

SPOUSAL MAINTENANCE

Who can apply for maintenance?

Either spouse or civil partner may make an application to the court for a spousal or civil partner maintenance order, also known as a periodical payments order. The person making the application is the applicant and the other person is the respondent.

A potential applicant must, except in certain specified circumstances, consider with a mediator whether the dispute may be capable of being resolved through non-court dispute resolution. The court will expect all applicants to have complied with these requirements before commencing proceedings and will expect any respondent to have attended a mediation information and assessment meeting (MIAM). For details of the requirement to attend a MIAM see Practice Note: [Non-court dispute resolution—mediation information and assessment meetings \(MIAMs\)](#).

What happens when the application is received by the court?

When either party makes an application to the court, the court automatically generates standard directions to progress your case and the timetable for the case is confirmed.

How does the court decide how much maintenance to order?

The court follows the legal principles from legislation and case law in making its decision, although each judge has a discretion to do what they perceive to be appropriate on the evidence in each particular case. This means the precise outcome of financial court proceedings can be quite difficult to predict.

The statutory principles are set out in section 25 of the Matrimonial Causes Act 1973 (MCA 1973) and Schedule 5, Part 5 to the Civil Partnership Act 2004 (CPA 2004). The court's first consideration is the welfare of any children involved. Alongside that, the court considers:

- the income and earning capacity that each of you has, or is likely to have in the foreseeable future, and in the case of earning capacity, any increase in that capacity that it would be reasonable to expect you to take steps to acquire
- the financial needs, obligations and responsibilities that each of you has, or is likely to have in the foreseeable future
- the standard of living enjoyed by the family before the breakdown of the marriage or civil partnership
- your ages and the length of the marriage or civil partnership
- any physical or mental disability each of you has
- contributions made, or likely in the foreseeable future to be made, to the welfare of the family, including any non-economic contribution
- conduct, if that conduct is such that it would, in the court's opinion, be inequitable to disregard it (although it is rare for conduct to be taken into account and the reason for the marriage or civil partnership breakdown is very unlikely to be a conduct issue), and

- the value to you of any benefit that you will lose the chance of acquiring

Other principles have become part of the law through the decisions of senior courts. These dictate that the court must also consider:

- fairness
- very rarely, compensation for loss of career opportunity through marriage or civil partnership, for example, and
- the sharing of any wealth above that which fulfils each party's reasonable needs

Is interim maintenance available?

Maintenance ordered to cover the interim position only is called 'maintenance pending suit' (MPS) (or maintenance pending outcome of proceedings (MPO) in the case of a civil partnership though the same principles apply). In an application for MPS/MPO, the court will concentrate on a party's immediate and interim needs only, so a separate interim budget usually needs to be prepared. An application for MPS/MPO may be made alongside an application for an order that one party make payment to the other party for their legal costs, also known as a legal services order.

An application for MPS/MPO can be made on or after an application for a divorce/dissolution has been submitted to the court, but before the final order/decreet.

Financial needs

In the majority of cases, meeting essential needs will be all that is achievable. Where financial resources are limited, it may only be possible to meet the basic needs of one party, often the parent with the day-to-day care of the children of the family. Your needs will be considered within the context of the available resources of the marriage or civil partnership.

Income needs are calculated by compiling lists of expenditure setting out income requirements on a monthly or annual basis and included as part of your financial statement in Form E. It is important that your expenditure is considered in the context of your available income. You should avoid overstating your income needs. The expenditure claimed should be realistic and proportionate, taking into account the standard of living enjoyed during the marriage or civil partnership and the available income of both parties. Excessive or unrealistic income requirement schedules will often lead to criticism by the judge.

Standard of living

If you enjoyed a high standard of living during the marriage or civil partnership with a high level of spending (or could have, had spending not been limited by the control of one party) and there are resources available, your needs may be approached more generously. The court will look to the standard of living in assessing income needs. However, after a short marriage or civil partnership to a very wealthy spouse/civil partner, the financially weaker spouse/civil partner may not be expected to continue to live at the same level in the future.

What maintenance orders can the court make?

The court can order one party to pay maintenance to the other either:

- for the rest of your joint lives (known as a 'joint lives order')—that is until either of you dies or the recipient remarries or enters into a subsequent civil partnership (whichever occurs first);

this may be appropriate after a long marriage or civil partnership, particularly where there is a large disparity in your income/earning capacities or where there are young children of the relationship and there is no realistic prospect of the recipient of maintenance returning to work for the foreseeable future

- for a fixed, non-extendable period of time that cannot be extended under any circumstances
- for a fixed period of time that can be extended, although the application to extend must be made before the end of the term (sometimes referred to as a 'term order')
- for a nominal sum, often for a specified period of time—this may be appropriate where one party does not have an immediate claim for maintenance, but a clean break at that time would be inappropriate where the parents have similar income but the parent with care is looking after young children
- by way of a capitalised clean break—ie a one-off lump sum payment instead of ongoing maintenance and a dismissal of the maintenance claims

A term order may be appropriate after a short marriage or civil partnership, particularly if the children are older or if there are no children. Term maintenance may be paid up until a specific future event, such as the recipient being able to draw down a pension.

In certain circumstances there may be no basis for a maintenance order, eg you may be of a similar age and earn broadly similar incomes. If there is no financial need for a maintenance order, or if the sharing principle means that no adjustment of income is required, an immediate clean break order may be appropriate.

How much maintenance will you receive?

Unlike child maintenance, no strict formula applies to calculating spousal/civil partner maintenance. It can only be quantified by applying the discretionary checklist set out in MCA 1973, s 25 (or CPA 2004, Sch 5, Pt 5). In broad terms, spousal/civil partner maintenance is calculated by balancing the income/earning capacity of each party against their needs, taking into account all the circumstances of the case.

What happens if you remarry or enter into a subsequent civil partnership during the term of the maintenance order?

A maintenance order will automatically terminate if the recipient remarries or enters into a subsequent civil partnership during the term of a maintenance order. By contrast, the marriage or formation of a civil partnership by the paying party will have no automatic impact on their obligation to continue to pay maintenance under an existing order.

What happens if there is cohabitation during the term of the maintenance order?

A maintenance order will not automatically terminate if the recipient cohabits during the term of a maintenance order. If the recipient were to cohabit and their relationship subsequently broke down, they would have no right to pursue maintenance against their former cohabitant. Furthermore, what amounts to cohabitation is uncertain. Unless a couple are living in the same house seven days a week, it can be difficult to state for certain whether they are cohabiting or not.

Cohabitation can be relevant in so far as it results in a reduction of the recipient's needs. This may be because of financial support received from a cohabitant, or because it is cheaper for people to live

together in a joint household rather than separately. Often, cohabitation prompts the payer to apply to the court to vary downwards or terminate a maintenance order.

Can a maintenance order be varied?

A maintenance order is always capable of variation (upwards or downwards) or termination. An application can be made by either party. A significant change in circumstances since the making of the original order may warrant a variation or termination of the maintenance order. Such circumstances may include:

- a significant increase or reduction in either party's income
- receipt of an inheritance
- retirement
- cohabitation (although the recipient's, rather than the payer's, cohabitation is more likely to be a factor to lead to a review of the maintenance)

None of these factors automatically lead to the termination of a maintenance order. Whether a termination is appropriate depends on the particular facts of your case, with first consideration being given to the welfare of any children of the family. The court must consider whether it would be appropriate to vary the order so that the maintenance is only required to be made for such further period as would be sufficient to enable the recipient to adjust without undue hardship to the termination of the maintenance.

The court has the power on an application for variation of a maintenance order to capitalise the maintenance. This means ongoing maintenance would terminate and a one-off lump sum would be paid to the recipient instead of ongoing maintenance.

How do you vary a maintenance order?

An application for a variation of maintenance order follows a similar procedure to that for an application for a financial order. The application is instigated by one party issuing an application in either Form A (where the application is for the discharge of a maintenance order and substitution for a lump sum, property adjustment or pension sharing order—known as capitalisation) or Form A1 (where the application is for the variation or discharge of a maintenance order only) and you are expected to exchange financial statements, questionnaires, statements of issues and attend court.

Although variation applications will largely deal with issues of income and expenditure, other capital resources and investments may be relevant in so far as they are income-producing or could potentially produce an income. It is therefore inappropriate for either party to argue that the form of financial statement the court directs them to submit should not be completed in full. Each party will be directed to complete a Form E2 if the application is for variation or discharge of a maintenance order only. The parties will each need to complete a Form E if the application includes a request for capitalisation or the court directs completion of this form.

Can a lump sum be paid instead of ongoing maintenance?

A claim for periodical payments may be 'bought out' by the other party by way of a lump sum payment, also known as capitalisation and clean break. If the dependent party has a claim for maintenance on a joint lives basis, the appropriate size of the lump sum may be calculated by reference to the *Duxbury* tables. These tables work out the appropriate level of lump sum by reference to the recipient's age-specific life expectancy and the appropriate level of net annual income

they are expecting to receive. They work on the assumption that the capital is eroded over time and would be exhausted around the time of the recipient's expected date of death. Such an order is more likely to be made where the financial assets are substantial and in excess of those required for the day-to-day needs of the parties and any children.

Although there is no presumption in favour of there being a clean break, the court is under a duty to consider whether financial obligations should be terminated, eg by capitalisation of a maintenance claim.