ESTABLISHING A CLAIM

The right of a spouse to maintenance

This is governed by s 72(1) of the FLA:

> "(1) A party to a marriage is liable to maintain the other party, to the extent that the…party is reasonably able to do so, if, and only if, that other party is unable to support herself or himself adequately whether:
>
> (a) by reason of having the care and control of a child of the marriage who has not attained the age of 18 years;
>
> (b) by reason of age or physical or mental incapacity for appropriate gainful employment; or
>
> (c) for any other adequate reason;
>
> having regard to any relevant matter referred to in subsection 75(2)."

This is known as the "threshold test" and is twofold:

- Is the payer "reasonably able" to pay, and
- Is the applicant "unable to support herself or himself adequately"?

Nygh J said in *Eliades* (1981) FLC 91-022:

> "The test of ability to support oneself is not identical to the test of whether one is in need but means whether the applicant is in a position to finance himself or herself from his or her own resources. That is to say, the test is whether by reason of earning capacity, by reason of capital or other sources of income which have accrued independently to the applicant, the applicant is in a position to look after herself."

De facto maintenance claims

De facto couples whose relationships break down after 1 March 2009 (1 July 2010 in SA) (except in WA which as at June 2010 had not referred its de facto relationship power to the Commonwealth) must apply for maintenance under FLA: ss 39A(5) and 90RC(2).

Those whose relationships broke down before then may choose to opt in to the new regime: s 86A, Part 2 of Schedule 1 of the Amendment Act (and s 90A in WA if it becomes a participating jurisdiction). This would be unlikely where opting-in would expose a party to a maintenance claim not available under their State or Territory law.

Section 72 above (the right to maintenance) is equivalent to ss 90SD – 90SF for de facto claims. Such claims also require a 2-year relationship or a child or substantial contributions in relation to a de facto relationship (and serious injustice if the order sought is not made) or a registered relationship (s 90SB) AND either party being ordinarily resident in a participating jurisdiction when the application was made, and both parties being ordinarily resident there when the relationship broke down (s 90SD).

The court's (spousal and de facto) maintenance power

- Section 74(1) empowers the court to make "such order as it considers proper for the provision of maintenance" of a party to the marriage (s 90SE for de facto claims).

- The court, under s 75(1), is then directed that "in exercising jurisdiction under s 74, the court shall take into account only the matters referred to in subsection (2)" (s 90SF(2) and (3) for de facto claims).

  Note – In de facto claims the court can also take into account the terms of any property or maintenance order made or proposed in relation to a de facto party's spouse or *other* de facto.

- The various kinds of order available are set out in s 80(1) (s 90SS for de facto claims).
- The court also has power under s 77 to order urgent spousal maintenance where a party is in immediate need of financial assistance (s 90SG for de facto claims).

Three types of application for maintenance

- Urgent maintenance (but see below)
- Interim order for maintenance
- Final order for maintenance

Court procedure
For how to issue and respond to maintenance proceedings, and for samples of orders to be sought (by both parties) and sample affidavits in support, see "procedure", "forms" and "precedents" below.

The Full Court held in *Bevan* (1995) FLC 92-600 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.

Bevan was followed by the Full Court in *Mitchell* (1995) FLC 92-601, where it was held that:

> "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."

Onus of proof

The Full Court applied these principles in *McCrossen* (2006) FLC 93-283, but ruled against an applicant wife who had failed to discharge the onus of satisfying the provisions of s 72 (s 90SF for de facto claims), having given evidence of not wanting to inquire about employment that was reasonably available to her (see "maintenance factors" under (b) below).