

Spousal support

What is spousal support?

Spousal support is a payment of money by one spouse to the spouse who has been financially disadvantaged as a result of the relationship ending.

Following the end of a common-law or married relationship, each spouse has a duty to become independent and self-sufficient as soon as possible. A spouse who is capable of supporting him/herself following the end of the relationship may not be entitled to receive spousal support.

Spousal support is available for married spouses under both the federal *Divorce Act* and the provincial *Family Relations Act*. Spousal support is available to unmarried couples under the *Family Relations Act* alone. Spousal support is also available to same-sex married and common-law couples.

Considerations

- The court may *not* take into account “spousal misconduct,” such as adultery or family violence, when making an order for spousal support.
- The fact that a receiving spouse is dependent on social assistance and has no other source of income does not cancel the other spouse’s obligation to pay spousal support.
- Priority is given to child support, which means that where the paying spouse simply cannot pay both spousal support and child support without going broke, the court is required to make an order for child support at the expense of an order for spousal support.

Means, Needs and Circumstances

While spousal support is decided on the particular circumstances of the case, there are some general trends:

Length of Marriage: The longer the marriage, the greater the likelihood that a judge will make an order for spousal support. As well, the longer the marriage the stronger the presumption will be that you and your former spouse should have an equal or almost equal standard of living after you separate.

Difference in Incomes: An order for spousal support is more likely to be made when there is a substantial difference in income between the parties.

Economic Disadvantage: The more one spouse has lost as result of the marriage, such as job skills, job opportunities or employability, the greater the likelihood of an order for spousal support.

Earning Capacity: The more one party's earning capacity is reduced because of family obligations like child care, for example, the greater the likelihood of an order for spousal support.

Types of orders

(a) Interim Orders

The courts generally rely on a “means and needs” test – does the person making the application have a need for support, and does the other spouse have the ability to pay support – in making an order for interim support.

The courts will not bankrupt someone to ensure that spousal support is paid. If there isn't enough money to go around and meet both the payor's reasonable monthly needs and the applicant's monthly expenses, then there isn't and the court will usually try to spread the economic hardship between the parties.

(b) Definite and Indefinite Orders and Agreements

Under both the *Divorce Act* and the *Family Relations Act* a court may make an order for spousal support for periodic payments for a fixed period of time (a “definite” term), or for forever (an “indefinite” term), depending on the particular circumstances of each case. In general the longer the marriage or common-law relationship was, and the older the parties are, the more likely the court will be to make an indefinite order for spousal support.

(c) Lump Sum Orders and Agreements

A “lump sum” order or agreement for spousal support requires the payor to make a one-time-only payment of spousal support. This kind of spousal support payment is fairly rare.

Lump sum payments are not likely to be ordered where the payor has a similar need for financial independence to the recipient or where the recipient has a significant amount of debt.

Lump sum awards are also available on interim applications.

Spousal support and division of property

The issues of spousal support and the division of the family assets are complicated and somewhat intertwined. Usually spousal support is discussed at the same time as, or after, the family assets have been divided between the parties.

If the financial disadvantage of one spouse is taken care of by an unequal division of property, spousal support may not be considered.

If the manner in which the assets were divided goes some way towards overcoming the financial disadvantage arising from the separation, but not all the way, spousal support may be ordered as a “top up” to the division of assets such that this objective is met.

Income tax considerations

Spousal support payments are included in a person’s total income reported for income tax purposes.

Spousal support payments can be claimed by the payor as a tax credit if the following criteria are met:

- The recipient must be able to use spousal support payments at their own discretion.
- The payments are made on a periodic basis (the payments are made weekly or monthly, and the order or agreement for spousal support is for an indefinite period or expires on some predetermined event). Lump sum payments are only tax deductible if they are paid to catch up on past-due periodic payments.
- The payments are paid for the financial support of the recipient.
- The payments are made to a spouse or former spouse, under a court order or written agreement, while the couple is living apart because of the breakdown of the relationship.

If a paying spouse wishes to ensure that he or she can claim spousal support payments as a tax deduction, the order or agreement which addresses spousal support must clearly state that the payments are for spousal support. If not, the federal *Income Tax Act* requires the payment to be treated as child support payments.

Unexpected taxes may result if spousal support payments are made directly through a company the payor owns, either on a company cheque, or in the case of support being declared as salary payments.

The *Income Tax Act’s* treatment of spousal support payments applies to same-sex common-law partners effective January 1st, 2001. The rules do not apply to an order or agreement made before 2001 unless the parties opt into the taxable/deductible scheme by way of a joint election for 2001 and subsequent taxation years.

Third-party payments

Sometimes spouses negotiate what is called third-party payments, i.e. payments are made directly to a third party instead of the spouse. An example of this would be mortgage or car payments made on behalf of the eligible spouse.

Third-party payments may be deductible to the payor, and taxable to the recipient, in the year of payment if all of the following conditions are met:

- They are paid under a court order or written agreement;
- The order or agreement specifically states that the *Income Tax Act* applies to the payment, or contains a clear and unambiguous clause stating that it is the parties' understanding that the third-party payments will be deductible to the payor and taxable to the recipient;
- They are paid for the financial support of the recipient;

Legal Fees

Your legal fees are tax deductible if you paid them:

- to enforce an existing court order or written agreement to collect late spousal support
- to resist the payor's attempt to reduce spousal support



Maintenance enforcement

In BC you can register a child or spousal support order or agreement with the Family Maintenance Enforcement Program. Many maintenance payments are paid on time and in full, but some people like having a third party (FMEP) involved to track the payments.

If payments aren't made, FMEP will contact the payor to try to get payment voluntarily. If this doesn't work, FMEP may take enforcement action. The Family Maintenance Enforcement Program can use a number of methods to enforce the order, including denying a driver's licence to a payor who has not paid.

For more information...

Ask a family justice counsellor or a support person at a Family Justice Centre to make a referral to the Family Maintenance Enforcement Program outreach officer or call the FMEP InfoLine:

Greater Vancouver: (604) 775-0796

Greater Victoria: (250) 356-5995

Elsewhere in BC: 1-800-668-3637