

SPOUSAL MAINTENANCE WHILE CARING FOR CHILDREN

23 November 2020

A spouse may have a right to obtain maintenance from the other spouse if at separation there is an income difference.

The additional requirement is that the low income earner must be unable to meet their reasonable financial needs and the high income earner must have the financial 'capacity' to provide assistance.

Although there is an obligation on the low income earner to pursue employment, the obligation is lifted if they are unable to support themselves adequately because of:

- Their care of a child of the relationship;
- Their inability to be gainfully employed by reason of their age, physical or mental incapacity; or
- Any other adequate reason.

Powers of the court in dealing with a spousal maintenance claim

The Court has wide powers when determining a Spouse Maintenance Application. The Orders the Court can make include:

- A payment of weekly, monthly or yearly Spousal Maintenance payments;
- A lump sum amount to be paid; or
- An Order that a property or asset be transferred to one party as a Spouse Maintenance payment.

Caring for young children

The question frequently arises as to whether a parent with primary care of the children can commit to that role and be eligible for spouse maintenance.

Case Study

In a recent case, the court considered an Application by a mother for spousal maintenance in the sum of \$100 per week. The child was 4 years and 11 months of age and had yet to commence formal schooling. The father's employment involved a rolling roster which the mother stated made it difficult for her to arrange a regular routine for her, or the child.

The father's case was that the mother was fit and able to work full-time and the parties' incomes were virtually equal.

The court found that the parties' incomes may have been practically equal but the mother was the child's primary caregiver and therefore bore the general expenses of his upkeep.

The court accepted that the mother was unable to obtain employment because the child was still below school age. She therefore demonstrated a need for maintenance until the child

commenced school. The father gave his expenditure as \$866 per week and his income as \$1,100. He therefore had some capacity to pay maintenance.

The father was ordered to pay the mother Spousal Maintenance in the sum of \$120 per week until the child turned 6 years of age or commenced school, whichever occurred first.

Limitation period for commencing a spousal maintenance application

For married couples that separate, if they are to bring a Spouse Maintenance Application to the court, they must do so within one year of the date on which the divorce becomes final. If a former defacto spouse is to make a Court Application they must do so within two years of the end of the relationship.

There is discretion for the court to extend this time if the Applicant can show that failing to do so would cause hardship to them, or the child.

How to extinguish any future applications for spouse maintenance

The only way that a party is able to extinguish any future application for Spouse Maintenance is by entering into a Financial Agreement. These agreements are outside the jurisdiction of the court and are a private agreement between the parties that are binding and enforceable.

As Financial Agreements are outside of the jurisdiction of the court, before signing the Financial Agreement both parties are required to obtain independent legal advice as to the nature and effect of the agreement upon their rights and the financial advantages and disadvantages of entering into the agreement.