. Conversely, where capital

assets are available, the court should not hesitate to make a lump sum order.

Variation of Spousal Maintenance Orders

Maintenance orders can be discharged or varied (including being increased or decreased), by an order of the court, or with the consent of the parties.

A maintenance order once satisfied (fully paid) is incapable of variation, but a previously satisfied maintenance order does not prevent a party from re-applying for maintenance.

How to Avoid Spousal Maintenance Claims

To avoid a future claim for spousal maintenance you should enter into an appropriately drafted Binding Financial Agreement (“BFA”). The BFA bars either party from making an application for spousal maintenance through the operation of section 71A (or s 90SA) of the FLA.

Remarriage Cancels a Spousal Maintenance Order

A spousal maintenance order ceases upon the death of either party or the remarriage of the party awarded maintenance, unless in special circumstances the court orders otherwise.