



**Legal Services Commission**  
OF SOUTH AUSTRALIA

# MAINTENANCE

**This information is general and not a substitute for legal advice. The Legal Services Commission provides free advice for most legal problems.**

**Contact the Legal Helpline 1300 366 424**

**(TTY 8463 3691) [www.lsc.sa.gov.au](http://www.lsc.sa.gov.au) [www.lawhandbook.sa.gov.au](http://www.lawhandbook.sa.gov.au)**

## MAINTENANCE

Orders can be made under the *Family Law Act, 1975* for various types of maintenance payments, which are not covered by the Child Support Scheme. Maintenance orders can be made for:

- Parents who separated and whose children were all born before October 1989
- Adult children (over 18) who are studying or have disabilities
- Children (under 18) who are applying for maintenance in their own right
- Step-children
- Some cases where the payer is overseas (this is a complex area and you will need to seek legal advice)
- Spouses (spousal maintenance)

[The Child Support Scheme applies to parents who separated or have children born on or after October 1989. If you can apply for an assessment of child support under the *Child Support (Assessment) Act, 1989*, you cannot apply for court ordered child maintenance. For more information see our pamphlet *Child Support*.]

### WHO CAN APPLY FOR MAINTENANCE?

#### 1. PARENTS WHO SEPARATED AND WHOSE CHILDREN WERE ALL BORN BEFORE OCTOBER 1989.

If you separated before October 1989 and all your children were born before this date, you can apply to a court for a child maintenance order. These provisions only apply to a small number of children, and will end after October 2007. However, in some cases, a court can still change the amount payable under these orders.

#### 2. ADULT CHILDREN (OVER 18) WHO ARE COMPLETING THEIR EDUCATION

A court can order maintenance for a child over 18 years of age if such maintenance is necessary to enable the child to complete their education. In these cases, either a carer or the student can be the applicant. The student will usually need to satisfy the court that they have made efforts to obtain employment and are contributing to their own upkeep. Ongoing maintenance payments will also be subject to satisfactory progress in the child's studies. For more information, see our pamphlet *Adult Child Maintenance*.

#### 3. ADULT CHILDREN (OVER 18) WITH PHYSICAL OR MENTAL DISABILITIES

Maintenance can be claimed for a child over 18 years of age who has physical or mental disabilities. The court must be satisfied that the child's ability to support himself or herself is limited because of the disability. It will also need to be shown that the child has made attempts to obtain suitable employment where this is appropriate.

#### 4. CHILDREN (UNDER 18) APPLYING FOR MAINTENANCE IN THEIR OWN RIGHT

A child can apply for maintenance from one or both parents if they are under 18 years of age and living independently of both parents.

## 5. MAINTENANCE FOR STEP-CHILDREN

Following separation, a court can make an order that a step-parent has a legal duty to maintain a step-child. A step-parent is someone who is or has been married to a parent of the child and who accepted the child as part of the family. A court will consider the nature, length and circumstances of the relationship between the step-parent and the child.

The duty of a step-parent to provide for a step-child is a secondary duty, and efforts must first be made to obtain maintenance from the child's natural parents.

## 6. SPOUSAL MAINTENANCE

A person may have a legal duty to maintain their spouse or former spouse if he or she is unable to support himself or herself adequately because:

- they have the care of the children of the marriage,
- they are unable to gain employment because of age, or physical or mental incapacity, or
- any other adequate reason.

Spousal maintenance claims are often resolved through property settlement proceedings. One spouse may receive a lump sum instead of periodic spousal maintenance. This is often preferred so as to finalise the financial relationship with a 'clean break'. **Time limits apply to spouse maintenance and legal advice should be sought.**

## HOW TO OBTAIN A MAINTENANCE ARRANGEMENT

There are three ways to obtain a legally binding arrangement for maintenance.

### 1. CONSENT ORDERS

A court order can be made by consent if the parties agree about the terms on which child or spousal maintenance will be paid. A court application is filed either before or after the parties have reached agreement. There is usually a period of negotiation during which all of the terms of agreement are resolved. The court order is a legally binding document which can be registered for collection of payments by the Child Support Agency.

### 2. COURT ORDERS

Where parties cannot reach agreement, the rate of maintenance payable can be determined by a court. In deciding how much maintenance should be paid, the court must consider the following:

#### **Child Maintenance Orders (including adult children and step-children)**

- the needs of the child and the costs of raising children
- each parent's ability to pay, taking into account their income, property, financial resources, earning capacity, necessary commitments, and
- any special circumstances.

#### **Spouse Maintenance Orders**

- the age and health of each of the parties
- the income, property, financial resources and necessary commitments of each of the parties
- the physical and mental capacity of each of the parties for employment and the extent to which spousal maintenance would increase a person's capacity to support themselves (eg by undertaking a course of education)
- the duration of the marriage and the extent to which it has affected the earning capacity of each spouse
- any other relevant factor.

The court must disregard the payee's (or the child's) entitlement to any income tested pension, allowance or benefit. Except in special circumstances, the court must also disregard the income, earning capacity, property or financial resources of any person who does not have a legal duty to maintain the child, such as the partner of either the payer (person paying maintenance) or the payee (person receiving maintenance).

### **3. BINDING FINANCIAL AGREEMENTS**

Parties who reach agreement about child or spousal maintenance can sign a Binding Financial Agreement before, during or after marriage setting out the terms on which spousal or child maintenance will be paid. Binding Financial Agreements will only be enforceable if each party has a certificate declaring that they have had independent legal advice. Legal advice must be sought before signing a Binding Financial Agreement.

### **CHANGING CHILD AND SPOUSAL MAINTENANCE**

If circumstances change, orders for child and spousal maintenance can be varied by application to the court. Binding Financial Agreements can be difficult to vary or set aside. Legal advice should be sought.

### **WHEN DOES LIABILITY END?**

A child maintenance order ends when the child turns

18 (unless otherwise stated), or when the child dies, marries, enters a de facto relationship, or is adopted. An adult child maintenance order ends if the adult child dies, marries, enters a defacto relationship, ceases education or ceases to have the disability that prevented the adult child from supporting his or herself. Court orders for child maintenance end on the death of the payer but Binding Financial Agreements can be made expressly binding against the estate of the payer. Both court orders and Binding Financial Agreements can continue after the death of the payee if someone is nominated to receive payment for the child. A spousal maintenance order ends on the death of either party (unless otherwise stated), and, in almost all cases, on the re-marriage of the payee.

### **PAYMENTS**

Maintenance can be paid directly to the other spouse, parent or child in some circumstances. Alternatively, the Child Support Agency can collect periodic amounts of maintenance arising out of a court order or Binding Financial Agreement. The Child Support Agency cannot collect lump sum maintenance and it cannot deal with the transfer of property in lieu of maintenance. These orders are enforceable by a court.

### **CENTRELINK MATTERS**

If a payee is receiving Centrelink benefits, all maintenance must be declared to Centrelink and it may affect the rate of benefit entitlement. Payees receiving Family Tax Benefit need to consult with Centrelink to decide whether they should be on the 'entitlement' or 'disbursement' method.

### **WHERE TO GET HELP ABOUT THE CHILD SUPPORT UNIT**

The Child Support Unit of the Legal Services Commission offers free legal advice and assistance in relation to all child support and maintenance matters. If your problem cannot be resolved by telephone advice, an appointment may be made. A service is provided from our Adelaide, Elizabeth, Noarlunga and Mt Barker offices. Interpreters can be arranged for non-English speaking clients.

